



State of New Hampshire
Department of Safety

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

ROBERT L. QUINN
COMMISSIONER OF SAFETY

DECISION & ORDER

In the Matter of:

Braun Bay on Lake Winnepesaukee Moultonborough, New Hampshire

Attorney Christopher Casco, Administrator, Bureau of Hearings, conducted a public hearing as designee for Commissioner Robert L. Quinn, Commissioner of Safety.

HISTORY:

The Department of Safety received a petition requesting the establishment of a No Rafting Zone on Braun Bay on Lake Winnepesaukee, Moultonborough, New Hampshire. The petition was submitted by Attorney James J. Armillay, Jr., Esq. on behalf of the Moultonborough Board of Selectman and residents in accordance with Saf-C 409.01 and was received on or about February 26, 2024. The petition presented the reasons by which the request was put forward requesting that a 1993 order of then Commissioner of Safety, Richard Flynn, that rescinded a prior 1989 order prohibiting rafting in Braun Bay be revoked. The 1993 Commissioner Flynn order allowed the rafting and anchoring of boats within 75 feet of shore in Braun Bay. More specifically, the petition argued that the small, enclosed nature of the sandbar at Braun Bay make it unique from other sandbars which attracts large numbers of boaters, thus posing significant boating safety problems due to overcrowding. Because the 1993 order allowed anchoring within 75 rather than 150 feet from shore, it allows even more boats in a confined area which created hazardous conditions

which pose risks to the health and safety of the boating public. Finally, since the 1993 order left open the question of the continuation of rafting in Braun Bay in that it stated, "[t]his order will be revoked if significant boating safety problems occur," Exhibit 1, tab 1, page 3, the petitioners request that the 1993 order be revoked and the rule changed back to the prior rafting prohibition.

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 Wednesday, June 5, 2024 at 11:00 a.m. at the Moultonborough Town Hall, Ernest Davis Room located at 6 Holland Street, Moultonborough, 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 published on May 20, 2024, 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 proper 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 starting on or about May 16, 2024.

STATISTICS:

Ten (10) people spoke in favor of the petition. Five (5) people spoke against the petition. One person presented neutral testimony. Nine (9) people signed to not speak but enter their support to the proposed No Rafting Zone. Seven (7) people signed to not speak but enter their opposition to the petition.

Written comment was submitted prior to/and or after the hearing during the comment period from 8 (eight) people in support of the petition, and from one hundred sixteen (116) against the petition. In addition, nine (9) emails of untimely public comment were submitted and maintained for the record but not considered.

The hearing record closed to public comment at the conclusion of the business day on Wednesday, June 12, 2024.

EXHIBITS:

1. Braun Bay, Lake Winnepesaukee, NH, Dangerous and Deadly Water with 6 tab marked sections

SYNOPSIS OF LETTERS RECEIVED:

Eight written statements in support of the petition were submitted. They argued that that the regulated area of Braun Bay constitutes a safety hazard warranting closure. Moreover, they argued that on weekend days and holidays during the summer, the large number of boats creates noisy crowds that have a negative impact on area properties.

On the other hand, 116 people submitted written testimony against the petition. They argue that the area is ideal for young boating families because of the shallow sandbar in front of state-owned property. They contradicted the accounts of the boaters engaging in alcohol-fueled parties. Many opponents indicated that they grew up going to Braun Bay and now spend time there with their young families. Furthermore, pushing boats further out than 75 feet from shore would bring noise closer to the properties on the other side of the bay, and exacerbate the noise concerns of residents, and it would make it more dangerous for navigation to anchor boats further out.

OFFICIAL NOTICE:

Official notice is taken of the Petition submitted by Attorney James J. Armillay, Jr., Esq. on behalf of the Moultonborough Board of Selectman and other property owners/residents as it references the

requested prohibition of rafting along with fifty four (54) initial signatures.

