



State of New Hampshire

DEPARTMENT OF SAFETY
OFFICE OF THE COMMISSIONER

33 HAZEN DR. CONCORD, NH 03305

603/271-2791

JOHN J. BARTHELMES
COMMISSIONER

DECISION & ORDER

In the Matter of:

Lake Massasecum, Bradford, New Hampshire

HISTORY:

The Department of Safety received a petition dated July 29, 2011 submitted by David B. Gaudes, Sr. and signed by at least twenty-five (25) co-petitioners supporting the request. The petitioners applied for a hearing pursuant to RSA 270:12. After review, an August 9, 2011 letter of instruction was sent to Mr. Gaudes providing general instruction regarding the law focusing on signatures. Mr. Gaudes provided a reply dated August 12, 2011 and a hearing was scheduled to review the petitioners' request.

Pursuant to RSA 270:12 and the New Hampshire Code of Administrative Rules, Saf-C 409, a public hearing was held under the authority of RSA 541 between the months of June and September and was scheduled for Monday, September 19, 2011 at 10:00 a.m. at the Bradford Town Hall, 75 West Main Street, Bradford, New Hampshire. Mr. Curtis Duclos conducted the public hearing as my designee. The procedure for adoption of such rules is outlined in section RSA 270:12 of Title XXII governing navigation, harbors, and coastal survey in the State of New Hampshire.

PETITION:

The Petition reads: "We the undersigned residents and taxpayers of the Town of Bradford, NH do hereby petition the Department of Safety of the State of New Hampshire to mark by means of a "No Wake" buoy the narrow passage between Massasoit Island and adjacent shore property in Lake Massasecum. It is our belief that positioning of a marker in this location will help prevent or reduce the numbers of watercraft passing through this area at high speed and thus greatly improve water safety, help protect water and environmental quality and simplify enforcement when available. Many or most Lake Massasecum and town residents are aware of this specific concern but our lake is open to and widely used by the general public making it impossible to address the issue with local publicity and education. The attached map shows the proposed "No Wake" area.

At normal water levels the distance from the island to the shore at its narrowest point is 300' or less. Lily pad growth on each side of the channel reduces the available water for powered watercraft to 100' or less. Water depth in the area in question is minimal and exposes the silt and vegetation in the area to direct damage from lower units which currently produce visible furrowing of the lake bottom, especially at high speeds. Turbulence from boat propellers loosens additional vegetation and adds to degradation of water quality and clarity in the vicinity. This area of the lake is a popular area for kayaks, canoes and other non-motorized watercraft. Unfortunately, this passage is also commonly used by motorized watercraft at high speeds, some pulling water skiers, who potentially come into conflict with non-powered craft either in the area of open water or in the adjacent lily pads. The safety concerns are obvious and cannot be adequately addressed by the infrequent presence of enforcement personnel alone.

A problem of equal but more insidious importance is that of recurring growths of milfoil which persist annually along the shore side of the channel and which are subjected to violent effects of wave action produced by passing watercraft at wake speeds. The State of New Hampshire DES and the Lake Massasecum Lake Association have and are investing considerable funds and man-power in combating milfoil in Lake Massasecum and it is believed that reducing vegetation disturbance in the channel area may allow final eradication of the persisting growth in this area of the lake."

EXHIBITS: Public Hearing

- A. Cover letter and Petition dated July 29, 2011 from Mr. David B. Gaudes, Sr.;
- B. Letter and general information to Mr. Gaudes dated August 9, 2011;
- C. Letter from Mr. Gaudes dated August 12, 2011 with added signatures;
- D. Exhibit #1 - Testimony of Mr. David Gaudes;
- E. Exhibit #2 - A document, presented by Chris Bishop, which was signed by eighty property owners and/or residents of Bradford, N.H. who oppose the proposed No Wake Zone;
- F. Exhibit #3 - Testimony of Mr. Chris Bishop and U.S. geological survey.

OFFICIAL NOTICE:

I take official notice of the following:

- Submitted Petition received August 1, 2011;
- Instructional letter sent to Mr. Gaudes dated August 9, 2011;
- Reply to the instructional letter with clarification from Mr. Gaudes dated August 11, 2011 which included four additional signatures;
- Publication from the newspaper of statewide circulation published on September 5, 2011;

- The hearing was conducted under the established statutes and rule listed on page one.
- Soundtrack of the public hearing conducted September 19, 2011 containing the instruction and recorded public commentary from the persons speaking in favor of or against the petition;
- List of exhibits submitted on the hearing date, or presented on that date and provided after the hearing within seven calendar days;
- Public commentary submitted by U.S. Mail or Email prior to the hearing, on the date of the hearing, or within the seven calendar days allowed after the hearing, and that have been listed by name and made a part of the official file for this hearing;
- The hearing was closed to public comment at the end of the business day on Monday September 26, 2011.

