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202-426-1527

5903/33-2

2 SEP 1975

From: Commandant  
 To: Commander, First Coast Guard District

Subj: Navigable Waters of the U.S.; determination concerning Lakes Wentworth, Winnepesaukee, and Winnisquam, New Hampshire, the Merrimack River, and Interconnected Waterways.

Ref: (a) CCGDI ltr 3270 to G-CCS of 27 Feb. 74  
 (b) Morse, R. Halliclay. "Lakes of the Lake," The New England Sampler II.  
 (c) Heald, Bruce D. Postmaster of the Lake, Meredith News Inc., 1971.  
 (d) Lt. Walton's Memo 3270 of 25 Oct. 73 w/enclosures.  
 (e) Telecon Lt. Wiese (G-LMI) to Lt. Maguire (CCGDI-d1) of 6 March 75.  
 (f) Annual Report of Chief of Engineers. U.S. Army, 1882  
 (g) Hunt, Elmer M. N.H. Town Names, Noone House, 1970.  
 (h) N.H. American Guide Series, Federal Writers Series, Houghton Mifflin Co., 1930  
 (i) Comdt. Instruction 5920.4 of 12 Nov. 71

1. Reference (a) requested a determination as to whether the waters of Lakes Wentworth, Winnepesaukee, and Winnisquam, the Merrimack River and all their interconnecting waterways in New Hampshire and Massachusetts are part of the navigable waters of the U.S.. The request was made in connection with the proposed construction of two bridges by the State of New Hampshire. One structure would replace an older bridge which presently spans "the narrows" of Winnisquam Lake at Winnisquam, New Hampshire. The other bridge would be built over the portion of the Smith River lying between Lake Wentworth and Crescent Lake in the vicinity of Wolfeboro Falls, New Hampshire. For reasons explained in the analysis below, and in accordance with 33 CFR 2.15-15, I find that the waters of Lakes Winnepesaukee and Winnisquam, the Merrimack River, and all their interconnecting waterways in New Hampshire and Massachusetts are navigable waters of the United States and waters subject to the jurisdiction of the United States for purposes of Coast Guard jurisdiction. However, the waters of Lake Wentworth, Crescent Lake, and both the upper and lower portion of the Smith River are determined not to be navigable waters of the United States for purposes of Coast Guard jurisdiction.



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2. Lake Wentworth is located near the eastern border of New Hampshire, about midway between the northern and southern boundaries of the state, in the vicinity of  $71^{\circ}10'$  longitude. It drains into Lake Winnepesaukee, a much larger body of water located several miles to the west. The waters connecting these two lakes are commonly referred to as the Smith River although, for purposes of this discussion, they will be divided into two sectors. The upper portion, approximately  $3/8$  of a mile in length, flows from the western shores of Lake Wentworth into Crescent Lake. The State of New Hampshire proposes the construction of one of the aforementioned bridges over this stretch. Crescent Lake drains in a westerly direction, through the lower portion of the Smith River. This segment of the stream flows for approximately  $3/8$  of a mile before entering Front Bay, a  $5/8$  mile long passage extending from the eastern shore of Lake Winnepesaukee. Lake Winnepesaukee is some 19 miles in length and varies in width from one to ten miles. It connects with Paugus Bay through a  $3/8$  mile channel which begins near Wier's Beach. Paugus Bay, an elongated body of water some  $3\frac{1}{2}$  miles in length, drains into Opechee Bay, with the interconnecting waterway running a relatively short distance of  $1/8$  of a mile. Opechee Bay is approximately two miles long and  $1\frac{1}{2}$  mile wide. Its waters flow through a  $1\frac{1}{4}$  mile passage before entering Winnisquam Lake. This lake is some 9 miles long and  $2\frac{1}{4}$  miles wide. Near the town of Winnisquam, which is located on the shores of the lake, the width narrows. It is at this point that the State of New Hampshire proposes reconstruction of the existing bridge. Lake Winnisquam drains through a  $3/4$  mile long passage into Silver Lake, which is approximately one mile long and  $1/2$  mile wide. The outflow of this lake forms the headwaters of the Winnepesaukee River. This river runs in a westerly direction for 8 miles before it merges with the waters of the Pemigwasset River, the confluence of the two forming the Merrimack River at approximately  $71^{\circ}40'$  longitude. The total length of the Merrimack River is some 110 miles. Initially it runs in a southerly direction, but shortly after it flows over the Hooksett Falls it crosses the Massachusetts border and turns east. It continues in this direction until it finally drains into the Atlantic Ocean near Newburyport Massachusetts. The entire length of the aforementioned interconnecting bodies of water, if measured by the most direct route, is  $148\frac{5}{8}$  miles.



