



State of New Hampshire
Department of Safety

James H. Hayes Safety Building, 33 Hazen Drive, Concord, NH 03305

JOHN J. BARTHELMES
COMMISSIONER OF SAFETY

DECISION & ORDER

In the Matter of:

**Arthur Fox Dam Cove on Pine River
Pond
Wakefield, New Hampshire**

Attorney Jeffrey Haus, Hearings Examiner, Bureau of Hearings, conducted a public hearing as designee for Commissioner John J. Barthelmes, Commissioner of Safety.

HISTORY:

The Department of Safety received a petition requesting the establishment of a No Rafting Zone within Arthur Fox Dam Cove, on Pine River Pond, Wakefield, New Hampshire. The petition was submitted by Mr. S.R. Lundgren in accordance with Saf-C 409.01 and was dated February 11, 2017. The petition presented the reasons by which the request was put forward citing public safety, water quality, lake access, residential value, recreational value, and peace and tranquility.

Pursuant to RSA 270:12, RSA 270:43 and the New Hampshire Code of Administrative Rules Saf-C 407 and Saf-C 409, a public hearing was conducted on Thursday, June 1, 2017 at 3:00 p.m. at the Wakefield Opera House located at 1 Circle Drive, Room C, Sanbornville, New Hampshire.

OPENING REMARKS:

Everyone present was informed:

- ➡ The public hearing was recorded;
- ➡ The recording would be preserved for seventy-five (75) days and an explanation of the procedure by which to receive a copy of the recording;
- ➡ The opportunity to sign the appropriate "sign-up sheet" to present comment on the petition;
- ➡ They could review the legal notice from the newspaper, along with the original petition and any other documents;
- ➡ How and where to submit written comment that must be received within seven (7) days from the hearing date by the Department of Safety;
- ➡ That abutter notification had been made by certified mail;
- ➡ The petition and hearing notice were posted on the Department of Safety web site at least 2 weeks before the public hearing on or about May 2, 2017; and
- ➡ The appeal procedure in accordance with RSA 541:3 and RSA 541:6.

The hearing was closed to public comment at the conclusion of the business day on Friday, June 9, 2017.

EXHIBITS:

1. Petition for Assisted Lake protection (rafting restriction) for the eastern half of Arthur Fox Dam Cove, Pine River Pond, Wakefield, NH
2. Map of Proposed No Rafting Area Eastern half of "Arthur Fox Dam Cove" Pine River Pond, Wakefield, NH
3. State of New Hampshire, Department of Safety, Notice of Hearing
4. State of New Hampshire, Department of Safety notice, as published in The Union Leader on Thursday, 05/04/17
5. State of New Hampshire, Department of Safety, Bureau of Hearings, website showing public hearing scheduled for Thursday, June 1, 2017 at 3:00 p.m. at the Wakefield Opera House, 2 High Street, 2nd Floor, Sanbornville, NH
6. PRP Regulated Rafting Area Petition, Public Hearing, June 1, 2017
7. Speaking in Favor of the Petition and attachments from Pam Ciavarra, John Dailey, Carol Lundgren, Susan Lynn, Robert and Carol Lundgren, C. Richard Lundgren, Erika Lee, Kevin Green, Scott Lundgren
8. Speaking Against the Petition and attachments from Fred Lindahl, Bruce Banatt, Fred Lindahl, Bill and Jen Engstrom, Cheryl Marston, Timothy Marston, Melissa Marston, Tom and Kellie Greer.
9. PowerPoint presentation with twelve slides.

DISCUSSION:

In considering the Petition, the following legal authority is given consideration and is provided for reference.

RSA 270:12. Operating Restrictions.

- I. The commissioner of safety shall, after receiving a petition signed by 25 or more residents or property owners of each affected town or towns in which a lake, pond or river is located and after notice and hearing, at which it appears that the public interest requires, adopt rules governing the maximum horsepower of boat engines and outboard motors or prescribe maximum speed limits for the operation of such boats or outboard motors applicable to or upon all or any portion of the public waters of this state. The commissioner of safety shall, in like manner and after notice and hearing, prohibit the use of motorboats and outboard motors on bodies of public water having an area of 35 acres or less; provided, that said prohibition shall not be construed as affecting the bodies of water covered by RSA 270:75 through 270:132. Hearings under this section shall be held in the vicinity of the body of water under consideration during the months of June, July, August, and September following the date of the petition.
- II. Notwithstanding the provisions of RSA 270:12, I, any hearings regarding the closing or restricting of any body of water to seaplanes shall be addressed to

and heard by the commissioner of safety or his designee. Prior to issuing a decision, the commissioner shall consult with the director of aeronautics, rail, and transit, department of transportation.