SYNOPSIS OF TESTIMONY:

Attorney James J. Armillay, Jr., hereafter Petitioner, spoke in support of the petition. He articulated the basis for the petition, with public safety being the primary focus. He summarized the procedural history of regulation in Braun Bay starting with the 1989 order granting a restriction of rafting. The basis for the order was that the activity constituted a hazard to safe navigation. Thereafter, in 1992, opponents filed a petition to rescind the rafting restriction, a hearing was held, and a new rule promulgated in 1993. The new order indicated that there was insufficient evidence of a problem including the lack of complaints or accidents. The new order rescinded the prior order in part and implemented a new regulation. This included allowing rafting within 75 feet rather than 150 feet from shore. The 1993 order concluded by stating that if significant boating safety problems persisted, the order could be revoked. The petitioners argue that there are now significant boating safety concerns which justify rescinding the 1993 order.

Furthermore, he described emails and deposition testimony from an unrelated legal matter involving the bay from the retired head of Marine Patrol, Timothy Dunleavy that articulated a tremendous amount of activity in Braun Bay including drinking, and loud, profane music, which creates a boisterous party environment. Moreover, there was a drowning in 3 feet of water during one such large gathering. Mr. Dunleavy also indicated that law enforcement or emergency response to medical emergencies is difficult due to the congestion created by the large number of boats. Also, those committing violations are not easily apprehended by officers because they can simply swim away from an officer who is unable to pursue them in a patrol boat, or even in a personal watercraft, hereafter PWC. Consequently, Mr. Dunleavy at times instructed officers not to engage with people in Braun Bay. The Petitioner argued that the record submitted including the petition, addendum, and the documents in Exhibit 1 demonstrate a profound public safety problem. Change is needed to reduce the number of people in the bay. Finally, the large number of people cause environmental and other concerns as described in the expert report contained in Exhibit 1, tab 6, related to litigation against The Dive, a floating restaurant and bar that does business in Braun Bay, as well as by the photographs of boats. He feels that the Commissioner Flynn order from 1993 was wrong and should be rescinded.

Several others also testified as above referenced. In short, their positions are summarized as follows: the large number of boats create safety, noise, and environmental issues. The volume of people nutrient loads the shallow water leading to cyanobacteria. One proponent said that boats empty toilet tanks. They suggest that granting the petition will not prohibit boaters from the area, but rather, limit the number of boats thereby reducing problems. Some have sold property in Braun Bay because there is too much activity. Loud music and obnoxious behavior is not conducive to loon in the Kona Mansion wildlife area. The atmosphere makes this a poor

area to bring children. Some suggested modifying the rule by striking the portion allowing rafting within 75 feet of shore. Furthermore, some referenced the reputation of Braun Bay due to large crowds with 200 to 300 boats, and in excess of a 1000 people, as being the "toilet bowl," or, "animal house on the water," which lowers property values. Also, noise carries a long way and enforcing the noise ordinance is difficult. Another theme throughout the bay on busy days is that individuals in wave runner PWC's drive recklessly to show off. Although some suggested striking the 75 foot rule to move boats out to 150 feet from shore, others said that doing so will make it more difficult for boats to navigate.

Several people, as noted above, testified against the petition. Their statements may be summarized by synthesizing the main points as follows: the shallow water and location in front of state owned property make this an ideal location for families to congregate and enjoy the water. They contradict that it is a raucous party atmosphere. Places to recreate have been reduced already and imposing a further restriction in Braun Bay is unwarranted. They argue that property owners do not own the water. Pushing boats further away from shore will create more harm. They suggest that noise may be mitigated by enforcing existing noise ordinances, and more enforcement on boat spacing can reduce the number of boats without changing the existing rule. Furthermore, imposing a ban on rafting is too drastic a measure to address the concerns. One person suggested using drones to photograph boat registrations and issue tickets to those committing violations. They also suggested allowing boaters to self-police to ensure compliance and offer rewards to those who report violators. Finally, that runoff from shoreline property causes a greater threat to the environment than boaters.