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3. Of the total 148  $5/8$  miles of waterway under consideration, approximately 136 miles are currently navigable in fact. No facts have been found which demonstrate that the entire chain of waterways has been cumulatively used as a continual and uninterrupted highway of commercial navigation. However, there is ample evidence that the portion of the chain below the lower Smith River (approximately 146  $3/8$  miles) was susceptible to development for use for commercial interstate water transportation. Both Lakes Wentworth and Crescent and the upper portion of the Smith River which joins the two are navigable in fact as all are presently used and have past histories of use for commercial purposes. However, the lower portion of the Smith River is not currently navigable, nor is there any indication that it ever has been. Lake Winnepesaukee shows a long and varied history of commercial use. As pointed out at pp. 13-16 of ref. (b), from the time of the earliest settlers who traversed its waters in dugouts there has been a continuous progression in the advancement of the types of vessels used on the lake, including large, flat bottomed, oar propelled vessels, paddle wheel boats, and several types of steamships. These boats engaged in varied types of commerce including the carriage of passengers for hire, raw materials, and provisions for early settlers. This commercial usage is continued today as is evidenced by a mail boat which presently operates on Lake Winnepesaukee as the only floating post office on an inland body of water in the U.S. Page 46 of ref. (c). The passage from Lake Winnepesaukee to Pausus Bay has an extensive history of navigational usage. As waters have been used for substantial logging purposes and as a route for mail delivery. Pausus Bay itself is navigable in fact and has been used in conjunction with Lake Winnepesaukee for commercial navigation for many years. This would include the carriage of supplies and passengers from Lakeport to various points on Lake Winnepesaukee, and the delivery of log rafts to the Mill at Lakeport. The passage from Pausus Bay to Opechee Bay is not presently navigable in fact, primarily due to the presence of several artificial barriers, such as a dam at Lakeport, New Hampshire. Opechee Bay is navigable in fact but is not presently used nor has any known past history of use for purposes of commercial navigation. The passage between Opechee Bay and Winnisquam Lake is not presently navigable in fact due to its shallow depth and the presence of several barriers, including a dam. Winnisquam Lake is navigable in





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fact although there is no indication of its present use for commercial navigation. However, it has a past history of commercial use by mailboats and by lografts of the timber industry. Throughout the nineteenth century boats for hire carried passengers and supplies to various points on the Lake, including the now developed towns of Laconia, Meredith Center, and Winnisquam, all of which border on its shores. pp. 7-8 of Ref (d). The passage between Winnisquam Lake and Silver Lake is not presently navigable in fact due to a dam near its southern end, nor is there any indication of past commercial navigation on it. Silver Lake is presently navigable in fact although there is no known information to show present or past commercial navigation. The Winnepesaukee River is not presently navigable in fact due to the presence of several artificial obstructions. Neither does it have any past history of commercial navigation. The upper reaches of the Merrimack River, between Franklin and Concord, New Hampshire, does not presently support commercial navigation. However, the history of the river's usage, beginning as early as 1764 and continuing through the mid-nineteenth century, shows its extensive employment for purposes of floating immense quantities of lumber from the Franklin area to destinations downstream as far away as Lowell, Massachusetts. Commercial navigation on the Merrimack River was increased in 1803 when a canal system extending from Boston was tied into the river approximately two miles north of Lowell, Massachusetts. Known as the Middlesex Canal, this system served as a major artery of transportation for products from New Hampshire to urban markets to the south. The canal boats which made these trips carried passengers as well as cargo. Initial planning was made to extend this canal system northward through the entire stretch of interconnecting waterways to Lake Winnepesaukee. In 1813, John L. Sullivan prepared a paper entitled Remarks on the Importance of Inland Navigation from Boston by the Middlesex Canal and the Merrimack River in the Present and Probable Future State of Foreign Commerce, in which he conceived of a canal system which would go beyond Concord, New Hampshire and "open up the fertile shores of Winnipisochee (sic) Lakes to trade with the Boston area." In support of this proposition the author described the economy and efficiency of this planned waterway system in transporting goods to and from Boston. This paper is an indication of the early recognition of the economic feasibility of development of this waterway system for commercial traffic, at a favorable cost-benefit ratio, although this plan became obsolete with the advent of the railroad and its extension