STATISTICS:

Twenty-nine (29) people signed the petition submitted initiating the hearing process (some of the petitioners spoke at the public commentary hearing on September 19, 2011 and/or submitted letters or emails in favor of the Petition). In addition, an addendum document clarifying addresses of the Petitioners along with four (4) more signatures was received.

The following sign-in sheets are categorized as follows:

- Six (06) persons signed to testify in favor of the petition;
- Eight (08) persons signed recording themselves present in support of the petition;
- Eight (08) persons signed to testify against the Petition;
- Thirteen (13) persons signed recording themselves present against the Petition;

Written public comments received before and/or at the hearing, or by email, or by U.S. Mail within seven (7) calendar days following the hearing are categorized as follows:

- Twelve (12) different individuals or couples wrote emails or letters in favor of the Petition;
- Four (04) different individuals or couples wrote emails or letters against the Petition;
- Eighty (80) persons (Exhibit #2) wrote stating they the signers, owners and/or residents of Bradford, NH oppose the imposition of a NWZ and that there is no need for additional regulations or restrictions on Lake Massasecum.

SYNOPSIS OF TESTIMONY:

David Gaudes, Sr. testified supporting the petition. A procedural question from an audience member asked the dimensions of the proposed No Wake Zone (NWZ). Mr. Gaudes said that Doctor Rice, owner of the island, indicated that at normal water levels the passage is less than 300 feet based on the weeds located in that area. The question was clarified to the length of the NWZ (between the two red markings on the drawing).

Mr. Gaudes said that the (State) Marine Patrol will determine where the buoys are placed. He provided public commentary on the following: the size of the body of water affected is approximately five acres; public safety will be enhanced as many boaters currently fail to observe the 150 foot rule in this area, as during normal water levels the channel is not 300 feet wide. He and many others have observed violations of the safe passage law as boats pass within 25 feet of kayaks, other boats and fishermen.

Mr. Gaudes testified that a son of one of the petitioners was ticketed by a Marine Patrol Officer a few years ago because the passage within the proposed NWZ was not wide enough to travel up on plane.¹ Boats traveling on plane through this area have eroded some of the shoreline, but he said he is not asking that the area not be accessed; on the contrary, the petitioners want boats to travel through this area. Milfoil is located in five different areas of the lake. The torque from propellers through this area is disturbing the milfoil; the petitioners do not want this area "netted" as is another location within Lake Massasecum. The lake bottom is rutted causing the once clear water conditions and pickerel once present to no longer be observed. Because the Marine Patrol is under-funded, the lack of enforcement is noted. However, Mr. Gaudes is confident that placement of NWZ buoys will be obeyed.

Chris Bishop spoke against the Petition. He said that he was speaking on behalf of eighty persons who live along the lake, are property owners, residents of Bradford or live in the area. All are opposed to the Petition and signed the document he offered which was marked as Exhibit #2. Mr. Bishop testified to the reasons including the following: A U.S. geological survey of the area shows the passage allows two boats to pass as the width from the mainland to the island is 735 feet, with the closest being 400 feet at the northern location. On the southern portion of the passage, the entryway is over 600 feet allowing safe passage in the middle. Mr. Bishop said there have been few boating incidents on the lake and Marine Patrol has done a good job enforcing rules and regulations. He pointed out that most boaters obey the law.

Mr. Bishop testified that this area of the lake is primarily uninhabited, describing the shoreline as lined with vegetation, granite formations and marshland, all of which are very good ways to dissipate any waves. This area of the lake is used by many types of watercraft. In addition, this area is used for fishing, sailing, kayaking, rowing and swimming. The lack of boat traffic in this passage will create environmental changes such as causing the area to fill with sediment and weeds, rendering the area useless to all watercraft and swimmers. He continued saying that the constant acceleration and deceleration from

¹ [For clarification, "on plane" is a term generally used to explain that the boat levels off as the engine develops power.]

boats going into and out of the NWZ will create waves much larger than if traveling through on plane. Also, the actions contribute to shoreline erosion and will create noise pollution to those adjacent to the NWZ boundaries. The signers of the document Mr. Bishop represents live in the lake area and they are opposed to the Petition under consideration. Mr. Bishop said any concerns regarding safety are already being addressed by enforcement under the safe-passage laws.