DISCUSSION:

In gathering findings of fact, the following legal authority is considered and provided for reference. It will determine whether there is sufficient evidence and legal authority to grant the petition, and thereby, impose a more restrictive rafting regulation on Braun Bay, rescinding the prior order.

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.

Saf-C 409.04 Criteria for Review.

(a) The commissioner shall, after the hearing, adopt rules of the type authorized by RSA 270:12 if it appears that, consistent with RSA 270:1-II, the rule shall provide for the safe and mutual enjoyment of a variety of uses, taking into consideration the factors in (b) below.

(b) In determining whether to adopt such rules the commissioner shall consider the following:

- (1) The size of the body of water or portion thereof for which action is being considered;
- (2) The effect that adopting or not adopting the rule(s) would have upon:
 - a. Public safety;

- b. The maintenance of residential, recreational and scenic values;
- c. The variety of uses of the body of water or portion thereof;
- d. The environment and water quality; and
- e. Threatened and endangered species;

(3) The number of people affected, either directly or indirectly, by adopting or not adopting the rule(s); and

(4) The availability and practicality of enforcement of the rule(s).

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.

The Petitioner introduced a petition signed by the Moultonborough Board of Selectman on behalf of residents. In addition, the Petitioner submitted an addendum to the Petition and Exhibit 1 with 6 tabs of additional information.

The issue presented is whether since promulgation of Commissioner Flynn's 1993 order regulating rafting in Braun Bay which allows rafting within 75 feet of shore has resulted in significant boating safety problems, which warrants rescinding the order? If the order is rescinded, the existing rule would be eliminated, and a ban imposed prohibiting rafting. The Commissioner must decide if there is sufficient evidence to do so applying the strict legal criteria governing the question.

The number of people in attendance at the hearing and the numbers of people recorded for or against the proposed petition are given weight in determining findings; however, greater significance is given to the specific laws that govern the practice of rafting and the variety of uses by the public of Lake Winnepesaukee. The Commissioner of Safety must balance the petition and governing law with the variety of uses of the lake, considering the rights of all citizens. Within RSA 270:1 the language for deliberation speaks to competing uses for the enjoyment of the waters; regulating that use for the benefit of all users, keeping in mind what may diminish the value to be derived from

them. In addition, the public waters of New Hampshire shall be maintained and regulated in such a way as to provide for the safe and mutual enjoyment of a variety of uses, both from the shore and from water-borne conveyances. The law places the responsibility on the Commissioner of Safety to consider the variety of special uses appropriate to our lakes, public safety, protection of the environment and water quality, and the continued nurture of New Hampshire's threatened and endangered species. The intent of the legislature to recognize in RSA 270:42-46 that the cumulative effect of boats congregated as "rafts" differs from that of the same number of boats scattered, and therefore, requires specific appropriate regulation in some instances. Therefore, the law allows restrictions on rafting in areas where such is needed to ensure public safety, protection of the environment, water quality, and endangered species, but only when the evidence presented at the hearing supports a significant problem remedied only by imposing a regulation. Where less restrictive means to address the problems presented by the petition exist, those should be explored before imposing strict regulation. Although it is noteworthy that the Board of Selectman signed the petition, it must be recognized that their primary obligation is to citizens and property owners of Moultonborough, while it is the State's responsibility to balance those interests with the public's right to use the water, a much broader, wide ranging constituency. The law clearly recognizes the public's interest in the water, an important part of which is in Braun Bay at the sandbar.

It is instructive to review prior decisions resulting from petitions to prohibit rafting and compare them to the evidence submitted in support of the petition for this hearing to determine whether the Petitioner has sustained the burden of proof. Doing so will ensure that the department applies these statutes and administrative regulations in a fair, consistent, and impartial manner. It also supports that the department will only adopt a rafting restriction when it is supported by substantial evidence of an egregious ongoing problem warranting implementation of a restriction of use of a public waterway because New Hampshire's public waterways are open to all people. Moreover, the law recognizes the important, longstanding legislative findings that our waterways are open to everyone and that waterfront property owners do not have any special rights to the public water greater than that of any other person. This is particularly true in this case because Braun Bay is property open to the public and intended for broad public use, not private property. In addition, there is a longstanding regulation in place that Commissioner Flynn imposed after carefully balancing all interests in Braun Bay. Public safety is the primary argument in favor of the petition.