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into the interior of New Hampshire. Nevertheless, the Middlesex Canal was actively used by a variety of types of vessels from its opening until the early 1840s/. This system allowed travel from Boston to Lowell via the canal and by river north to Concord, New Hampshire. Canal boats were used for the transportation of freight on the canal itself, but a steamship did operate a regular run on the river between Lowell Mass. and Nashua, New Hampshire for a few years, carrying a capacity of 500 passengers. P. 11 of ref (d). The Concord River intersects the Merrimack River at Lowell. As a result, the size of the lower portion of the Merrimack, if merely measured in sheer volume of water carried, is considerably larger than the upper portion. With the exception of a natural waterfall at Lowell, the lower Merrimack is navigable in fact from Lowell to Newburyport. However, the aforementioned barrier did not impede prior river traffic, as the Pawtucket Canal was built at Lowell to circumvent the falls, thus enabling vessel navigation from the mouth of the river all the way to Concord. Ref (e). The susceptibility of the lower river segment to commercial navigation is further evidenced by the fact that a large passenger steamer negotiated the river from Lowell to Newburyport in 1840. P. 12 at Ref (d).

4. Aside from actual navigational use of the segments of waterway under consideration several prior governmental actions have particular bearing on this determination. The Fausus Channel was dredged in 1882 and redredged in 1929 by the U.S. Engineer Office for that district under the then existing Department of War. The purpose for this original project was stated as being to enable the five steamships which operated on Lake Winnepesaukee to reach the town of Lakeport on the southern end of Fausus Bay (then known as Long Bay) by sailing through the interconnecting channel. P. 501 of ref (f). Two separate congressional appropriations were made for the original project under the River and Harbor Act of 14 June 1880 and 3 March 1881. It should also be noted that in 1932 the U.S. Corps of Engineers granted a bridge permit to the State of New Hampshire for the construction of a bridge over this channel. In doing so, the Corps made an administrative determination that this segment was part of the navigable waters of the U.S. The Corps conducted a study of the Winnepesaukee River as the result of a resolution of 14 July 1970 by the Committee on Public Works of the U.S. House

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of Representatives. The findings of this study showed that the development of the river channel was feasible from an engineering standpoint, although such development has not been forthcoming. It is also pertinent that the Corps previously issued a bridge permit at mile 72 of the Merrimack, well above Lowell, Mass., indicating a prior administrative determination of navigability up to that point on the river. Prior state actions concerning this water system also have particular significance. Early charters from the State of New Hampshire to private construction companies indicate legislative intent to develop this system as a waterway for commercial traffic up to Lake Winnepesaukee. One such charter was issued in 1796 and is mentioned in State v. Hutchins 105 A. 519, 79 N.H. 132(1919). This case refers to the legislative intent behind this particular charter "for the improvement of the Upper Merrimack River" as being the development of a navigable passage to Lake Winnepesaukee. The opinion states, in part:

The enactment of this class of legislation bears upon the issue of legislative intent in other ways. It shows that at the beginning of the 19th century the idea was prevalent that the inland waters of the state were to become great highways for the transportation of freight. The legislative viewpoint as to the use to be made of Lake Winnepesaukee (sic) ← is more accurately shown in this way than by the vague and scanty evidence as to what craft were in actual use there. The country was underdeveloped and sparsely settled. Great advances were expected and planned for. The grant in 1796 of a charter for improving the upper Merrimack upon condition that the grantees should "render said waters navigable for boats of ten tons burthen to pass up and down from the Isle of Hooksett Falls to Winnepisiochee pond" (6 NH Laws, 298, 299), shows that a future commercial use of the lake as a waterway was contemplated before the grant was made.

Hooksett Falls, which was mentioned in this 1796 charter, is located near the town of Hooksett, New Hampshire, a small settlement on the Merrimack River about midway between Concord and Manchester. Ref (g) and (h). The above passage points out that the New Hampshire legislature envisioned a comprehensive





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waterway system for commercial navigation in their state, beginning at Hooksett and extending all the way up to Lake Winnepesaukee, including all the aforementioned links in this chain between these two points. The fact that such a charter was granted suggests that this body felt that the benefits to be gained by such a development outweighed the costs and thus the project was economically feasible.

