

MAINE STATE LEGISLATURE

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ATTORNEY GENERAL



86-15

STATE OF MAINE
DEPARTMENT OF THE ATTORNEY GENERAL
STATE HOUSE STATION 6
AUGUSTA, MAINE 04333

May 23, 1986

Representative Daniel R. Warren
54 Elmwood Avenue
Scarborough, Maine 04074

Dear Representative Warren:

You have inquired whether the Commissioner of Inland Fisheries and Wildlife is legally required to revoke a waiver of the prohibition of waterskiing within 200 feet of the shoreline of a particular body of water, previously issued pursuant to Department regulations, because the municipal officers of the municipality in question request that the waiver be so revoked. For the reasons which follow, it is the Opinion of this Department that the Commissioner is not required to revoke the waiver under these circumstances, but has the discretion to maintain the waiver if he believes that greater waterskiing safety will be promoted thereby.

The Legislature has granted rulemaking authority over the conduct of waterskiing on the inland waters of the State to the Commissioner, acting jointly with the Commissioner of Marine Resources. 12 M.R.S.A. § 7792(2). Pursuant to this authority, extensive rules have been adopted governing the operation of watercraft upon the waters of the State. Section 13.06 of these rules expressly deals with waterskiing and provides, in paragraph A, that:

No person shall operate a watercraft on the internal waters of this State for the purpose of towing a person or persons on waterskis, surfboards, aquaplanes or similar devices in a water safety zone as defined in Section 7791, Title 12, . . .

12 M.R.S.A. § 7791(16) defines a water safety zone to be the area of water within 200 feet of any shoreline. The waterskiing rule, however, then goes on to provide, in paragraph B, that the Commissioner, acting through the division of ATV, Watercraft and Snowmobile Registration of the Bureau of Administrative Services of the Department:

. . . may, upon written application from the majority of the municipal officers of a municipality wherein said waters are located, waive these provisions along undeveloped shorelines, if after inspection of the site by the Division, it is determined that such a waiver would provide a greater safety factor than would be achieved by compliance with these provisions. (Emphasis added).

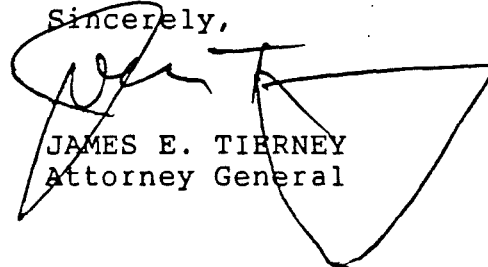
The import of this rule is plain. In order for a waiver to be established on a particular body of water, a request must be received from a majority of the municipal officers of the municipality in question, in addition to which, the Commissioner, acting through the Division, must determine that water safety will be promoted by the granting of the waiver. If both such requirements are met, the waiver "may," in the words of the rule, be imposed. By not using the term "shall," the rule makes clear its intention to give discretion to the Commissioner. The provision is silent, however, as to the procedure for revoking the waiver. Your inquiry hypothesizes a situation in which a municipality, having once requested that a waiver be established, now wishes it to be withdrawn. The question thus becomes whether the Commissioner may, if he remains persuaded that greater safety will be promoted by the continuation of the waiver, decline to revoke it in the face of the municipal request.

In the view of this Department, there is nothing either in the statute controlling the situation, or in the rule quoted above, that would require such action on the part of the Commissioner. In the first place, the Commissioner's power to grant a waiver is discretionary, as indicated by the use of the word "may," emphasized above, in the rule. Moreover, it is not at all clear that if the rule were read to require the concurrence of the municipal officers in question, it would be constitutionally valid, since such a rule would involve the delegation of legislative power from an administrative agency to a municipality of the State without any express authorization therefor from the Legislature.

Needless to say, the Commissioner's powers in this field, as well as generally, are subject to the control of the Legislature. There would therefore be no barrier to future legislation which would alter the regime just described, including the institution of a requirement of municipal concurrence for the establishment and continuation of a waiver.

I hope the foregoing answers your question. Please feel free to reinquire if further clarification is necessary.

Sincerely,



JAMES E. TIERNEY
Attorney General

JET/ec

cc: Glenn H. Manuel, Comm'r. Inland Fisheries & Wildlife