

**FITTS, OLSON & GIDDINGS, P.L.C.**

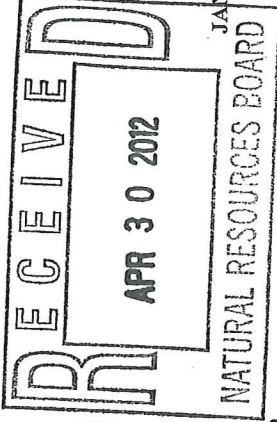
ATTORNEYS AT LAW  
16 HIGH STREET  
BRATTLEBORO, VERMONT 05301-3001  
(802) 254-2345  
(802) 254-6061 FAX

**COPY**

JEAN BREWSTER GIDDINGS\*

LORIE A. CARTWRIGHT  
LAURIE A. ROWELL  
DAVID M. SCHULTZ\*\*

\*ALSO ADMITTED IN NEW HAMPSHIRE  
\*\* ALSO ADMITTED IN WASHINGTON



OSMER C. FITTS  
1905-1985  
PAUL N. OLSON  
1915-2003

JANICE M. MOMANEY  
LEGAL ASSISTANT

April 27, 2012

John Hasen, General Counsel  
Natural Resources Board, Water Resources Panel  
National Life Records Center  
National Live Drive  
Montpelier, VT 05620-3201

Re: Removing Kenny Pond from Public Waters Listing

Dear John:

Thank you so much for speaking with me on the above matter. Enclosed please find a petition to remove Kenny Pond from the State's Listing of public waters. We have also sent six copies to the Board.

Also enclosed is a Certificate of Service showing the various organizations that the regulations required us to serve this petition on in addition to your own. We have made service by certified mail, return receipt requested. Please let me know if your rules require service by sheriff.

We hope we make it onto your panel's docket.

I look forward to hearing from you soon.

With best wishes.

Sincerely yours,

FITTS, OLSON & GIDDINGS, P.L.C.

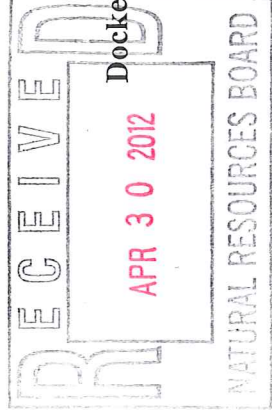
A handwritten signature in cursive script that reads "Jean Brewster Giddings".

Jean Brewster Giddings

JBG:tla  
Enclosures

Agency of Natural Resources  
Vermont Natural Resources Board  
Water Resources Panel

In Re: Kenny Pond  
Newfane, Vermont



COPY

PETITION TO WATER RESOURCES PANEL

The trustees of the Trust Indenture dated October 30, 1976, known as the Martha K.

Palmer Trust and as the Marth-Kinne-Palmer Trust, owners of the lands on which Kenny Pond is located entirely, hereby request the Vermont Natural Resources Board Water Resources Panel pursuant to 10 V.S.A. section 1424 (e) to amend the Vermont Use of Public Waters Rules to exclude Kenny Pond in Newfane, Vermont, from designation as Public Waters in appendix A, page A 26 of the Vermont Use of Public Waters Rules book. The grounds for such removal are:

1. The pond is an artificial pond lying entirely on lands of petitioners, and waters under 20 acres in size and waters created artificially of any size are both defined as a private pond in 10 V.S.A. section 5210 and in the Rules of the Vermont Natural Resources Board Water Resources Panel section 5 - Definitions, Paragraph 5.7, and are excluded from the definition of public waters in 5.9 thereof.
2. The pond is under 20 acres in size and therefore is also excluded from the definition of public waters.

Uses to be affected by the change: All public use without landowner approval

Actions taken to review concerns prior to request: Despite several years of stocking Kenny Pond with fish, posting against various uses and the licensing of some uses by neighbors, use of the pond by members of the public for boating and the placement of ice fishing structures

(ice shanties) have come to the attention of the petitioners. When they sought to curtail these uses by discussion with the persons using the ice shanties and boats, they were advised of the improper designation of the pond as "public waters," and the users failed and refused to stop the use. The pond abuts a public highway and makes posting and prosecution of trespassers difficult as it is hard to determine if access can be gained to the pond from the right of way without crossing petitioner's land.