5. One of the earliest judicial definitions of navigable waters of the U.S. is set forth in the Daniel Ball, 10 Wall 557(1870), as being those waters which are "navigable in fact as shown by their use or susceptibility for use, in their ordinary condition, as highways for commerce, over which trade and travel are or may be conducted in the customary modes of trade and travel on water." The U.S. Supreme Court refined this definition in U.S. v. Appalachian Electric Power Co., 311 U.S. 377 (1940), by stating that navigability is determined not solely by the natural condition of the waterway, but also by a consideration of the "feasibility of interstate use after reasonable improvements which might be made." Consequently, a waterway which is capable of improvement at a time when there is a favorable ratio between the cost of improvement and the benefit to be derived from it, making the waterway susceptible to commercial navigational use, is to be considered a part of the navigable waters of the U.S. U.S. v. Appalachian Electric Power Co., supra 407. It should be noted that this "feasibility test" of the Appalachian Case need not be applied to the waterway's condition as it exists at the present time, but may be applied to any era in the waterway's history during which the "cost-benefit" ratio might have been satisfied. Hence, if the requisites of the test are satisfied under prior existing facts then a present finding of "navigable waters of the U.S." can be supported. Under the Appalachian test it is not necessary that the improvements have been actually completed, or even authorized. What is essential is that there must have been a favorable balance between the cost and need at a time when the improvement would have been useful. This is particularly important where obstructions such as dams have later been erected in waterways, since once a waterway has been determined to be a navigable water of the U.S., it retains such status even though it may no longer be used for commerce, either because it falls into disuse or as a result of changes in its condition. Economy Light and Power Co. v. U.S., 256 U.S. 113(1920). In applying the Appalachian test to a water system, consideration of types





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of travel on water is not confined to any one particular mode. The operation of something seemingly as crude as a log raft may be evidence of susceptibility to substantial commercial navigation. Likewise, a determination of "navigable waters of the United States" will not be negated because of occasional difficulties in navigation experienced by vessels. The presence of obstructions such as falls, rapids, or sandbars will not effect a determination if the cost-benefit ratio has been met at some point in the waterway's historical development.

6. In making a determination as to whether a particular waterway or system of waterways is a navigable water of the United States for purposes of Coast Guard jurisdiction the factors enumerated in 33 CFR 2.15 et. seq. and in ref. (1), as well as the aforementioned case law are controlling. The major portion of the 146 3/8 miles included in this analysis satisfies the Daniel Ball test of "navigability in fact." Moreover, there is a known history of commercial navigation on Lakes Winnepesaukee and Winnisquam, Paugus Bay, and the entire Merrimack River. The historical development of this water system shows that, near the turn of the 18th century, commercial development of a water route all the way to Lake Winnepesaukee appeared to be a realistic and feasible proposition. Plans for such a development were an influencing factor behind the construction of the Middlesex Canal. The Hutchins Case shows that the legislative intent behind certain early New Hampshire charters was a desire to open a water route from Hooksett Falls to Lake Winnepesaukee. At this time it was felt that the benefits to be gained by such a project outweighed the cost. This susceptibility to development for commercial navigational purposes satisfied the Appalachian test, even though these projects were subsequently abandoned when the railroad was extended enough to offer an alternative mode of travel into the interior of New Hampshire. As pointed out in the Economy Light Case, after a system is deemed to be "navigable water of the United States" it remains so, even though it is not presently "navigable in fact" in its entirety due to the existence of natural and man made barriers such as the dams, sandbars, waterfalls, and rapids present in this water system. After the Appalachian test is met, later developments will not affect the system's status. Thus, in considering the waterway links from Lake Winnepesaukee to the mouth of the Merrimack, of those short segments which are not currently navigable in fact, all fall within the scope of "navigable waters of the United States as defined in the Appalachian case.

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These early developmental plans did not extend above Lake Winnepesaukee. Consequently, although Lakes Wentworth and Crescent and the upper Smith River are currently navigable in fact, they do not fall within the ambit of the Appalachian test. Prior Determinations by other Federal agencies are also afforded a great deal of weight in these types of determinations, as pointed out in 33 CFR 2.15-5. Besides actual improvements made pursuant to Congressional appropriations, it should be noted that the Corps of Engineers has issued bridge permits at two points on the system, indicating its prior determination that these were "navigable waters of the United States."