Joseph Haden, living opposite the north end of Massasoit Island, spoke in favor of the petition. Over the years he has observed a very few violators of common sense and the law in this area. People speeding through, by and large, are occasional users of the lake; however, a NWZ will slow more from traveling so fast. The Marine Patrol safeguards the lake and noted the officers stop boaters for life preserver violations. The area is shallow and a buoy or marker rather than a NWZ would be helpful to tell people to use common sense. He noted that he enjoys speeding on the lake, but does so in a responsible manner during quiet times. People come into the passage because the water is calmer and are encroached on when boaters travel through. The only alternative seems to be a NWZ.

Bob Dunlap first spoke against the petition on behalf of Linda and Roger Dowling, the owners of the Casino (a campground on the lake). Mr. Dunlap read their comments from a document saying their concerns include the NWZ will definitely increase boat traffic between the island and the campground. Those boaters, by turning at the approach to the NWZ to avoid it, will be putting at risk the casino patrons renting the casino's small paddle boats, kayaks and canoes. Mr. Dunlap testified that he observes that most boaters are already conforming to safe boating laws and it would be a shame to take away from the majority for the few who would not exercise good judgment anywhere in the lake.

Marcia Keller spoke about the milfoil problem in the lake. Ms. Keller explained the efforts that she and others, such as DES, have undertaken to reduce the weed, but it has not diminished. She said that in the area of the proposed NWZ there has been evidence of milfoil which is spread boat-to-boat. If the milfoil continues to increase, the money and efforts will be to no avail. Ms. Keller said another aquatic plant, *Sclerolepis Uniflora* (a good plant) is an endangered species only found locally in Lake Massasecum. Allowing boats to go through at speed could allow the milfoil to spread and may cause the passage to be closed, so the NWZ is a better alternative.

Fred Morland said that a boat traveling at on plane speed is better than traveling at a no-wake speed because the propeller is lower in the water when at a no-wake speed. He also noted that the turning boats, as discussed by an earlier speaker, in the area of the public boat ramp and the casino will result in increasing boat traffic.

Denise Renk spoke in favor of the petition saying that you cannot say that the boat propellers are good (because their action in the water does not let the weeds grow) and also argue that the propellers are good because (the action of the propellers) will kill the flora and spread the milfoil that are going to be uprooted in the lake.

David Currier said his biggest concern is trying to regulate regulations already in place. He said there are enough laws now in place to cover the area in question. It comes down to an enforcement issue. The "safe passage rule" in place is probably the most violated law in bodies of water in New Hampshire. Mr. Currier said the confusion regarding boats traveling through the channel in connection with milfoil is not a motorized boat issue; it is all boats because milfoil is so sensitive. When broken off by a paddle or other object, it will break and travel away. He believes the Sclerolepis Uniflora is not endangered; however, if it is, ending all boating may need to be considered.

George Keller spoke in favor of the petition speaking about his concern regarding the speed of boats through the passage. He sails in this area, explaining the need to tack back and forth across the channel saying it is hazardous and describing the confusion as the motorboat and his sailboat try to adjust to each other's traveling pattern.

Rick Hudson having signed to speak against the petition said that he had nothing further to add.

Chris Bishop, Jr. spoke against the petition focusing on the Sclerolepis Uniflora issue. He said that no matter how fast boats are traveling though the lake the plant is going to be dug up. On the subject of milfoil, the speed of the craft makes no difference because the plant will either be chopped up or not, so there is no sense for a NWZ.

Barbara Francis spoke in favor of the petition saying that the larger section of the lake is big enough to water-ski rather than traveling through the proposed NWZ area. Presently, she rakes her shorefront daily to remove the weeds deposited there.

Linda Dowling spoke against the petition. She is an owner of the campground discussed earlier. She believes the species of weeds discussed is not really a factor leaving safety as the main topic for consideration. Her concern is that the lake is large enough to support water-skiing, but the location where the water-skiing boats will turn around is in front of the campground waterfront. The campground not only has swimmers, but also rents paddle boats and kayaks, but does not rent motorized boats that would travel to and from the island. However, there could be twice the amount of boats turning in this area to avoid the proposed NWZ and the campground owners have concerns for the safety of those persons using the water.

SYNOPSIS OF EXHIBITS; LETTERS; E-MAIL SUBMITTED:

(Documents received prior to or within the lawful timeframe after the public hearing. Specifics such as salutations, non-related remarks, home or email addresses have been removed from these documents as they will be posted on a website. All commentary has been cataloged and recorded including any noted exhibits. The information received is listed alphabetically by last name.)

SUPPORTING THE PETITION:

Carolyn Carlson is in favor of a no wake buoy in the narrow passage between Massasoit Island and adjacent shore property in Lake Massasecum.