First, as to this hearing, the Marine Patrol did not submit a formal position or input reflecting an opinion on this petition. Statements and emails of the former head of the Marine Patrol, Timothy Dunleavy were submitted, and the petitioner argued that they constitute strong support in favor of granting the petition. The deposition testimony, however, was from an unrelated lawsuit, and the purpose of a deposition is to elicit information, not prove a specific legal standard as applies to this hearing. Although former Captain Dunleavy's statements concerning Braun Bay must be given some weight due to his vast knowledge, training, and experience with the Marine Patrol, nothing in the record suggests that he advocated completely rescinding Commissioner Flynn's prior order in full. Rather, in an email related to Braun Bay and Ossipee Lake, he wrote in part, "Furthermore, the Bureau of Hearings has received correspondence from two different law firms representing private property owners seeking relief from the steady presence of rowdy users of these sandbars. After a lengthy discussion, it seems the areas of concern could be addressed by changes to the existing administrative rules." Exhibit 1, tab 4, page 1. In addition, he acknowledged a fatality during daylight hours in 3 feet of water and the fact that first responders are delayed in their responses to medical emergencies attributable to illegally anchored boats and the resulting congestion thus created. Id.

These are points well taken and must be addressed. In the first instance, however, enhanced enforcement to ensure compliance with the existing regulation is a compromise. If enforcement action could result in the proper distribution of boats both in the distance from shore and between boats, such is a way to reduce the number of boats at one time. Moreover, since most boaters arrive early and stay for the day, the presence of Marine Patrol on some of the days with the heaviest amount of expected activity at the start of the day could assist with spacing the boats in the proper manner and from shore, and then preventing more boats from entering, and citing those that violate the rules. There is already a restriction in this area which constituted a compromise between property owners and boaters, and to abandon it without first attempting other solutions is short sighted.

In addition, previously, the Marine Patrol has provided opinions for rafting hearings. For example, in the matter of Johnson Cove on Lake Winnepesaukee, in Wolfeboro, New Hampshire in 2008, then Director of Safety Services David Barrett submitted a letter that expressed concerns about the petition. Director Barrett indicated that while the rights of shorefront property owners should be respected and considered, granting a no rafting petition acts to take public waters from the public, and therefore, must be carefully scrutinized. Moreover, granting a petition only causes rafting to be moved to

another part of the body of water. In that hearing, there was evidence of 50 to 70 boats being in that small cove at a time.¹ Based on the evidence presented, Commissioner Barthelmes denied the petition. In this case, if the petition is granted, because this is a desirable area with limited space, boaters may continue to come to the area. An unintended consequence of enacting the requested regulation will be to require any anchoring boats farther than 150 feet from shore, closer to the navigable portion of the water, which could present a safety hazard that does not exist, as suggested by opponents.

On the other hand, in 2013, in the matter of Camp Starfish Cove on Lake Monomonac in Rindge, Sgt. Robertson of the Marine Patrol conducted a site investigation of the area and submitted a report for consideration at the hearing. The report documented complaints of disorderly conduct, excessive drinking, urinating, defecating, and a general disregard for others that went back to 2010. Furthermore, there was a camp for troubled children negatively impacted by the behaviors, a unique and sensitive constituency of property users. Sgt. Robertson concluded that rafting frustrated the camp's use of its property and that a rafting prohibition was a necessary enforcement tool. Efforts to patrol the area and address the behaviors were first attempted but proven unsuccessful. Commissioner Barthelmes granted the petition.