7. Accordingly, since:

- (A) the major portion of this chain of waterways between Lake Winnepesaukee and the point where the Merrimack River drains into the Atlantic Ocean is navigable in fact;
- (B) commercial navigation has been maintained in the past or is currently present on a large segment of the system; and
- (C) prior plans and studies concerning both the dredging of the waterway and the construction of parallel canal works conducted by private individuals, private companies under State charter, and the U.S. Army Corps of Engineers, indicated the economic feasibility of development of the entire waterway for purposes of interstate navigation;



it is hereby determined that Lake Winnepesaukee, New Hampshire, Winnisquam Lake, New Hampshire, the Merrimack River, and their interconnecting waterways are navigable waters of the United States and waters subject to the jurisdiction of the United States for purposes of Coast Guard jurisdiction. The determination does not apply to the jurisdiction of the Coast Guard respecting navigable waters under the Federal Water Pollution Control Act. The waters of the Merrimack River and the Winnepesaukee River watershed in their entirety as well as Lakes Crescent and Wentworth and the Smith River constitute navigable waters for purposes of Coast Guard jurisdiction under that statute.

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8. This determination solely represents the Coast Guard's opinion of the extent of its own jurisdiction and does not represent an opinion of the extent of the jurisdiction of the United States, or any other Federal agency.





RECONSIDERATION OF THE DETERMINATION BY THE COMMANDANT  
OF THE UNITED STATES COAST GUARD THAT THE WATERS OF  
LAKES WINNIPESAUKEE AND WINNISQUAM, NEW HAMPSHIRE, THE  
MERRIMACK RIVER, AND INTERCONNECTED WATERWAYS ARE  
NAVIGABLE WATERS OF THE U. S. DATED SEPTEMBER 2, 1975

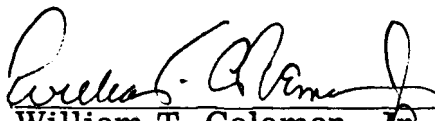
On September 2, 1975, in connection with the construction of two bridges by the State of New Hampshire, the Commandant of the United States Coast Guard determined that the waters of Lakes Winnepesaukee and Winnisquam, the Merrimack River, and all their interconnecting waterways in New Hampshire and Massachusetts were navigable waters of the United States under the Constitution and laws of the United States.

Subsequent to that determination, the Attorney General of the State of New Hampshire raised new historical and geographic facts that are material and relevant to the Coast Guard's determination of navigability. The State Attorney General also raised certain pertinent legal questions. After meeting with the Attorney General, the Commandant and I have decided that it is in the interest of a just and fair resolution of this issue that the question of navigability be reopened in order to assess these new facts and evidence and to review further the applicable law in light of these new facts.

Because it is in the interest of all parties concerned that these questions be resolved on the basis of full and fair consideration of all relevant information, the Commandant has decided to reconsider his determination. The Commandant will undertake a thorough review of all the historical and geographic facts that are relevant to a determination of navigability. The Commandant will invite the Attorney General of the State of New Hampshire to submit whatever facts, views, and recommendations are appropriate. The Commandant will consult with me before making any final determination.

The Commandant has informed me that he therefore has revoked his determination of September 2, pending completion of his de novo review. As a result, the Coast Guard will not undertake any further action under the Federal Boat Safety Act until after the final resolution of this issue.

*Dated: March 31, 1976*

  
William T. Coleman, Jr.



## PRESS RELEASE

Secretary of Transportation William T. Coleman, Jr. announced today that he and the Commandant of the United States Coast Guard have decided to review and reconsider the issue of whether certain waters in the State of New Hampshire are navigable under the laws of the United States. These waters include Lakes Winnepesaukee and Winnisquam, New Hampshire, the Merrimack River, and inter-connected waterways.

In deciding to reopen the issue for further consideration, the Commandant and the Secretary cited new factual evidence about the historical use and geography of these waters which were brought to their attention in a recent meeting with the Attorney General of the State of New Hampshire.

The Commandant announced simultaneously that he has revoked his determination of September 2, 1975, pending the outcome of the new review. Thus, the Coast Guard does not intend to undertake any further activity pursuant to the Federal Boat Safety Act.

In calling for the review, the Secretary said that "it is in the interest of a just and fair resolution of this issue that the question of navigability be reopened for reconsideration in order to assess these new facts and evidence and to review further the applicable law."

"It is important," the Secretary said, "in an issue involving the application of constitutional law to a complex set of facts that a complete and thorough review take place." The Commandant will invite the Attorney General of the State to submit additional facts, views and recommendations that will be useful in the reconsideration. The Commandant will consult with the Secretary before making a final determination.