Carol Cullinan is in favor of the petition.

Barbara French attended the public hearing. She believes the petitioners are asking for a NWZ to slow boat speed behind the big island to reduce milfoil even though a paddle can break up the plant. In addition, there are safety concerns when boats pass one another. As to those opposing the petition, the 80 signatures appear to be over-kill and the signers may not all know about the situation. Although regulations exist, the boaters do not slow down.

Marcia Keller is concerned about the new and increasing growth of milfoil in the area proposed for the NWZ. She writes that for ten years the ten-acre cove at the north end of the Lake, where most of the milfoil infestation was located, was netted off by order of DES, Safety Services, and Fish & Game. This was done to prevent further spreading by the action of motorized boats traveling to other parts of the lake. Non-motorized vessels were not prohibited since paddles do not contribute to the spread of milfoil. She continued saying after herbicide was used, DES determined that the milfoil was under control and the net was removed. Motorized boats are once again allowed to use the cove. If the milfoil continues to spread throughout the proposed no wake area, this part of the lake could be subject to the same netting at either end of the area keeping all motorized boats from using it at any speed. A NWZ would effect only 5-6 acres at headway speed rather than by prohibiting the use entirely for powerboats. As a clarification, *Sclerolepis Uniflora* is considered an endangered species in Lake Massasecum since this is the only lake in New Hampshire where it is found.

Patricia Laughlin supports the petition to "mark by means of a 'No Wake' buoy the narrow passage between Massasoit Island and adjacent shore property in Lake Massasecum".

Bethann McCarthy is in favor of a No Wake Zone. The area is very narrow and made even narrower with the significant growth of beneficial vegetation and large boulders. It is especially dangerous when water-skiers go through this area. The area is frequented by kayakers and fishermen, so there is rarely a clear zone through the area. Motor boaters are often unaware of the laws or disregard the laws, because even when boats are in the narrow area they often drive through at "through speed".

Ms. McCarthy believes that the growth of vegetation and the boulders are an unusual circumstance that should cause the Department of Safety to create this NWZ, even though the distance between the shoreline

and the island is greater than 600 feet. In addition to the public safety issue, there is the disturbance of the vegetative growth when motor boaters steer into the vegetation in order to avoid other boaters. This type of action is especially practiced when the motorboats are going fast, causing the vegetation to be dislodged from the lake bottom. Further, there are now some areas of milfoil growing on the edges of the vegetation on the west side of the area which can easily be disturbed by boaters. Her family owns property on the lake and uses boats, motor boats and kayaks. Having a NWZ would not hinder enjoyment of the lake when using a motorboat.

Deborah Morton supports the petition.

Elizabeth Rice writes that a NWZ will be helpful as the area in question is very narrow with a lot of vegetation and rocks. She states that requiring boats to travel slowly in this area will increase the safety of all motorboat users as well as others enjoying the lake including fishermen, and people using kayaks and canoes. A NWZ will also be beneficial to the health of the lake in that area, as the heavy vegetation in that area would be protected.

Ms. Rice has enjoyed the lake her entire life and believes she will be able to enjoy the lake even more if she felt safer as a kayaker/canoer going through the narrow channel. Since it is so narrow there, she is hesitant to paddle that area of the lake as boats pass through it very quickly. The wake that the motorboats create is also a great hindrance in that area since they pass by so closely. As a motorboat owner she would not be hindered by the NWZ on one part of the lake because the rest of the lake is a much larger and safer area in which to speed.

John and Celia Rice are both strongly in favor of the proposed petition. The lake is large enough to have a public boat launch so is widely used by persons new to the area and unfamiliar with potential harm caused by running powerboats at high speed through the narrow passage between Massasoit Island and the main shore. Boaters use the lake for fishing, water-skiing, personal watercraft enjoyment as well as non-motorized activities. There is no power restriction on the lake so some of the craft in current use are surprisingly powerful.

The expanse of open water on the opposite side of the island is extensive so restricting speed of passage of powered craft though the narrow, proposed NWZ does not present a significant inconvenience to power-boaters. Posting "No Wake" buoys at each end of the passage would not close the area to power-boaters wishing to pass through the area at slow speeds. Posting buoys would simply remind and require boaters to proceed at speeds dictated by common sense and safe boating practice and make flagrant violations inarguable from an enforcement standpoint. The furrows caused by lower unit skegs and prop wash in this area are evident to even the casual observer.

The resulting disturbance to the vegetation and silt bottom in the area is environmentally unacceptable and certainly adds to water turbidity in the immediate area and to the lake as a whole, given the flow of water out Melvin Brook.

