



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:

No Wake Zone Petition SQUAM LAKE, HOLDERNESS, NEW HAMPSHIRE

Pursuant to RSA 270:12 and the New Hampshire Code of Administrative Rules, Saf-C 409, a public hearing was scheduled under the authority of RSA 541 between the months of June and September and was held on July 2, 2020, by video conference pursuant to Governor Sununu's Emergency Order #12 pursuant to Executive Order 2020-04, paragraph 4. Christopher Casco, Esq. conducted the public hearing as designee on behalf of Commissioner Robert L. Quinn.

HISTORY:

The Department of Safety has a Petition received on or about February 5, 2020, signed by at least twenty-five (25) Co-Petitioners who are residents or property owners, supporting the request.

The Petitioners applied for a hearing pursuant to RSA 270:12 to address concerns providing the specific reasons within an attached Petition of names signatory thereto. The Petition requests that the Department of Safety establish a No Wake Zone on Squam Lake, in Holderness, New Hampshire. The Petitioners request a No Wake Zone in this area be designated in order to minimize the speed with which boats traverse this passage thereby enhancing public safety and protecting a threatened and endangered species, loons.

The procedure for adoption of such rules is in section RSA 270:12 of Title XXII governing navigation, harbors, and coast survey in the State of New Hampshire.

PETITION:

The Petitioners seek a No Wake Zone within the area described between the tip of Finisterre Point between the southern tip of Livermore Cove and extending to Potato Island on Squam Lake in Holderness, New Hampshire.

OPENING REMARKS:

Everyone present on the video conference was informed:

- The public hearing is 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 comment on the Petition;
- they could review the legal notice from the newspaper, along with the original Petition and any other documents electronically;
- how and where to submit written comment that must be received within seven (7) days from the hearing date by the Department of Safety specifying the end of business on July 10, 2020, no later than 4:15 p.m.;
- the appeal procedure in accordance with RSA 541:3; and,
- the emergency legal authority to hold the hearing by video and telephone conference rather than at a location within the vicinity of Squam Lake.

The Notice of Hearing and the Petition along with all supporting documents were available for electronic review by interested persons. Notification of the public hearing was published in The New Hampshire Union Leader on or about May 31, 2020.

EXHIBITS RECEIVED AT PUBLIC HEARING:

1. Petition and supporting documents.
2. Power Point slides.

STATISTICS:

On or about July 2, 2020, thirteen (13) people testified in favor of the Petition and one (1) person indicated support of the Petition but did not speak. No one spoke in opposition to the Petition. Prior to and/or after the hearing, one (1) person submitted public comment. I closed the hearing record to public comment at the conclusion of the business day on July 10, 2020.

OFFICIAL NOTICE:

Petition for no wake zone.

SYNOPSIS OF TESTIMONY:

Dr. Thomas Michel spoke on behalf of the Petitioners. He introduced Exhibit 2, a detailed Power Point presentation that summarized all of the reasons and established support for the Petition to establish a no wake zone between the tip of Finisterre Point between the southern tip of Livermore Cove extending to Potato Island. This is a distance of approximately 250 feet. By establishing a no wake zone in this narrow passage, the safety of swimmers and wildlife will be protected. In particular, Potato Island is frequently used as a nesting site by loons, and boat traffic in the area is both highly disruptive to loon nesting behavior and dangerous to loon chicks. In fact, shortly before the hearing, a motor boat struck and killed a loon in this area sought to be protected by a no wake zone.

Moreover, Dr. Michel indicated that his neighbors, abutters and/or Squam Lake property owners were requesting that the area be designated as a no wake zone to minimize the speed with which boats traverse this passage, thereby enhancing public safety and protecting threatened loons.

He provided detailed information on the process of preparing and submitting this Petition. Those details are that thirty (30) verified landowners from towns around Squam Lake signed in support of the Petition asking for a no wake zone. Seven (7) of those people are from Livermore Cove or Shad Bush Cove. Four (4) people are from Center Harbor; three (3) are from Sandwich; one (1) is from Ashland. Finally, fifteen (15) others are from Holderness from all across Squam Lake. In addition, there are many others who are considered friends of Potato Island loons. As part of the process, all abutters within a quarter mile of the proposed no wake zone were notified by certified mail. The Petitioner submitted the return receipts and they are incorporated into the hearing record.