ACTIVITY REPORT COPY  
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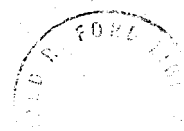
MAR 11 1976

Honorable Meldrim Thomson, Jr.  
Governor of New Hampshire  
Concord, New Hampshire 03301

Dear Governor Thomson:

Thank you for your letter of February 10 in which you renewed your request that I place a moratorium on federal action affecting Lakes Winnepesaukee and Winnisquam and the Merrimack River. In my earlier letter to you I said that I was exploring my authority in this regard, and I have now reached several conclusions which are based upon my understanding of federal maritime law, as it has been established by the courts and the Congress.

Over the years the courts have laid down a series of tests for the determination of the navigability and resultant jurisdictional status of any water body. In the case of these New Hampshire lakes, the Coast Guard simply applied the judicial tests to the pertinent geographic and historic facts. Neither the Commandant of the Coast Guard nor I can alter either the pertinent judicial decisions, the geography or the facts. No one can prevent a private citizen whose rights may be affected by the jurisdictional status of these water bodies from bringing a suit based on the judicial decisions and the factual situation. There is an entire body of federal maritime law applicable to the navigable waters of the United States. Some of these laws are administered by the Department of Transportation. Other departments have administrative responsibilities that arise from a determination of federal jurisdiction. Many of the laws deal with private rights and are not within the cognizance of any department. For these reasons, I find that I have no authority to grant either a moratorium or in some other way prevent the application of law to the operative facts. The Congress, as I indicated to you earlier, has that power which it may exercise by changing the legal test, and the courts, of course, have the power to review the facts and determine whether a particular body of water is navigable.





It has been suggested that I have authority under the Federal Boat Safety Act, Section 9, (46 U.S. Code, Section 1458) to issue exemptions from any provision of that Act, or the regulations or standards established under it, subject to appropriate terms and conditions, provided that boating safety will not be adversely affected. Concerning the scope of this authority the Senate Report (92-248) states:

"This section permits the Secretary to exempt boats or classes of boats from particular provisions of the Act or from various regulations or standards."

This statement on Congressional intent should be considered in the context of the broader policy of Congress set forth in 46 U.S. Code, Section 1451: "to encourage greater and continuing uniformity of boating laws and regulations as among the several states and the Federal Government, a higher degree of reciprocity and comity among the several jurisdictions, and closer cooperation and assistance between the Federal Government and the several states..." in the boating safety field.

Section 9 and its legislative history demonstrate that the Congress did not intend that this authority be used to exempt a state or particular body of water from the entire Act. Exemptions have been granted equipment or labeling requirements because of a peculiar type of vessel configuration. If I were to exercise the exemption authority by excluding the application of all or part of the Federal Boat Safety Act to the water bodies in question for a period of time -- you have suggested two years -- it is possible that consumer related interests would successfully challenge my action in court. In my view, it would be difficult to defend against such a suit without a strained interpretation of section 9.

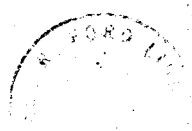
I realize that one of your concerns is the impact of this navigability determination on the current state boating registration requirement and, consequently, I asked the Coast Guard to evaluate the situation. The Coast Guard informs me that the State of New Hampshire registers approximately 50,000 boats at an average of \$5 a boat at a reported gross income of \$250,000. It is estimated that 25,000 of these boats are used on the waters under discussion. Therefore, 25,000 would continue to operate on sole state waters and be required to have a state motor registration plate. Of the 25,000 used on the lakes at issue



it has been estimated that one half, or 12,500, belong to residents of New Hampshire. These residents, in all likelihood, would continue to register their motors with the state because of the high probability that the boat will be used at some time during the season in waters exclusively under the jurisdiction of the state. There is also good reason to believe that some out-of-state boaters who use the waters in question will also use sole state waters and would continue to register their motors with the state. Therefore, the projected loss of income for the forthcoming boating season, based on these assumptions and the available projections will in all probability be minimal.