The bulk of milfoil contamination in Lake Massasecum currently is scattered along several sites on the shore side of the passage in the adjacent, shallow lily pad areas. These noxious plants are easily fragmented, the manner in which they spread from site to site; also,

violent wave action caused by powerboats passing close by at high speed increases the risk of spreading milfoil.

John R. Rice said in reviewing the petitions of those for and those against posting a NWZ in Lake Massasecum, there seems to be wide variance in reference to the supposed width of the water channel between the island and the adjacent shore. Mr. Rice used a Zeiss rangefinder to measure the width and came up with 300 feet. He said those opposing the proposed petition suggest the distance is 700 feet. Obviously, the width of the channel will vary with lake water levels. It would seem logical to measure the width at summer water levels, during periods of peak boating use, rather than using spring flood measurements.

Mr. Rice requested that the State of New Hampshire determine the distance under discussion. He suggested that Ms. Smagula, a State DNR employee who has had extensive exposure to the milfoil problem along the channel area in question, or the divers she has called in to try and manage the milfoil problem, could provide accurate and less impassioned information on which to base a decision. At stake is the biological health, water quality and the future of one of the State's most beautiful recreational areas. In Mr. Rice's opinion, an appropriate decision should be based on science in preference to emotional politics.

Amy Smagula, Limnologist/Exotic Species Program Coordinator, NH Department of Environmental Services, writes that she had been notified that local lake residents on Lake Massasecum in Bradford have petitioned for a No Wake area designation between Massasoit Island and the western shoreline of the lake by that island.

Ms. Smagula writes: ... "While I understand the decision for such a designation is based primarily on navigation and safety-related issues, I did want to bring your attention to some environmental concerns that exist in this area. The portion of the lake that is bounded by Massasoit Island on the east and the shoreline of Lake Massasecum to the immediate west of the island is very shallow, ranging in depths from about 1.5 feet to approximately 4 feet in depth. Because of this, fast-moving boats can easily stir up the silty bottom sediments and disturb aquatic plant growth (including exotic variable milfoil growths) in this narrow shallow area, and could cause waves that lead to shoreline erosion along this shallow sensitive zone. If a No Wake Area is designated in this zone it would serve to reduce potential impacts from high speed boat traffic within this area, protecting the integrity of the lake in the long-term."

Kathy and Steve Zorawowicz own a cottage on the lake. They have always been concerned about the lake in the area across from "the large" island. This area is very shallow and there is an over abundance of aquatic vegetation. When boats go speeding through this area it churns up the "weeds" which end up right in front of their dock causing a very messy and smelly situation. They take a weekly trip to the dump with all the weeds they have to clean up. If there was to be a NWZ in this area it would preserve the aquatic vegetation which is important to the lake's ecosystem and stop the constant mess in front of their cottage.

When the lake level rises, the vegetation is being washed ashore in very large quantities. When boats go speeding through the area of the proposed NWZ, the wake causes the already high water to wash up even higher and in some instances knocks over their dock along with depositing all the unpleasant debris that gets churned up. The Zorawowicz have

also discovered milfoil in this area and a NWZ will help prevent it from spreading. When boats go speeding through, there is a very high possibility of the milfoil getting mixed in with the other weeds and floating to other portions of the lake.

OPPOSING THE PETITION:

Catherine Balck-Gallivan owns a home on Lake Massasecum and strongly argues against a NWZ, saying there is already limited space for boats. She feels strongly that limiting it further would make the lake less safe.

Jean Bishop is a fulltime resident on Lake Massasecum and is writing in opposition to the proposed NWZ. She writes that she left the hearing Monday morning with a couple of thoughts that she would like to share. First, it is only the occasional boater who disregards the current boating safety laws that are of concern to the petitioner. The placement of a NWZ will not stop the occasional boater from disobeying the law but will disrupt the natural rhythm of the lake, causing more traffic and safety issues in the areas adjacent to the proposed zone. Secondly, the discussion around weeds is not relevant to the NWZ hearing. It is an issue that should be dealt with by Department of Environmental Services, not the Department of Safety.

Caren Morell writes that she lives at/near the lake all year and also owns a small piece of waterfront on Oakdale to access the lake. She says that this issue is a personal preference for no powerboats (in front of personal property). There are lakes that have no power boat rules for people who prefer that. For the lakes that do allow power boats, there are rules already set forth for safety. With the State of New Hampshire requiring boat licenses, the boaters are all aware of these laws. These rules should be enforced. To have one shorefront owner ask for rules pertaining to lake area in front of their cottage is silly and could be precedent-setting. If they are allowed to do this, then anyone could; what a mess that would become, not to mention the infringement on everyone else's rights!