The Braun Bay petition at issue here is distinguishable. First, there are restrictions on rafting in place as per the Commissioner Flynn order which balanced the concerns of property owners with those of the boating public. This area remains very popular with boaters who socialize in the area, many of whom go there regularly and these groups have developed strong bonds. They suggest that if the petition is granted, the public's right to use this area will be so drastically limited so as to frustrate their right to use it at all. Thereafter, they will be forced to seek other recreational areas, which have already been limited on Lake Winnepesaukee, one of New Hampshire's finest and most popular natural resources.

Furthermore, there are already sixteen (16) rafting restricted areas on Lake Winnepesaukee.² This is evidence that the available

¹ The size of Johnson Cove is 2.58 acres.

² Saf-C 407.03(a): 1) The area known as Kona Mansion, in the town of Moultonborough, east of an imaginary line running north and south from the red top mark buoy located on the western tip of Avery's Point on the south to the Kona Farm gas docks on the north;

(2) Small's Cove in the town of Alton, southwest of an imaginary line running southeast-northwest from light 75 on the northwestern end to the northernmost point of land marking the entrance to the first cove, south of Small's Cove on the south;

areas for rafting are already reduced on the lake, further restricting the public's ability to recreate on Lake Winnepesaukee, which justifies strict scrutiny of this petition. In fact, six of the 16 areas prohibiting or regulating rafting are in Moultonborough.

Furthermore, the exhibits and public comment at the hearing each provided the fact-finder specific information in reference to the size and configuration of the area being considered. The area of the existing regulation is approximately 2800 linear feet of shore front owned by the New Hampshire Fish and Game Department. There are homes within 1000 linear feet on either side of this area. There is a 300 foot buffer on both sides where rafting is prohibited.

Next, application of the legal standard of review will determine whether there is sufficient evidence to grant the petition. First, the area being requested by striking down the existing regulation is to

(3) Wentworth Cove, southwest of Governor's Island Bridge west of an imaginary north-south line, running from light 43 on the north to the black top buoy, located off Wentworth Cove Estates on the south;

(4) Braun Bay, within 300 feet of both fish and game property lines, to be delineated by marine patrol with orange mooring balls;

(5) Braun Bay, at a distance less than 75 feet from shore, to be delineated by marine patrol with orange mooring balls;

(6) The area known as Cedar Cove, specifically identified as the area opposite Plum Island which borders the town of Alton tax map 18, lot numbers 12 through 20 and 55;

(7) The area of Winter Harbor from the southern boundary of the town of Tuftonboro tax map 51, block 3, lot number 14 to the southern boundary of tax map 51, block 1, lot number 20;

(8) The entire area known as Green's Basin in the town of Moultonborough;

(9) Orchard Cove, on the east side of Cow Island, in the town of Tuftonboro;

(10) The entire area known as Buzzell Cove in the town of Moultonborough;

(11) Brickyard Cove, south of an imaginary line running about 2,300 feet from the northern tip of Clay Point to the southern tip of Barndoor Island;

(12) The entire area known as Black Cove, in the town of Meredith, encompassing an area in Meredith tax map S-7, east from the northern most point of Lot 5-1 to the southeastern most point of Lot 1;

(13) The entire area known as East Cove in the town of Moultonborough;

(14) The entire area known as Advent Cove in the town of Meredith;

(15) Roberts Cove, in the town of Alton, east of an imaginary line running north to south from the westerly boundary of lot 41 on tax map 48 to the westerly boundary of lot 1 on tax map 48; and

(16) The entire areas known as Round Cove, Fish Cove, and Flag Cove in the town of Meredith.

restrict rafting in the entirety of Braun Bay, including the sandbar, and therefore, going back to the 1989 regulation applicable from then until 1993. The regulated area in 1989 constituted the Braun Bay area, meaning, the entirety of the bay. After enactment of the 1989 regulation, significant public disagreement over the necessity of a rafting rule resulted in a petition to rescind the regulation. After a public hearing with hundreds in attendance, half in favor, and the other half against, Commissioner Flynn revised the rule, thus striking a compromise. Similarly, there are strong opinions both for and against a rafting ban. In general, those in favor are property owners and the Board of Selectman, and those against are boaters who frequent the area. The evidence on the existence of a significant safety problem is conflicted.