Should the state enact legislation to permit the approval of a state numbering system there probably would not be any loss of revenue and a gross income in excess of the present \$250,000 is highly possible. The number of boats subject to the new system would be the 25,000 presently used on sole state waters and those 12,500 boats operating on the waters in question and owned by residents of the state. Of the remaining 12,500 boats from out of state, a fairly high proportion of the boat owners would consider these water bodies as their place of principal use. These boats would still be required to be numbered in New Hampshire. The state would also receive the revenue derived from the numbering of approximately 12,000 New Hampshire boats which the Coast Guard presently numbers. Other considerations, such as the personal property tax situation in other states, could undoubtedly continue to make numbering in New Hampshire attractive. Of course, the allocation of federal grants to the state would be increased if the state adopted an approved numbering system. The judgment of the Coast Guard is that the overall revenue situation would improve if New Hampshire enacted legislation to establish a state numbering system, consistent with the Federal Boat Safety Act requirements.

I want to assure you that the Federal Boat Safety Act does not in any way inhibit a state in its exercise of a vigorous boating safety enforcement program. Indeed the purpose of the Act is to promote safe boating by making available the combined capabilities of both state and federal authorities. Thus the excellent work now being done in the state would hopefully continue. The Act is clearly a cession of power to the states that has worked extremely well and it is not a delimitation of state authority or a federal takeover of responsibility from the states.

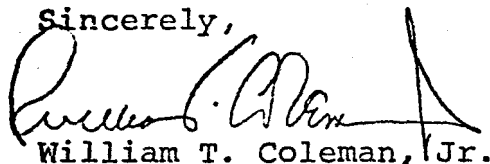


The Coast Guard has assured me that they will cooperate with state officials during the coming season and will do everything possible to assist. I would welcome a continuing dialogue between state officials and the Coast Guard's Office of Boating Safety, and I am confident of continuing cooperation and understanding. The Coast Guard does not contemplate any boating enforcement activity under the Federal Boat Safety Act on the waters in question during the coming season because of prior commitments and our desire to respect fully state concerns during this transitory period. By next year, I hope we can work out an agreement on the Coast Guard's role that is satisfactory to you.

I certainly respect the wishes of the people of New Hampshire concerning boating in your state and I hope that officials in this Department and in your state government can work together to develop a program that is fully supportive of the fine work already being done by the state and is in the interest of the people of New Hampshire. From your public statements and record, I know that you believe in operating in accordance with the law, and, therefore, I know you will appreciate my concern that whatever action now undertaken is consistent with federal law and my statutory mandate. On this basis, I am confident we will find a solution to this problem, consistent with both federal and state law.

With kindest regards,

Sincerely,



William T. Coleman, Jr.



[March 1976]

Section 8 -

The Congress shall have power -

To regulate Commerce w/

foreign nations, and among the  
several states,

---





P/

[March 1976]

Don't want it  
to happen  
waterway

---

Maintain  
annual report

---

---

Cost over  
more jobs  
one  
when possible  
can't  
be  
terminated

---



[March 1976]

asserting jurisdiction

See out in ... who -

April 1 - registration process

DoD - pleasant but no action

No complaint C G.

Jurisdiction cannot be refused  
competition of jurisdiction

C G - let a citizen raise  
the issue

Preparing a suit within 10  
days -

C G worry on law, worry on  
facts - See § 5 - can resolve  
out pending resolution of  
legal difficulties.



[March 1976]

asserting jurisdiction

the out in ... who -

April 1 - registration period

DOO - pleasant but no other

NI complaint C G.

Jurisdiction cannot be refused  
competition of jurisdiction

C G - let a citizen raise  
the issue

preparing a suit within 10

days -

C G worry on law, worry on  
facts - see J.T. - can resolve  
out pending resolution of  
legal difficulties.



# THE WHITE HOUSE

WASHINGTON

## TELEPHONE MEMORANDUM

JAMES M. CANNON

March 24, 1976

, 19

|     | TIME   |      | NAME                                                                               | ACTION |
|-----|--------|------|------------------------------------------------------------------------------------|--------|
|     | PLACED | DISC |                                                                                    |        |
| OUT | 4:15   | AM   | Roger Porter would like to speak with you this afternoon.                          |        |
| INC |        | PM   | <i>SUTER</i>                                                                       |        |
| OUT | 4:16   | AM   |                                                                                    |        |
| INC |        | PM   | Attorney General David Souter of New Hampshire called, would like you to call him. |        |
| OUT |        | AM   | 603-271-3655.                                                                      |        |
| INC |        | PM   |                                                                                    |        |
| OUT |        | AM   |                                                                                    |        |
|     | 4:40   |      | Secretary Coleman                                                                  |        |
| INC |        | PM   |                                                                                    |        |
| OUT |        | AM   |                                                                                    |        |
| INC |        | PM   |                                                                                    |        |
| OUT |        | AM   |                                                                                    |        |
| INC |        | PM   |                                                                                    |        |
| OUT |        | AM   |                                                                                    |        |
| INC |        | PM   |                                                                                    |        |
| OUT |        | AM   |                                                                                    |        |
| INC |        | PM   |                                                                                    |        |
| OUT |        | AM   |                                                                                    |        |
| INC |        | PM   |                                                                                    |        |
| OUT |        | AM   |                                                                                    |        |
| INC |        | PM   |                                                                                    |        |
| OUT |        | AM   |                                                                                    |        |
| INC |        | PM   |                                                                                    |        |