In addition, enjoyment of the lake by all users will be enhanced by establishing a no wake zone. The safety of kayakers, paddle boarders and loon will be enhanced by establishing a no wake zone. In addition, due to the small area that will be impacted, this will have minimal impact on boaters utilizing Squam Lake. If this area is designated a no wake zone, it will take a boater an additional one minute and twenty-six seconds to traverse this area. This is an insignificant inconvenience to boaters in the area, and it will greatly enhance and protect the safety of the loons.

Dr. Michel has been a resident of Squam Lake since 2000. The loon struck and killed the Sunday before the hearing was part of a pair. It was anticipated that they were mating successfully and had mated successfully for

a long time. A necropsy of the body determined the cause of death to be that the loon was struck by a boat. For all of these reasons, he urged the Department of Safety to grant the Petition and establish a no wake zone.

SUMMARY OF OTHER INDIVIDUALS TESTIFYNG AT THE HEARING

Tiffany Grade, a loon expert, testified. She is a Squam Lake project biologist, and she spoke on behalf of the Loon Preservation Committee. She provided detailed testimony as to how establishing a no wake zone in this area will protect loons, a threatened and endangered species. She provided a detailed letter to support her testimony. Some of the highlights of both her testimony and written comment are that on or about June 28, 2020, an abandoned female was killed in the boat lane north of Potato Island due to trauma that the New Hampshire Veterinary Diagnostic Laboratory determined to have been caused by a boat collision. In addition to massive blunt force trauma to the loon's body, she sustained an injury to her head from a boat propeller. Granting the Petition will help to ensure that such a death does not occur again.

Moreover, she provided information concerning the history of loon nesting in this area. Since the year 2000 the loon pair has nested on Potato Island, and four (4) times on Perch Island. Seventeen (17) times these nests have hatched thirteen (13) chicks in nine (9) of those years of which eight (8) chicks have survived. The loss of the loon in this area the Sunday before the hearing will destabilize the territory and potentially this part of the lake for the next several years. Human-caused mortality on Squam Lane over the last twenty (20) years seems to have contributed to instability in the loon social structure, which the data suggests is a factor in the poor productivity the lake has experienced over the last fifteen (15) years. These productivity levels are less than half the statewide average. Adult survival is a critical factor in loon population growth. The loss of this female loon to a boat collision is a serious setback to the recovery of loons on Squam Lake.

In addition, in years when the loons nest at Potato Island or have chicks, they spend at least 70 percent of their time in the general area of this proposed no wake zone. She has observed several instances of people informally trying to slow down boat traffic in this area at times when the loon are present. Moreover, she has also witnessed close encounters between loon families and high-speed boats in the area covered by the no wake zone Petition, and she has had to protect the loons from oncoming boat traffic.

In summary, the Loon Preservation Committee's data suggests that a no wake zone in this area would be particularly beneficial when the pair has chicks or is nesting on Potato Island which has occurred in twelve (12) of the last twenty (20) years since 2000.

Other individuals testified, and these individuals have been residents in this area on Squam Lake and have personally witnessed the area where the

Petition is proposing a no wake zone. They suggest that boat traffic and jet ski traffic has increased dramatically in recent years. There is heavy boat traffic. There are swimmers in this area as well as people who use small watercraft like kayaks and paddle boards. The individuals testifying suggest that the New Hampshire state law of traveling no wake within 150 feet of people or other boats is routinely not observed by boaters traveling in that area. In addition, wake from boats travels to the island and causes damage to the land. They supported Dr. Michel's testimony that this will be a minimal inconvenience to people driving in boats to drive at a lower speed because it will take minimal extra time for them to get through this area than it does now without a no wake zone.

In summary, all individuals who testified were in support of the Petition. They were unanimous that establishing a no wake zone will increase public safety as well as increase the safety of a threatened and endangered species.

COMMENTARY RECEIVED PRIOR TO END OF BUSINESS ON JULY 10, 2020

Tiffany Grade, the Squam Lake project biologist on behalf of the Loon Preservation Committee submitted detailed written testimony, which was summarized above in the summary of her testimony. It is her opinion that establishing a no wake zone in this area will be extremely beneficial to loons and give them better population growth and a better chance for survival. It will help establish a productivity level for loons that is better than the statewide average. At present, their productivity levels are less than half the statewide average. Granting the Petition will increase those numbers.