Your petitioners wish to retain control of these private waters to protect summer homes owned by the trustees of the Martha K. Palmer Trust which are sometimes vacant, especially in the winter, to preserve the character and quality of the waters by limiting use by the public in activities that may result in greater littering and introduction of invasive aquatic plants. The petitioners ask that the Board remove the pond from the current designation.

Impact on the water will be positive as the petitioner intends to prohibit boating by the public and the location of structures on the property. A proposed rule change is attached.

In the alternative, should the Board find Kenny Pond is "public waters," the petitioners request that the rules regarding the use of said pond be amended to exclude the placement of ice shanties in winter.

#### MEMORANDUM OF LAW

The Vermont Natural Resources Board Water Resources Panel has promulgated rules regarding the Vermont Use of Public Waters. The pond located entirely on the petitioner's premises, Kenny Pond in the town of Newfane, is listed in Appendix A, Lake-Specific Rules Regulating the Use of Public Waters on page A-26. While the State of Vermont believes the

pond to be 26 acres it is the petitioner's belief that this pond is under 20 acres in size.

The pond is not a natural pond having been created by damming prior to the 1930's. Attached is a letter dated November 7, 1973, from Joseph L. Druke, a long-time resident of the town of Newfane, describing to the Palmers, prior owners of the property, the method by which the pond was created. Also attached are photographs of the man-made dam creating the pond, and the Town of Newfane Highway map which also depicts the approximate location of the dam.

10 V.S.A. chapter 49 entitled "Protection of Navigable Waters and Shorelands," provides a definition of public waters at section 1422 (6) "Public waters' means navigable waters excepting those waters in private ponds and private preserves as set forth in sections 5204, 5205, 5206 and 5210 of this title."

10 V.S.A. section 5210 describes private ponds as "...a natural pond of not more than 20 acres or an artificial pond entirely upon his or her premises, ...."

The Vermont Use of Public Waters Rules, as amended, Effective December 30, 2011, adopts the language of the statutes. In section 5, Definitions, the rules describe a private pond as "(a) A natural pond of not more than 20 acres, or (b) an artificial pond of any size, when such natural or artificial pond is located entirely upon lands owned by one person or entity." (Rule 5.7) It defines public waters at Rule 5.9 as "navigable waters excepting those waters in private ponds and private preserves as set forth in 10 V.S.A. section 5204, 5205, 5206 and 5210," the statutory provisions exempting artificial ponds. Based upon the statute and the rule, an artificial pond of any size should not be listed as public waters by the State of Vermont and therefore Kenny Pond, which is an artificial pond created by damming should be removed from the list of public waters.

Kenny Pond lies entirely on lands of the trust deeded to it by several deeds of Martha

Kinne Palmer. It lies entirely on tax parcel A-114.1 listed with the Town at 23 acres in size. A smaller pond and swampy area lies on the other side of the town highway 19 and is not a part of the Kenny Pond. It further appears, Kenny Pond is under 20 acres in size and therefore should be removed from the list of public waters.

In the alternative, petitioners wish the pond to be restricted against the location of ice shanties in the winter. This use results in more littering and encourages greater use of the pond in winter near summer homes which are not occupied causing a security risk. The greater use by the public places more stress on the quality of the waters.

The petitioners are available to provide additional information, testimony and documentation as required by the Board.

Respectfully submitted on behalf of the trustees,



Jean Brewster Giddings  
Fitts, Olson & Giddings, P.L.C.  
16 High Street  
Brattleboro, VT 05301  
(802) 254-2345



Beckley Alley Gaudette, Trustee

Pinelands/MKP Trust

April 24, 2012

*Martha P. Leape*

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Martha P. Leape  
Trustee  
Pinelands/MKP Trust  
April 24, 2012

STATE OF VERMONT

Natural Resources Board  
Water Resources Panel

In Re: Kenny Pond  
Newfane, Vermont

CERTIFICATE OF SERVICE

I, Jean Brewster Giddings, Attorney for the Trustees of the Trust Indenture dated October 30, 1977, known as the

Martha K. Palmer Trust or Martha Kinne Palmer Trust, Petitioner, hereby certify that on 27 April 2012 the petition in re Kenny Pond, together with attachments, was served by mailing them first class, certified mail, return receipt requested, postage prepaid to:

Honorable Deborah Markowitz, Secretary  
Vermont Agency of Natural Resources  
Center Building  
103 South Main Street  
Waterbury, VT 05671-0301

Honorable David Meas, Commissioner  
Department of Environmental Conservation  
One South Building  
103 South Main Street  
Waterbury, VT 05671-0501