Furthermore, not adopting a rule will not have a significant negative impact on public safety. As evidenced by the public comment, testimony, photographs, and video evidence, although many boats use the area, they only do so a small part of the time, on warm weather weekends and holidays. Since the sandbar is in front of unpopulated Fish and Game Property, the allowance of anchoring 75 feet from shore results in an area where the boating activity does not impede navigation. In addition, imposing a further restriction to move boats 150 feet from shore and into the navigable waterway, will thus create a safety issue that does not presently exist. Moreover, to rescind the prior order will significantly impair the public's right to use this public waterway. Less restrictive alternatives exist and should be explored before modifying the rule. The Marine Patrol does a remarkable job of patrolling this area and enforcing state law with limited resources. Their efforts, however, are restricted by staffing issues, and there are fewer available officers than there once were. In addition, the high concentration of boats when the sandbar is busy and shallow water make traditional enforcement with a patrol boat difficult. As indicated in the record, the Marine Patrol utilizes PWC which are smaller and more maneuverable than patrol boats. There is a lack of documented violations in Braun Bay recently. Therefore, before taking the drastic measure of implementing a rafting ban in the entirety of Braun Bay, which will drastically limit the public's access, additional enforcement action should be utilized first. This could include photographing and identifying violators later and issuing violations, as well as additional boater education. Moreover, as indicated in the Flynn order, the 75 feet from shore and 300 foot buffers where rafting is prohibited should be marked with orange mooring balls to inform boaters of where they may and may not be. The photograph on the cover of Exhibit 1 displays clear violations of the distance requirements both from the shore and the buffer zone. The mooring balls can be used in enhanced enforcement efforts to attempt to remedy the problem.

In addition, the burden of proving a significant increase in boating safety problems rests squarely on the petitioner. Increased noise, inconvenience, and general nuisance, by themselves, are insufficient to satisfy this legal standard. Implementing an administrative rule that would, in essence, largely prevent the boating public from fully using this area in the manner that they have been using it for the last 30 years requires strict scrutiny. Due to the fact of the shallow water, and uninhabited, State owned property in front of the sandbar, make this an ideal recreational area, which areas are few on Lake Winnepesaukee. The Commissioner received 116 emails disputing that the area presents a safety problem, or is an alcohol fueled party. The opponents argued that the shallow water of the sandbar makes this an ideal location for families with young children to recreate, and many have been doing so for decades. The emails prove that scores of responsible boaters utilize this area in an appropriate manner and have now done so for generations. This disputes the assertion of the constant alcohol fueled party which presents an ongoing public danger.

Several individuals also testified at the hearing that the sandbar in Braun Bay is used for responsible recreation. For example, many boats have restrooms onboard, and although alluded to, there was no specific evidence of dumping of those facilities into the water. In fact, due to the communal nature of the boating community in the area, it may be inferred that the portable boat restrooms could be shared to ensure that there is no individual dumping into the water. While it may be reasonably inferred that in an area with a large number of people, including children, congregating in the water, may result in the inevitable discharge of human waste, there is no greater risk than in other public areas on Lake Winnepesaukee where the public may enter the water like at the public beach at the Weirs. This is insufficient justification to close the sandbar until alternatives are pursued. Although Exhibit 1 presents reasons why The Dive floating restaurant/bar is problematic, a positive feature is that it has restrooms. A creative solution to the human waste problem is for alternative facilities, which boaters could self-fund to ensure the continued public use of this resource.

Also, opponents stated that they should be allowed to police themselves to address concerns of property owners, a reasonable alternative. Therefore, boater education about the permitted numbers of boats and spacing between boats, as well as the allowable distance from shore is a less restrictive alternative to a rafting prohibition.

Moreover, the tragic drowning in this area in 2019 is noteworthy. This is the most significant incident in the record of a safety problem. The overconsumption of alcoholic beverages, and the fact that the decedent's acquaintances lost track of him contributed to his death. He was not hit by a boat or killed due to the volume of people in the area. Therefore, it is insufficient basis to ban rafting. Consequently, there is insufficient evidence of a specific, current safety problem to warrant a regulation.

