



State of New Hampshire

Department of Safety

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

JOHN J. BARTHELMES
COMMISSIONER OF SAFETY

DECISION & ORDER

In the Matter of:

**Wheeler's Cove,
On Franklin Pierce Lake,
Antrim, 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 Friday, June 2, 2017 at 5:00 p.m. at the Antrim Town Hall, 66 Main Street, Antrim, New Hampshire. Christopher Casco, Esq. conducted the public hearing as designee on behalf of Commissioner John J. Barthelmes.

HISTORY:

The Department of Safety received a petition dated August 6, 2016 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 approve an administrative rule to establish a no wake zone in Wheeler's Cove on Franklin Pierce Lake, Antrim, New Hampshire.

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 as Wheeler's Cove on Franklin Pierce Lake in Antrim, New Hampshire.

OPENING REMARKS:

Everyone present 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 sign the appropriate "sign-up sheet" to present comment on the petition;
- they could review the legal notice from the newspaper, along with the original petition and any other documents;
- how and where to submit written comment that must be received within seven (7) days from the hearing date by the Department of Safety specifying the end of business on Friday, June 9, 2017; and,
- the appeal procedure in accordance with RSA 541:3 and RSA 541:6.

The Notice of Hearing and the petition along with all supporting documents were displayed for review by interested persons. Notification of the public hearing was published in The New Hampshire Union Leader on May 3, 2017.

EXHIBITS RECEIVED AT PUBLIC HEARING:

- Petition and supporting documents

STATISTICS:

On June 2, 2017, six (6) people testified in favor of the petition and (1) person signed to record himself or herself in support of the petition but did not speak. No one appeared and spoke in opposition to the petition, and no one appeared opposed but did not speak. Prior to, at the hearing, or after the hearing, (3) people sent via mail, e-mail or facsimile public commentary in favor of the petition. No one submitted public comment opposed to the petition. The hearing was closed to public comment at the conclusion of the business day on Friday, June 9, 2017.

OFFICIAL NOTICE:

Petition dated August 6, 2016.

SYNOPSIS OF TESTIMONY:

Mr. Roger Weymouth testified in favor of the petition. He filed the petition. He read a statement into the record which statement is part of the public comment. He stated that the no wake zone is sought for the channel leading into, and the entirety of Wheeler's Cove on Franklin Pierce Lake. Franklin Pierce Lake is 550 acres, and the requested no wake zone is 1.5% of the total acreage. This will leave 98.5% of the lake available for boating without administrative rule restriction.

The basis of the request is safety of swimmers, paddle boarders, and kayakers who use the area. Moreover, boats have caused shoreline erosion, which is exacerbated because the properties in the area have slopes leading to the water. Many of the residents have spent considerable time, effort, and money to remediate erosion on their properties. The erosion problem has a negative impact on property values.

The width of the cove is 300 feet, and two boats may not pass in opposite directions while maintaining the legally required 150-foot distance necessary to travel at greater than headway speed. Therefore, it is unsafe to traverse the cove at greater than headway speed.

In addition, boat traffic on the lake has increased considerably. This has resulted in boaters unfamiliar with the lake and raised additional safety concerns in Wheeler's Cove.

Forty-one (41) lake front residents/property owners signed the petition. Thereafter, 3 additional property owners expressed to Petitioner that they wished to sign in as additional petitioners.

Beverly Weymouth testified in support of the petition. She stated that boats travelling at high speeds have a negative impact on an eagle, loon, and blue heron in the cove. Jet skis operate at high speeds, and in one case, circled loons, which drove them from the area. Moreover, there are submerged boulders in the cove, which necessitates lower speeds. Boats drive at high speeds in close proximity to swimmers, docks on the shoreline, and small boats like kayaks and canoes, thus creating a safety problem.

Bruce McGuffin lives in Wheeler's Cove. He stated that large waves caused by speeding boats have caused serious erosion. Boats drive too close to swimmers and small watercraft.

Helen Weymouth testified about problems caused by the heavy boat traffic in this area. She has had erosion on her property. The boat operators drive too fast while not paying sufficient attention to their surroundings, which makes it hard for her to paddle. She has seen large boats, going too fast within 10 feet of her dock. In her opinion, the area needs to be controlled.

Nancy Niven stated that she has been in the area since 1984. She supports what had previously been testified to. She wants to put a no wake sign on her dock in order to slow the speeds of boats.

Albert Niven supported all of the prior testimony.

COMMENTARY RECEIVED PRIOR TO END OF BUSINESS ON June 9, 2017

Three people submitted written comment, which included the written testimony of the Petitioner. The public comment in favor indicated that public safety and erosion support the petition. One writer stated that she has spent thousands of dollars to mitigate erosion. The written comment also indicated that boat wake disturbs loon.

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 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. . . .”

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.

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 petitioner, speakers, and those that provided public comment identified several persistent problems that will be remedied by a no wake zone rule.

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. The petitioners presented information through testimony in support of their Petition as well as a map. The testimony provided the fact-finder general information supporting the petition.

The fact-finder reviews 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: Franklin Pierce Lake is 550 acres.

Public safety: The testimony established significant safety concerns due to boats operating at greater than headway speed in this narrow area. The area for the requested no wake zone constitutes 1.5% of the total area of the lake. Boats drive at high speeds too close to swimmers, small watercraft, and loons. There are rocks in the area which makes driving at greater than headway speed dangerous.

The maintenance of residential, recreational, and scenic values: Several property owners have experienced serious erosion problems due to boat wake. Moreover, residents have spent thousands of dollars to remediate erosion damage, and despite those efforts erosion continues to present a problem. The money spent to remediate erosion may have a negative impact on property values.