Jon Stiener owns a home on Lake Massasecum and has lived in Bradford full-time for over 20 years. He has spent many hours on the lake in powerboats, PWC's, kayaks, canoes and sailboats. In his opinion, a NWZ is unnecessary in that area. The shoreline is ledge and the lake is wide enough. If this is simply to satisfy the desires of a homeowner who wants slower boat traffic in front of his or her house then this is overkill and not the solution.

DISCUSSION:

In gathering findings of fact, the following is considered:

RSA 270:1, II Declaration of Policy

"In the interest of maintaining the residential, recreational and scenic values which New Hampshire public waters provide to residents of the state and to the promotion of our tourist industry, and in light of the fact that competing uses for the enjoyment of these waters, if not regulated for the benefit of all users, may diminish the value to be derived from them, it is hereby declared that the public waters of New Hampshire shall be maintained and regulated in such way as to provide for the safe and mutual enjoyment of a variety of uses, both from the shore and from water-borne conveyances. Such provisions shall take into consideration the following: the variety of special uses appropriate to our lakes, public safety, protection of environment, and water quality, and the continued nurture of New Hampshire's threatened and endangered species."

RSA 270:12 Operating Restrictions.

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 under RSA 541-A 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 270:75-109. 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.

RSA 270-D: 2 General Rules for Vessels Operating on Water.

"...Vessels shall be operated at headway speed only, while passing under all bridges. VI. (a) To provide full visibility and control and to prevent their wake from being thrown into or causing excessive rocking to other boats, barges, water skiers, aquaplanes or other boats, rafts or floats, all vessels shall maintain headway speed when within 150 feet from: (1) Rafts, floats, swimmers; (2) Permitted swimming areas; (3) Shore; (4) Docks; (5) Mooring fields; (6) Other vessels. . . ."

Administrative Rule Saf-C 409.01 Request for Hearing.

- (a) Any group of 25 or more persons, any association having not less than 25 members, or any governmental subdivision or agency may, pursuant to RSA 270:12, petition the commissioner for a hearing to determine whether a problem exists which could be alleviated by the adoption, in accordance with RSA 541-A, of the following types of rules:
- (1) Governing the maximum horsepower of boat engines and outboard motors on all or any portion of the public waters of the state;
 - (2) Prescribing maximum speed limits for the operation of boats on all or any portion of the public waters of the state; or
 - (3) Prohibiting the use of motor boats and outboard motors on public waters having an area of 35 acres or less, except any body of water covered by RSA 270.
- (b) Pursuant to RSA 270:12, this rule shall not apply to those bodies of water covered by RSA 270:75-109.

Administrative Rule 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 rulemaking action is being considered;
 - (2) The effect which 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 such 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 number of people in attendance at the hearing and the numbers of persons recorded for or against the proposed petition are given weight in determining findings; however, greater weight is given to the authority of law establishing factors which shall be considered in formulating a ruling based upon the statutes and administrative rules (*Supra*). The appropriate review is the substance of information presented through public commentary as compared to or contrasted with the applicable law, not just the numbers of persons.

The petition focused chiefly on the open water between the shorefront of Lot #91 and the opposite island and neither the petition nor any petitioners or any persons commenting, provided a detailed description of Lake Massasecum. Many commentaries referred to this area as a passageway. Looking at an overview map of this lake, the location described is in the lower portion of the lake. Lake Massasecum is a 402-acre body of water located in the town of Bradford, in Merrimack County. Outflow from Lake Massasecum travels via the Warner River and the Contoocook River to the Merrimack River. The maximum length is one and one-half miles with a maximum width of seven-tenths of one mile.² A 2010 NH Fish and Game public boat ramp map of the lake reveals the area in question is in the southern portion of the lake where the shoreline is near NH Route #114. The proposed NWZ is described as about five acres in area, but the petitioners could not determine a location for the beginning and ending of the proposed speed limitation, saying this is a decision best determined by the Marine Patrol.

The petitioners' spokesperson argued that many boaters fail to observe the 150 foot rule in this area because the water level in the channel varies during the year and the area for the proposed NWZ is not 300 feet wide. In addition, there are weeds on the shores limiting boat travel. Others have described the width between the mainland and the island as more than 300 feet. The spokesperson for the eighty persons not wanting further regulations in Lake Massasecum and in his own behalf provided data he located from a United States Geological Survey. This data included more specific measurements of the width of the water between the island and the mainland as not less than 400 feet and in

² wikipedia

other areas more. He also testified that this area of the lake is primarily uninhabited, describing the shoreline as lined with vegetation, granite and a marshland; all very helpful in dissipating any waves. The commentaries submitted either in favor or not, agree this area of the lake is used by all types of watercraft and for other activities such as swimming. In the days following the public hearing I received no rebuttal to the measurements presented.