After public safety, the next factor for consideration is the maintenance of residential, recreational, and scenic values. There was anecdotal evidence on this issue but no specific proof. Several people alluded to decreased property values, but the Petitioner did not provide any proof that real property in the area is less valuable due to boating. Also, the high volume days are limited to weekends and holidays during the summer, so the times that many people and boats are in that area suggest that at all other times, scenic value in the area is not compromised. On a busy lake during the summer, it is to be expected that people will visit, particularly in the sandbar. Finally, the property in front of the sand bar is uninhabited, and owned by the State, and therefore, its value is unaffected.

Next, the variety of uses. Based on the large number of comments on both sides, this factor is neutral. Many members of the public use the area and feel as strongly connected to it as shorefront property owners. In addition, boaters have made substantial investments in their boats and equipment in reliance, at least in part, to visit Braun Bay.

As to the environment and water quality, the evidence of a problem is anecdotal. The expert opinion contained in Exhibit 1 was given as part of what the Petitioner described as an unrelated lawsuit. The lawsuit related to The Dive floating bar, not rafting. Therefore, the record contains minimal concrete evidence that rafting has caused environmental problems. As in any area where people recreate, trash is created and sometimes, unfortunately, discarded into the water. This, however, is an exception and the vast number of public statements indicate responsible boating, where people carry out and dispose of trash properly. The existence of trash, without more, is insufficient evidence of a water quality or environmental problem.

Next, threatened, and endangered species. There is reference to loon in the area, as well as animals on the Fish and Game land. There is not, however, any specific evidence of an animal being negatively impacted by boaters who go to the area for the day and then leave. Therefore, there is scant evidence relative to this factor.

Furthermore, the people affected by adopting or not adopting the rule. Again, this is neutral because although many people spoke and wrote in favor of granting the petition, many more submitted public comment against changing the restriction, and several testified against it. People on both sides are equally passionate about their positions. Moreover, the Commissioner received comment from both those in favor and against a restriction. Many on both sides are passionate about the bay and all opinions have been given equal consideration.

The final legal criteria is the availability and practicality of enforcement. The Marine Patrol has limitations due to reduced staff. Their officers, however, are highly trained and many are very experienced at law enforcement on Lake Winnepesaukee, and are a part of the New Hampshire State Police, with the resources of that organization available to them. Before resorting to a ban, exploring other methods of law enforcement are preferable before frustrating the public's right to use the area. For example, using orange mooring balls to better define the rafting area, engaging in boater education of the proper use of the already regulated area and proper boat spacing, issuing citations to offenders, and enhanced, directed patrols during times of heavy use should be explored first.

In short, after application of all of the legal criteria, there is insufficient evidence of boating safety problems to justify rescinding the 1993 order. The regulation should remain.

The Petitioners have failed to provide sufficient evidence of persuasive reasons under the law that meet a preponderance of the evidence standard to allow the Department of Safety to implement a permanent rafting ban by administrative rule, as such is defined in RSA 270:44, taking into consideration the exceptions to rafting provided in RSA 270:45 and all relevant criteria under the legal standard of review.

After carefully considering all of the evidence, exhibits, testimony and all public comment presented, Findings of Fact are issued.

FINDINGS OF FACT:

1. That pursuant to RSA 270:12, twenty-five (25) or more residents or property owners petitioned Robert L. Quinn, Commissioner of the Department of Safety to conduct a public hearing to prohibit rafting.