DISCUSSION:

In gathering findings of fact, the following legal authority 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.

- 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...

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. . . .”

Saf-C 409.01 Request for Hearing.

- (a) A group of Petitioners made up of 25 or more residents or property owners of each affected town or towns in which the subject body of water is located, an association having not less than 25 members who are residents or property owners of each affected town or towns in which the subject body of water is located, or any governmental subdivision or agency may, pursuant to RSA 270:12, Petition the commissioner for a hearing to determine whether a problem exists such that the public interest requires the adoption 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 on any body of water covered by RSA 270.
- (b) Pursuant to RSA 270:12, this section shall not apply to those bodies of water covered by RSA 270:75-109.

- (c) The department shall not accept a Petition to repeal a rule adopted as a result of the granting of a Petition for at least one year following the effective date of the Petition.
- (d) When the Petition seeks the establishment of a no-wake zone, the Petition shall be accompanied by a listing of names and addresses of the abutters within 300 feet of the proposed zone, together with a statement certifying that all such abutters have been notified of the Petition by certified mail, return receipt requested, and have been provided copies of the Petition.

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 decision on the Petition relies not only on the comments made; the comments made are weighed against the criteria set forth in RSA 270:12 and Saf-C 409, and the decision is based on whether there is sufficient evidence after consideration of both testimony, written comment, and the relevant legal criteria. The record evidence should be sufficient to establish that a problem exists that will be remedied by establishing a no wake zone. The primary motivation of the Petition is due to high-speed boats endangering loons in the area. Moreover, the high-speed boat traffic in this area compromises public safety. The residents who testified were unanimous in the fact that boats traveling through this area do so at a high rate of speed. In fact, a loon was killed the Sunday before the hearing by a powerboat, which supports this Petition.

The number of people in attendance at the hearing, and the number of persons recorded for or against the proposed Petition are given weight in determining findings. The Petitioners presented information through testimony in support of their Petition as well as maps and photographs. The

testimony provided the fact-finder information supporting the Petition. The requested area is a very small distance of approximately 250 feet. In addition, boaters traveling in the area will suffer a minimal inconvenience if the Petition is granted. Assuming that the no wake zone is 200 yards long, a boat traveling at 25 mph takes sixteen seconds to go 200 yards. In addition, a boat traveling at a wake speed of 4 mph takes one minute and forty-two seconds to go those 200 yards. Therefore, the difference in travel time will be approximately one minute and twenty-six seconds longer if the Petition is granted. That one-half minute will go a long way to protecting loons and public safety in that area. Many people swim and use small personal watercraft in the area. It is a small and narrow passage. Therefore, it is appropriate for a no wake zone.

The fact-finder reviewed the listed statute(s) and rule(s) as authority for this Petition in addition to the list of authority placing 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. The criteria for the Commissioner of Safety to consider includes the language within Saf-C 409.04 including:

The size of the body of water or portion thereof where the rule is being requested.

The portion of the body of water for the no wake zone is very small, approximately 250 feet in length.

Public safety: Many people swim or use small personal watercraft in this area. People who testified at the hearing established that they personally witnessed boats driving too fast. Moreover, individuals in the area stated that at times they have to try to get the attention of boaters to attempt to slow them down in that area.

The maintenance of residential, recreational, and scenic values: Public safety in this area will be greatly enhanced by establishing a no wake zone. There are many recreational uses of this area in addition to boats that require establishing a no wake zone.

The variety of uses of the body of water: In addition to people using powerboats, many other people swim and use small personal watercraft in the area.

The environment and water quality: There was testimony that wake goes into the shore and may cause some damage. It could cause some damage to loon nests, although there is no evidence that specific nests have yet been damaged. A no wake zone likely, however, will enhance and protect against boat wake damaging nests on the shoreline in the future.

Threatened and endangered species: Significant testimony was presented that this is a critical area for loon nesting and mating. Granting the Petition in this area will greatly enhance the loon, which is a threatened and endangered species. Expert testimony supported the assertions that boats present a significant danger to loon.

The number of people affected, either directly or indirectly: Many residents in the area testified that they are negatively impacted by fast-moving boats. Long-time residents in this area are in unanimous support of the no wake zone. No one opposes the no wake zone. Therefore, there is minimal negative impact for establishing a no wake zone. It will take a mere minute and a half more for a boater to drive through this area if the no wake zone is established.