It is suggested that a number of people have observed violations of the safe passage law. Only one person recalled a boater being summonsed a few years ago because the width of the passage being too narrow for above wake speed. No commentary was received indicating there have been complaints about unsafe boating practices reported to the Bureau of Marine Patrol.

The subjects of shoreline erosion, resulting from boats traveling "on plane" through this area, and of milfoil, an invasive plant located in five different areas of the lake, were discussed. A speaker said that there has been evidence of milfoil in the area of the proposed NWZ and that milfoil is spread boat-to-boat. Others commented alternative methods of milfoil being moved, including the plant breaking from paddles, etc.

There was commentary discussing water quality. The comments spoken of talked about threatened or endangered species included not having seen pickerel in the lake and the plant known as *Sclerolepis Uniflora* being threatened by infestation of milfoil, which is reported to be an invasive plant; however, many mentioned that fishing is an ongoing activity on the waters of the lake. The State of New Hampshire Limnologist/Exotic Species Program Coordinator commented that the portion of the lake that is adjoining Massasoit Island on the east and the shoreline of Lake Massasecum to the immediate west of the island is very shallow, ranging in depths from about 1.5 feet to approximately 4 feet. Because of this, fast-moving boats can easily stir up the silty bottom sediments and disturb aquatic plant growth (including exotic variable milfoil growths) in this narrow shallow area and could cause waves that lead to shoreline erosion along this shallow sensitive zone. She went on to say a NWZ would reduce impact to the plants. I respect her position, but there is no substantiation revealing the erosion is the result of wave action from boats traveling above a no-wake speed beyond the 150 foot distance.

Regarding the number of people affected to consider, they include the persons who own, rent and use the shorelines along the mainland and Massasoit Island and the people who use the water within Lake Massasecum, including by swimming, fishing, water-skiing and boating in its many forms both motorized and non-motorized.

The testimonials, both for and against, are an important part of the fact-finding review process and are given weight as applicable. The measurements and size of the body of water and numbers of people affected as presented by the speakers do vary. Those in favor of the petition describe the width of the proposed NWZ as closer to 300 feet while those opposed take their measurements from the U.S. Geological publications saying the north entrance of the island is approximately 745 feet from shore; the closest point to the shore is approximately 400 feet, and the entry at the south over 600 feet from shore, allowing for the 150-foot rule in the middle, providing greater weight to their figures.

As the Commissioner of Safety, I have carefully studied the listed statute(s) and rule(s) governing this petition. I recognize and give great weight to the instructive language found within RSA 270:1,II

(*Supra*); this passage speaks unmistakably to the Declaration of Policy our legislature has placed within the statute.

There is persuasive commentary showing that the variety of uses reveals diversity within Lake Massasecum including, but not limited to, boating, fishing, water-skiing, swimming and enjoying wildlife habitat. However, there is little or no information on water quality concerns, erosion, or the direct result of motorboats or ski-craft within a described five acre portion of a four hundred and two acre lake. I have determined that the availability of Marine Patrol personnel and practicality of monitoring and enforcing navigational laws are adequate within Lake Massasecum.

After carefully reviewing and considering all of the evidence and testimony received, in conjunction with the law and what the petition seeks to accomplish, please refer to my findings.

FINDINGS OF FACT:

1. That pursuant to RSA 270:12, twenty-nine (29) people petitioned the Commissioner of the Department of Safety to conduct a public hearing to regulate motorboat usage in the area of Lake Massasecum located in Bradford, New Hampshire.
2. The petition seeks to adopt a rule to establish a No Wake Zone (speed restriction) in Lake Massasecum located within the Town of Bradford, New Hampshire at or near the shoreline at Lot # 91 and across the passage between the mainland and the opposite shoreline of Massasoit Island.
3. Official notice for the hearing was published in a newspaper of statewide circulation, The Union Leader, Manchester, NH on September 5, 2011. In addition, notification was sent to the town officials of Bradford. Press releases were disseminated to the general media and the Notice of Hearing was posted on the Department of Safety website at: <http://www.nh.gov/safety/divisions/hearings/compendium/watercraft/index.html>
4. A public hearing was scheduled for Monday, September 19, 2011 and conducted pursuant to RSA 541, RSA 270:12 and Administrative Rule Saf-C 409 at the Bradford Town Hall, 75 West Main Street, Bradford, N.H.
5. The Petitioners provided little clarifying data or measurements of the proposed No Wake Zone. The general measurements are not adequate for determining the other contributing factors to consider within Saf-C 409.04(b)(1);
6. Public comment was received centering on public safety by proponents and opponents of the requested No Wake Zone that shows public safety is a concern and the implementation of a No Wake Zone will not be in the best interest of safety Saf-C 409.04, (b)(2)(a.);
7. Little public comment was received regarding the maintenance of residential, recreational, and scenic values in violation of RSA 270-D:2 Saf-C 409.04, (b)(2)(b.);
8. Public comment was received generally regarding the variety of uses of this body of water or portion thereof showing a diversity including