2. That official notice for the hearing was published in a newspaper of statewide circulation, The Union Leader, Manchester, NH on May 20, 2024.
3. The petition and notice of hearing were posted on the Department of Safety web site pursuant to RSA 270:12-III for more than 2 weeks before the hearing date beginning on or about May 16, 2024.
4. The Petitioner notified all abutters by certified mail and provided the return receipts before the hearing pursuant to RSA 270:12-III and RSA 270:12-IV, in compliance with the statutory requirement.
5. That a public hearing was held at 9:00 a.m. on Wednesday, June 5, 2024 for public comment regarding the issue and was conducted pursuant to RSA 541, RSA 270:12, RSA 270:43 and Administrative Rules Saf-C 407, and Saf-C 409 at the Moultonborough Town Hall, Ernest Davis Room, 6 Holland Street, Moultonborough, N.H.
6. That the petition seeks to adopt a rule to prohibit rafting on Braun Bay by rescinding a 1993 order which allows rafting and anchoring within 75 feet of shore and going back to a complete prohibition of rafting in the entirety of Braun Bay.
7. That the effect which adopting or not adopting the rule(s) would have upon the public safety is considered. The law requiring banning watercraft from rafting or limiting the location and times is as defined within RSA 270:12, RSA 270:43, RSA 270:44 and administrative rules, Saf-C 407 and Saf-C 409 are considered and given great weight. Not adopting the rule will not have a substantial negative impact on public safety.
8. The evidence is insufficient to establish that not adopting the rule will have a sufficient negative impact on public safety to warrant frustrating the public use of this area.
9. That there is insufficient proof of an environmental problem since the evidence is anecdotal.
10. That some public comment was received in reference to recreational and scenic values which related mostly to the noise from rafting boats which includes music with profane

lyrics. Noise ordinance violations may be addressed as an enforcement issue without rescinding the prior regulation.

11. That some testimony was received referencing the maintenance of residential values including assertions that shorefront property is less valuable. There was no testimony from any real estate professional supporting a diminution of property values in Braun Bay due to the rafting of boats in front of the Fish and Game property.
12. That public comment was received referencing the variety of uses of the waters in Braun Bay on the environment and water quality. The number of people affected, either directly or indirectly, by adopting or not adopting the rule(s) was discussed. Therefore, the fair variety of uses supports not imposing a rafting regulation.
13. There was testimony concerning negative impact on animals including loon, but any human activity could impact animals. Therefore, the evidence is insufficient that imposing a ban will eliminate all possible negative impact.
14. The availability and practicality of enforcement of the rule(s) was presented. Law enforcement presence is available and ongoing by Marine Patrol. The less restrictive measure of targeted enforcement of existing law and the current regulation is more appropriate than instituting a rafting prohibition in the entirety of Braun Bay.
15. That the Department of Safety, Division of State Police, Marine Patrol enforces the statutes and rules governing the public waters within Braun Bay, Lake Winnepesaukee located in Moultonborough, New Hampshire, and navigational law is enforced through that agency. The testimony presented indicated that further rafting regulation is unnecessary.
16. That based on the facts presented, law enforcement in this area will not be enhanced by adopting a rule.

I recommend that the following Conclusion of Law and Disposition be approved based upon the Findings of Fact listed within this report.

Respectfully,



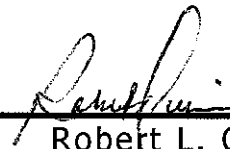
Christopher Casco, Administrator
Bureau of Hearings

CONCLUSION OF LAW:

The evidence demonstrates that the petition is not in the public interest fulfilling the purpose of law. There is insufficient evidence that the petitioners have met a burden of proof by a preponderance of the evidence showing cause that a "No Rafting Prohibition" be adopted pursuant to RSA 270:12 and Administrative Rules Saf-C 407; 409.

DISPOSITION:

It is hereby ordered that the petition be respectfully **DENIED**.



Robert L. Quinn
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 by electronic mail.



Christopher Casco, Administrator

Date of electronic mailing:

7/17/24

A copy of this order was sent to the following:

Petitioner Designee, Attorney
James J. Armillay, Jr. Esq.

(Posted on DOS web site.)

Colonel Mark Hall, Director
NH State Police/Marine Patrol
& Lt. Irwin Malilay, State
Police/Marine Patrol

Town Clerk/Administrator & Board
of Selectman, Moultonborough,
New Hampshire

CC: File