John Hasen, General Counsel  
Natural Resources Board, Water Resources Panel  
National Life Records Center  
National Life Drive  
Montpelier, VT 05620-3201

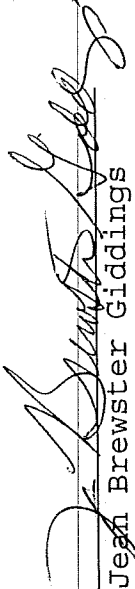
Gloria Cristelli, Town Clerk  
Town of Newfane  
P.O. Box 296  
Newfane, VT 05345

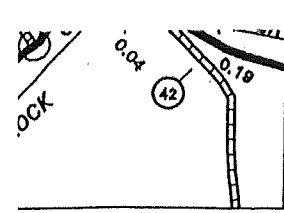


Adam Granger, Chairman  
Town of Newfane Planning Commission  
P.O. Box 296  
Newfane, VT 05345

Chris Company, Director  
Windham Regional Commission  
139 Main Street, Suite 508  
Brattleboro, VT 05301

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Jean Brewster Giddings  
Fitts, Olson & Giddings, P.L.C.  
16 High Street  
Brattleboro, VT 05301  
(802) 254-2345



N 48 000 m

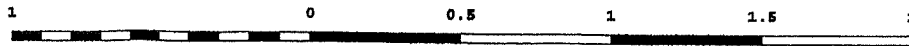
# VERMONT GENERAL HIGHWAY MAP

# TOWN OF NEWFANE

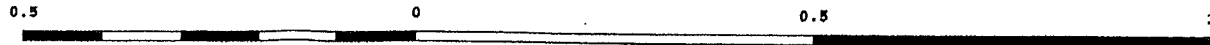
PREPARED BY THE  
VERMONT AGENCY OF TRANSPORTATION  
TECHNICAL SERVICES DIVISION  
IN COOPERATION WITH  
U. S. DEPARTMENT OF TRANSPORTATION  
FEDERAL HIGHWAY ADMINISTRATION

N 44 000 m

SCALE 1:31680



MILES  
SCALE 1:12000



MILES  
SCALE FOR INSETS (UNLESS OTHERWISE NOTED)

E 492 000 m

E 496 000 m

E 500 000 m

## WINDHAM COUNTY

Vermont Agency  
of Technical  
Services  
Division

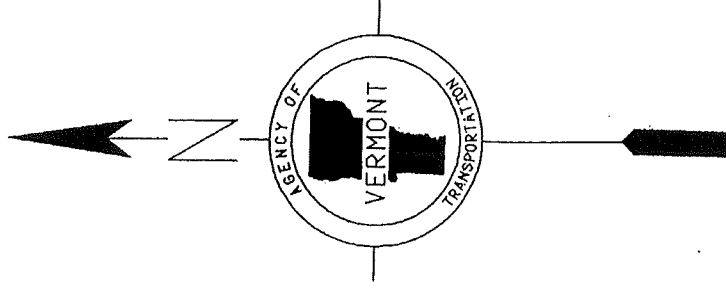
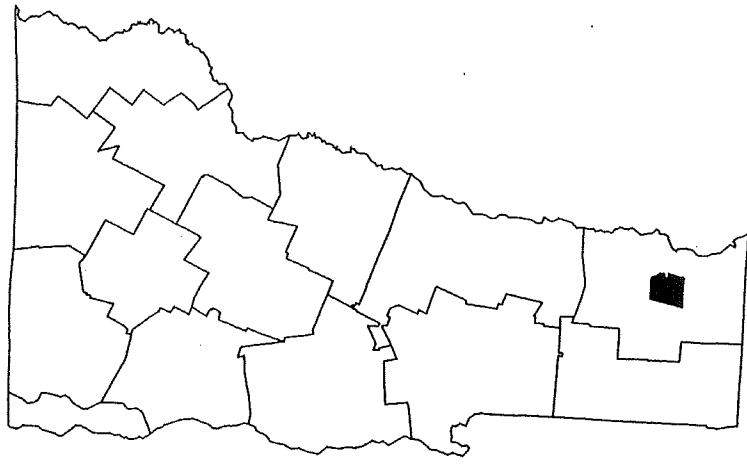
N 60 000 m