use of motorized and non-motorized watercraft, swimming, water-skiing, sail-boating and fishing. Saf-C 409.04, (b) (2) (c.);

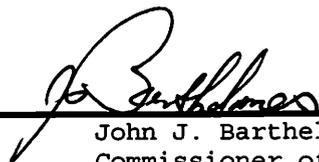
9. Public comment was received regarding the environment and infestation of invasive aquatic milfoil and the possibility of reducing the other aquatic plant known as *Sclerolepis Uniflora*. There is little specific evidence to associate motorboat propellers with increasing the infestation of milfoil within the proposed No Wake Zone if boaters comply with RSA 270-D:2, IV through and including RSA 270-D:2, VI. Saf-C 409.04, (b) (2) (d.);
10. No commentary discussed the disruption or destroying and nesting areas of waterfowl; however, fishing is described as an activity on Lake Massasecum. Saf-C 409.04, (b) (2) (e.);
11. Public comment was received generally regarding the number of people affected, either directly or indirectly, by adopting or not adopting the rule(s). There were no specific numbers of people or households provided, but commentary provided reveals an increase in use attributable to and including persons who own, rent and use the shorelines along the mainland and islands within and adjacent to Lake Massasecum. In addition, the people who use the water within Lake Massasecum enjoy it in many ways whether by swimming, fishing, water-skiing and boating with both motorized and non-motorized vessels. In addition, there is a reasonable possibility of a changing pattern of boat traffic to avoid the No Wake Zone or speeding up/slowing down to enter or exit the No Wake Zone affecting a commercial campground. Saf-C 409.04, (b) (3);
12. The New Hampshire Department of Safety through the Marine Patrol enforces the navigational laws governing the public waters within Lake Massasecum in Bradford, New Hampshire. Public comment was received generally regarding the availability and practicality of enforcing the navigational safety laws. The few violations being committed in the area of Lake Massasecum are categorized as violations of 'safe passage' laws, as listed within RSA 270-D:2. Saf-C 409.04, (b) (4);

CONCLUSION OF LAW:

Pursuant to RSA 270:12 (as amended effective 6/24/2011) and the New Hampshire Code of Administrative Rules, Saf-C 409, the information submitted was thoroughly considered within the petition, along with the public commentary received. The practicality of a No Wake Zone in Lake Massasecum is not reasonable or sensible. The evidence demonstrates that the petition is not in the public interest and shall not fulfill the purpose of law.

DISPOSITION:

The Petition seeking to establish a No Wake Zone in Lake Massasecum in the Town of Bradford is denied.

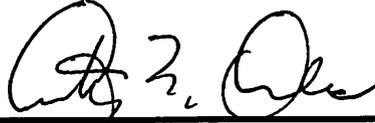


John J. Barthelmes
Commissioner of Safety

RSA 541:3 Motion for Rehearing.

"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."

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



C. N. Duclos,
Commissioner Designee

Petitioner's Designee
David B. Gaudes, Sr. **VIA EMAIL**
(To be distributed to
petitioners)

Town Administrator **VIA EMAIL**
Bradford, New Hampshire

Director Robert Quinn,
Division of State Police
Department of Safety

Lieutenant Timothy Dunleavy,
Division of Safety Services
Department of Safety

CC: File

Date of mailing: October 12, 2011

The Decision and Order shall be uploaded to the Department of Safety Website and remain for at least seven days. After that time, a synopsis of the decision shall replace this Order and Decision,

Go to: <http://www.nh.gov/safety/divisions/hearings/compendium/watercraft/watercraft2011.html>

The original documents shall be available and may be reviewed or copies obtained through the Department of Safety. You may contact this department, calling or writing for an appointment to review or request copies in accord with Saf-C 203.14 Fee Schedule and Pre-Hearing Access.

Telephone (603) 271-3486

Email Safety-hearings@dos.nh.gov

Department of Safety, Bureau of Hearings
33 Hazen Drive,
Concord, New Hampshire 03305