The variety of uses of the body of water: In addition to motorboats, which have increased dramatically on Franklin Pierce Lake, there are swimmers and small boats like kayaks and canoes. Moreover, there is wildlife in this area including loon, blue heron, and an eagle. In one instance, a jet ski drove at a high speed circling loons, a threatened species.

The environment and water quality: The erosion at the shoreline due to waves is a significant problem for the environment on this section of the lake.

Threatened and endangered species: Loon, a threatened species, are negatively impacted by boats and jet skis driving at high speeds. It may be inferred that such activity may drive them from the area.

The number of people affected, either directly or indirectly: The residents in this area are negatively impacted due to erosion and safety problems due to speeding boats. If the petition is denied, the erosion problem will worsen. The negative impact on the boating public is minimal because 98.5 percent of the lake will be available for regular boating because the requested area constitutes only 1.5 percent of the lake.

The availability and practicality of enforcement of the rule: The Marine Patrol division of the State Police is responsible for enforcing the rule, and has the ability to do so.

This petition, if granted, will not control but will restrict the varied uses for all the residents of the State of New Hampshire and the

enjoyment of the public waters within Franklin Pierce Lake. 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 John J. Barthelmes, Commissioner of the Department of Safety to conduct a public hearing to regulate motor boat usage in the area of Wheeler's Cove located within Franklin Pierce Lake in Antrim, New Hampshire.
2. The petition seeks to adopt a rule establishing a no wake zone to commence at a point 100 feet north of the northern lot line of property identified on the Town of Antrim assessor's map parcel #206-027 and including the area of Wheeler's Cove on Franklin Pierce Lake.
3. The petitioner 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 3, 2017 in The Union Leader, Manchester, New Hampshire.
5. The petition and hearing notice were posted on the Department of Safety web site on or about May 1, 2017 and have remained there.
6. A public hearing was scheduled and conducted at the Antrim Town Hall, 66 Main Street, Antrim, New Hampshire on Friday, June 3, 2017, pursuant to RSA 541 (et seq.), RSA 270:12 and Administrative Rule Saf-C 409.
7. Establishing a no wake zone in Wheeler's Cove will result in a no wake zone size of 1.5 percent of the 550-acre lake.
8. Public comment received indicated that large wake creates an unsafe situation because boats drive at high speeds through a narrow area in close proximity to kayaks, canoes, paddle boarders and swimmers. In addition, boats drive at high speeds within 10 to 20 feet of docks on the shoreline. Moreover, there are submerged rocks making high-speed boat operation unsafe.

9. The fact finder received public comment in reference to maintenance of residential, recreational and scenic values indicating that there is serious erosion at shoreline properties, which residents have spent thousands of dollars to remediate. Property values will decline if excessive erosion continues, and erosion is exacerbated by waves hitting the shore.
 10. Public comment was received in reference to a variety of uses including swimming and small watercraft like kayaks and canoes.
 11. 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 the no wake zone will result in the continuation of an unsafe condition.
 12. Testimony revealed concern for the environment within Wheeler's Cove due to erosion. Boat wake causes leaves and sticks to be washed ashore. The erosion on the shoreline is worsened by boat wake.
 13. There was no conflicting testimony regarding the necessity of the no wake zone as no one spoke, or submitted public comment against the petition.
 14. Public comment was received regarding the number of people affected by establishing a no wake zone. Shoreline property owners are negatively impacted by speeding boats due to erosion and safety problems. At the same time, since the area for the no wake zone is small, consisting of 1.5 percent of the 550-acre lake, a no wake zone rule will have an insignificant negative impact on the general public. As a result, the benefits to public safety and the environment in the cove, which will result from implementing a no wake zone, outweigh the negative impact on the public by limiting the use of the public water in Wheeler's Cove.
 15. The New Hampshire Marine Patrol enforces the law governing the public waters within Franklin Pierce Lake in Antrim, New Hampshire, and navigational laws are enforced through that agency. Due to the small area of the no wake zone, it will be enforceable.
-

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

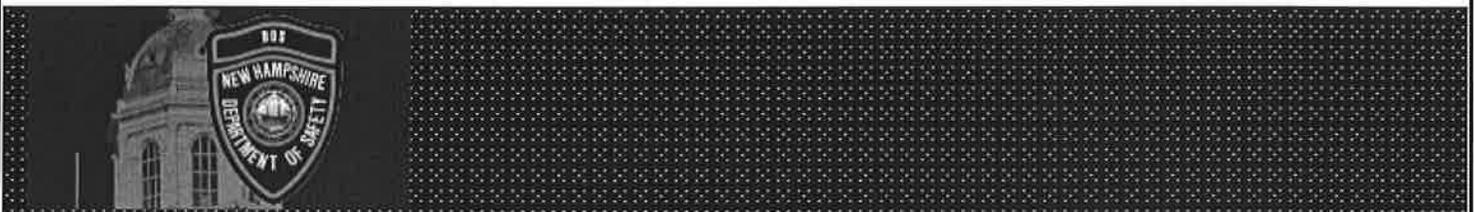
Respectfully,



Christopher Casco, Esq.
Administrator

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 a No Wake Zone encompassing Wheeler's Cove on Franklin Pierce Lake in Antrim, New Hampshire.



DISPOSITION:

The Petition to establish a No Wake Zone as described in the document submitted by the Petitioner is hereby granted. Rulemaking will proceed in accordance with this decision.



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."

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 mailing: 7/14/17

Petitioner Designee: Roger
Weymouth
(*To be distributed to petitioners*)

Town Administrator
Antrim, New Hampshire

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

cc: File