E 476 000 m

TOWN HWY NO.	LENGTH IN MILES CLASS 3	LENGTH IN MILES CLASS 4
6	0.900	
7	0.450	
8	0.230	
9	0.250	
10	0.050	
11	1.540	
12	0.680	
13	0.740	(0.400)
14	0.150	
15	3.390	
16	0.400	
18	0.330	
19	6.340	
20	4.150	
21	1.560	
22	0.650	
23	0.180	
24	0.440	
25	0.100	
26	1.570	
27	2.420	
29	0.390	
30	2.050	
31	0.290	
32	1.840	(0.100)
33	0.000	
34	0.070	
35	1.840	
36	0.270	
37	0.400	
39	0.290	
40	0.200	
41	2.020	
42	1.900	
43	1.000	
44	0.200	
45	0.910	
47	0.490	
48	0.060	
49	0.060	
50	0.080	
51	0.140	
52	0.270	
53	0.090	
55	0.110	
56	0.000	(0.160)
58	0.060	
59	0.020	
60	0.200	
61	0.020	
63	0.290	
64	0.150	
65	0.780	
68	0.090	
69	0.050	
70	0.100	
71	0.740	
75	0.670	
76	0.610	
77	0.260	
78	0.400	

N 56 000 m

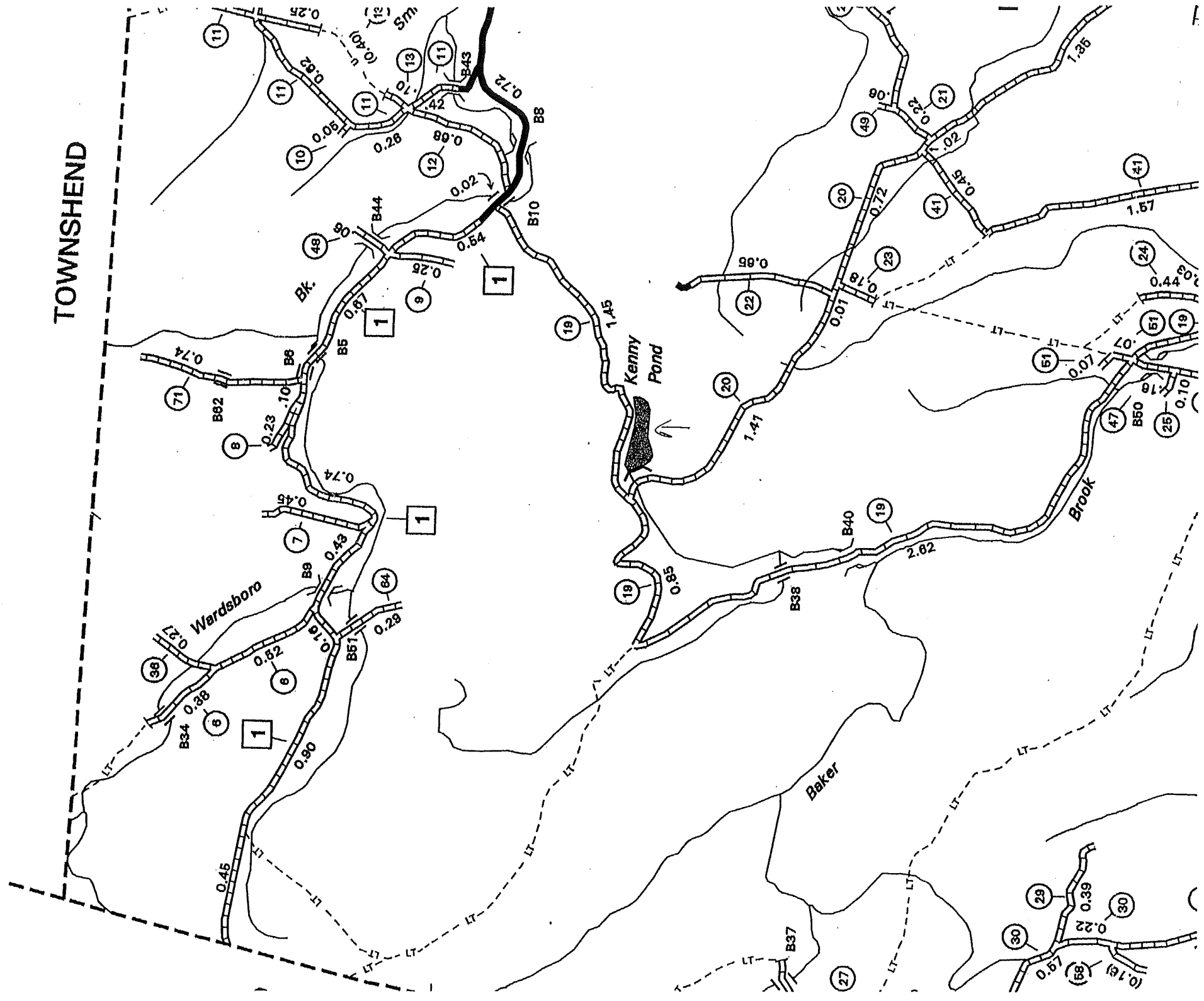
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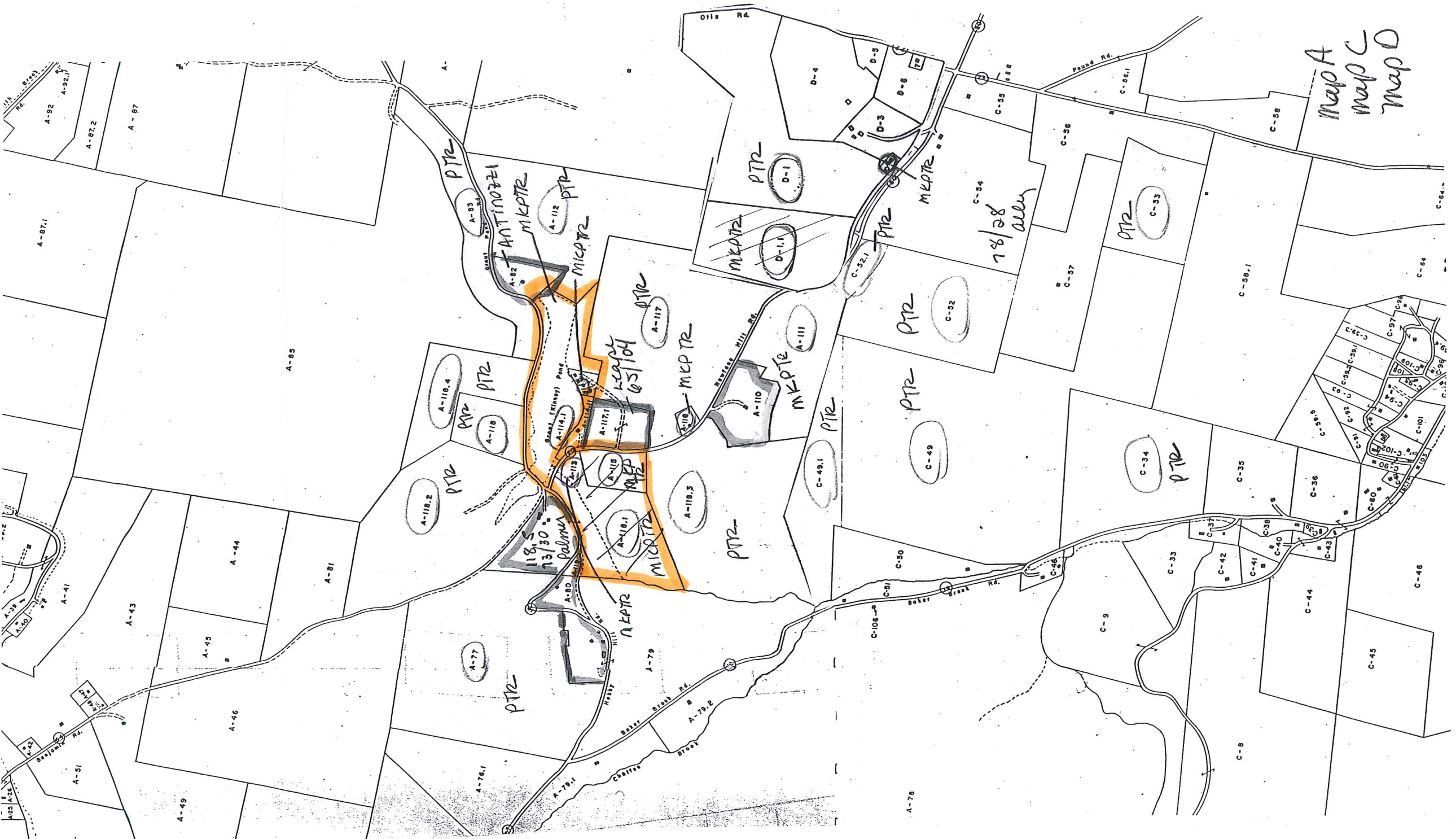