The availability and practicality of enforcement of the rule: Several people testified that New Hampshire state law is not always observed by driving at a no wake speed within 150 feet of other boats, people or wildlife. The Marine Patrol is responsible for enforcing boating laws in the State of New Hampshire.

This Petition, if granted, will not control but will place a minimal restriction on the varied uses for all the residents of the State of New Hampshire and the enjoyment of the public waters within Squam Lake. In fact, it will enhance the use of this area for most users in a significant way by providing them with greater safety and by providing loons with greater safety and enabling their habitat to thrive at a higher level than it has been able to.

After carefully reviewing and considering all of the evidence and testimony received, in conjunction with the law, and what the Petition seeks to accomplish, published findings are as follows:

FINDINGS OF FACT:

1. That pursuant to RSA 270:12, at least twenty-five (25) people Petitioned Robert L. Quinn, Commissioner of the Department of Safety to conduct a public hearing to regulate motor boat usage in the area of Squam Lake in Holderness, New Hampshire.
2. The Petition seeks to adopt a rule establishing a no wake zone on Squam Lake. The Petition, received by the Department of Safety on or about February 5, 2020, was accepted and scheduled for a hearing.

3. The Petitioners notified all abutting property owners of the Petition by certified mail.
4. Formal public notice for the hearing was published in a newspaper of statewide circulation on May 31, 2020, in The Union Leader, Manchester, New Hampshire.
5. The Petition and hearing notice were posted on the Department of Safety web site.
6. A public hearing was scheduled and conducted by video conference pursuant to RSA 541 (*et seq.*), RSA 270:12, Administrative Rule Saf-C 409, and Governor Sununu's Emergency Order #12 pursuant to Executive Order 2020-04, paragraph 4.
7. Public comment received indicated that establishing a no wake zone in this area would benefit both public safety and the safety of a threatened and endangered species.
8. Public comment was received in reference to maintenance of residential, recreational and scenic values. In fact, those who testified were unanimous in their view that granting the Petition will enhance recreational, residential and scenic values for all property owners as well as for the public.
9. Public comment was received in reference to a variety of uses including that in addition to motor boats, there are many swimmers and users of small watercraft including kayaks and paddleboards in this area. This is an area with competing uses. The inconvenience, however, to those using motor boats to get through this small area at lower speeds will be minimal.
10. Public comment was received regarding the effect which adopting or not adopting the rule(s) would have upon the public safety or water quality. Not adopting the rule to establish a no wake zone could result in some erosion at the shoreline and could cause damage to loon nests in the area.
11. Testimony revealed some concern for the environment within the area due to wake potentially affecting the shoreline as well as loon nesting areas.
12. The testimony provided unanimous support for the no wake zone.
13. No one objected to the creation of a no wake zone in this area.
14. Public comment was received regarding the number of people affected by not establishing a no wake zone. There will be a minimal impact on

individuals by establishing a no wake zone, but great harm may be caused if one is not adopted. This is evidenced by the death of a loon caused by a motorboat shortly before the hearing.

15. The New Hampshire Marine Patrol enforces the law governing the public waters within Squam Lake in Holderness, New Hampshire, and navigational laws are enforced by that agency.

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

Respectfully submitted,



Christopher Casco, Esq.
Administrator

Dated: 8/28/20

CONCLUSION OF LAW:

Pursuant to RSA 270:12 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 evidence demonstrates that the Petition is in the public interest and will fulfill the purpose of law. There is sufficient proof to allow the creation of a No Wake Zone on Squam Lake between the tip of Finisterre Point between the southern tip of Livermore Cove extending to Potato Island, a distance of approximately 250 feet.



DISPOSITION:

The Petition to establish a No Wake Zone as described in the Petition is granted. I approve adoption of a rule in accordance with this decision.



Robert L. Quinn
Commissioner of Safety

Dated: 8/28/20

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.”

RSA 541:6 Appeal

“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 Decision and Order has been forwarded to the below-named via first-class mail or electronic mailing (*as applicable*).



Christopher Casco, Administrator

Date of emailing:

8/28/20

Petitioner Designee: Dr. Thomas Michel

(To be distributed to Petitioners)

Town Administrator
Holderness, New Hampshire

Captain Timothy Dunleavy,
NH Division of State Police
Marine Patrol Unit
Department of Safety

cc: File