- III. Persons petitioning the commissioner requesting a change of use or restriction of the use of any public waters shall notify, by certified mail, all abutters with deeded waterfront property or deeded water access rights of the proposed change or restriction and the department shall post the petition on its official website at least 2 weeks prior to a public hearing scheduled by the department.
- IV. In this section, "abutter" means any person who owns property immediately adjacent and contiguous to the area on which the change of use or restriction of use will take place. If the change of use or restriction of use is located in an area which by its configuration would cause the change or restriction to affect noncontiguous properties, owners of those properties are considered as abutters. The term does not include the owner of a parcel of land located more than 1/4 mile from the limits of the proposed change or restriction.

The Commissioner of the Department of Safety, pursuant to RSA 541-A, and New Hampshire Code of Administrative Rules Saf-C 407 and 409 (*et seq.*) defines and regulates the practice of rafting of boats. RSA 270:43 Rules; Enforcement further defines designation of prohibited locations or times during which the size of rafts is limited and a minimum distance is required between the boats and rafts in accordance with the provisions of RSA 270:44.

After reviewing the record, I conclude that there is a dispositive threshold issue regarding the duty to notify abutters to the area affected by the rafting ban. Although not raised prior to the hearing, the issue is jurisdictional in nature and may be raised, *sua sponte*, at any time during the proceedings.


The Petitioner presented a map of the proposed no rafting area and identified nine parcels of shorefront properties as abutters. While this list would satisfy the requirements of RSA 270:12 III, section IV goes on to further define the term "abutter" under circumstances where the restriction may affect non-contiguous property owners. "If the change of use or restriction of use is located in an area which by its configuration would cause the change or restriction to affect noncontiguous properties, owners of those properties are considered as abutters. The term does not include the owner of a parcel of land located more than 1/4 mile from the limits of the proposed change or restriction."

The area of the proposed rafting ban is a desirable area of the lake for recreational purposes due to its shallow waters and sandy bottom. It attracts boaters from other parts of the lake. The lake does not have an accessible public boat ramp and thus most, if not all boaters and users of this area of the lake will be from property owners who have docks and boats at their properties. There was testimony to the effect that there are not many such areas in the lake and that restricting rafting at this location would force the users of the lake to go to other areas for recreation. Thus, I find that the configuration of the area may affect non-contiguous property owners and triggers the requirement to notify all owners within ¼ mile of this area.

In reviewing the Wakefield Tax Assessment on-line map and using the Petitioner's property, a ¼ mile radius circle would include approximately 46 shorefront parcels. Since the petitioner notified only 9 owners, the Petition does not satisfy the statutory notification requirements and is deficient for consideration of a ruling on the merits.

I recommend that the following Conclusion of Law and Disposition be approved.

Respectfully,



Jeffrey Haus, Hearings Examiner
Bureau of Hearings

CONCLUSION OF LAW:

The evidence demonstrates that the petitioner failed to notify all abutters as defined in RSA 270:12 IV.

DISPOSITION:

No action shall be taken upon the Petition.



John J. Barthelmes
Commissioner of Safety

RSA 541:3 Motion for Rehearing/ RSA 541:6 Appeal.

Within 30 days after any order or decision has been made by the commission, any party to the action or proceeding before the commission, or any person directly affected thereby, may apply for a rehearing in respect to any matter determined in the action or proceeding, or covered or included in the order, specifying in the motion all grounds for rehearing, and the commission may grant such rehearing if in its opinion good reason for the rehearing is stated in the motion.

Within thirty days after the application for a rehearing is denied, or, if the application is granted, then within thirty days after the decision on such rehearing, the applicant may appeal by petition to the supreme court.

I certify that a copy of the order has been forwarded to the below named via first-class mail or electronic mailing (as applicable).



Jeffrey Haus, Hearings Examiner

Date of mailing: 7/13/17

A copy of this order was distributed as follows:

Petitioner Designee
Mr. S.R. Lundgren
(To be distributed to co-petitioners)

Captain Timothy Dunleavy
NH State Police/Marine Patrol
Unit

Toni Bodah
Executive Assistant
Town of Wakefield, New
Hampshire

CC: File

[A copy was posted on the Department of Safety web site.]