RECEIVED APR 17 2012

E 480 000 m

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Map A  
Map C  
Map D

## PROPOSED RULE CHANGE

- b. Use of personal watercraft is prohibited (VUPW Rule 3.3)
- c. Use of aircraft is prohibited May 1 - November 30, except where authorized under 5 V.S.A. Ch. 9 (VUPW Rule 3.4)

### Kennedy's Pond, Town of Windsor (77)

See: Mill Pond (Kennedy's Pond), Town of Windsor

### ~~Kenny Pond, Town of Newfane (26\*)~~

- ~~a. Vessels powered by motor shall not exceed 5 mph (VUPW Rule 3.2(a))~~
- ~~b. Use of personal watercraft is prohibited (VUPW Rule 3.3)~~
- ~~c. Use of aircraft is prohibited May 1 - November 30, except where authorized under 5 V.S.A. Ch. 9 (VUPW Rule 3.4)~~
- ~~d. Use of internal combustion motors is prohibited (VUPW Rule 3.5)~~

### Kent Pond, Town of Killington (99)<sup>4,6</sup>

- a. Vessels powered by motor shall not exceed 5 mph.
- b. Use of personal watercraft is prohibited (VUPW Rule 3.3)

### Kettle Pond, Towns of Groton, Peacham and Marshfield (109)<sup>4,6</sup>

- a. Vessels powered by motor shall not exceed 5 mph.
- b. Use of personal watercraft is prohibited (VUPW Rule 3.3)

### Knapp Brook Pond #1, Towns of Reading and Cavendish (25\*)

- a. Vessels powered by motor shall not exceed 5 mph (VUPW Rule 3.2(a))
- b. Use of personal watercraft is prohibited (VUPW Rule 3.3)
- c. Use of aircraft is prohibited May 1 - November 30, except where authorized under 5 V.S.A. Ch. 9 (VUPW Rule 3.4)

### Knapp Brook Pond #2, Towns of Reading and Cavendish (35\*)

- a. Vessels powered by motor shall not exceed 5 mph (VUPW Rule 3.2(a))
- b. Use of personal watercraft is prohibited (VUPW Rule 3.3)
- c. Use of aircraft is prohibited May 1 - November 30, except where authorized under 5 V.S.A. Ch. 9 (VUPW Rule 3.4)

November 7, 1973  
Williamsville, Vermont 05362

Mr. and Mrs. James B. Palmer  
Newfane Hill  
Newfane, Vermont 05345

Dear Mr. and Mrs. Palmer:

I have been a resident of the Town of Newfane practically all my life (less about two years in 1959 & 1960).

I have been familiar with the Kenny Pond area most of my life, beginning with about 1933 when my father, two brothers and myself routinely provided salt for some stock belonging to my father which was pastured in the so-called "Merrifield Big Pasture", now owned by you and when my father, two brothers and I with a wagon and team cut marsh grass adjacent to Kenny Pond.

At that time Kenny Pond was approximately one-third the area that it is in 1973.

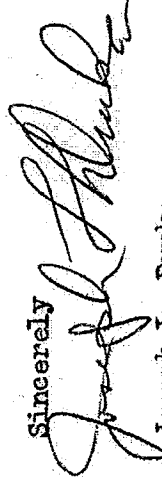
The Holt's, former owner, raised the water level in the late 1930's, to the best of my recollection, and had it surveyed to keep it under 25 acres. I remember discussing the pond with Mr. Holt, whereby he said he had it surveyed and had some correspondence with one of the Departments of the State in Montpelier ( I can't remember which one) regarding the keeping of the Pond under 25 acres to keep it private property.

To my understanding Kenny Pond was originally a swampy area that was dammed by Abel Grout, previous owner to Holt. I have always known Kenny Pond to be private property, treated as such by the public and the owners, I have never known of any procedure or default that could change Kenny Pond from private property into public waters.

If you remember the discussion you and I had with Roy Hood of the Fish and Game Dept. approximately seven or eight years ago, regarding posting the area, I understood from Mr. Hood that the Fish and Game Dept. considered the pond as private property.

I would consider that if you could obtain the papers of Harper Holt regarding the Pond or the survey which I am not sure but think was made by Tom Taylor, deceased, surveyor, who lived in Newfane.

Sincerely



Joseph L. Druke

JJ/dd

# Kenny Pond Dam Pond Side





# Kenny Pond Dam Outlet Side