*Home (603) 529-2382*

(2)

pt of law - when go

Test of navigability - one of  
3

1) navigable and continuously connected  
historical

2) at present - navigable

3) may be in future -



C.E. - says if at some time  
were navigable or suitable  
to be made so.  
never demonstrated in fact -

4) In 1932 - bridge over part of Washington  
N.H. asked for aid Capt Egan - approval  
for improvement - i.e. C.E. says that  
means N.H. & C.E. accepted. - reason

U.S. mail boat went under Bridge. -  
C.E. had to see if could

5) 1874. Custom -

when C.E. want jurisdiction?  
Don't know



Why - 72 & 73

at two. But we are -

State Highway Dept -

looked up

saw CE

has appeared

Butter got it

again

CE - must be navigable -  
CE in it

for - Bureau to E - 71 Boat forty for  
Act 1. Very simple law when  
he satisfied. Not any secret  
requiring CE. Got into this.



July  
Mr. M<sup>rs</sup>. Duffey, -  
A A to Gov Thompson

[March 1976]  
(603)  
668 - 0300  
←

Re Admiral James Stewart  
1st District C.G.

Rep from Coast Guard in  
re: Reconn  
dissemination  
guidance C.G.  
will expect further  
will follow

Friday  
3/12/76

Comm to see the Governors

Morshaw Cobleigh  
& Peter Thompson



Said - a ~~alternation~~  
had been made ~~some~~  
on all

That Lake W. W. W. W. W.  
new

My Wash Boat  
doesn't meet federal  
safety requirements

Congress people could  
intro state's exemption  
Boat



Congress comes also  
except like Waterparks  
N.H. can't charge a fee

---

If navigable water,  
C.G. must

---

DOT legislation not set  
up

DOT drafted legislation  
Congressman has  
seen in future was it.



has not introduced it

---

CG. at reg of  
an Asst Atty Gen  
of N.H. - who since turned -  
declared it a  
navigable water.

---





Thompson

Friday  
3/17/76

Week ago Friday

Given them - Whistman  
entangled in traps last Sat

Father asked for help

3 hrs - help - then

responded -  
still haven't found body.

C G wouldn't help

phewer

entirely inadequate on

on performance



asked Coray ~~the~~ Clewless  
for Coray investigation

---

Capt Howland in Boston  
no help

---

NO helicopter -

---

admiral ~~later~~ took over  
day lost Coburn

---

atby <sup>David Souter</sup> ~~gran~~ ~~shin~~ ~~file~~ ~~suit~~

---

again  
could have gotten an exemption



Report on ~~stop~~

1)

Put in papers

A Mellman  
CG re facci  
Dad's  
and

injection  
to  
that this is  
will

consent  
to

against  
on  
have safe water



[March 1976]

Coburn to call State Atty Gen  
he delighted

---

~~to~~ to notify  
Inclusion Sen W. J. Dwyer  
D. H. M.  
Cong. Cleveland



[March 1976]

Congressman Cleveland's request for drafting service

LT ANTRIM

CAPT HALLBERG

(a) Commandant memo 5903/33-2 (G-LMI/81) dated 2 Sept 1975

1. Reference (a) made the determination that the waters of Lake Winnepesaukee, Lake Winnisquam, the Merrimack River, and all their interconnecting waterways in New Hampshire and Massachusetts are navigable waters of the United States and waters subject to the jurisdiction of the United States for purposes of Coast Guard jurisdiction. Representative Cleveland has requested the Coast Guard to prepare as a drafting service proposed language which would permit New Hampshire to continue to have exclusive numbering authority over boats operating on the above named waters.

2. Section 4 of the Federal Boat Safety Act makes that act applicable to "vessels and associated equipment used, to be used, or carried in vessels used, on waters subject to the jurisdiction of the United States..." Section 18, of the FBSA requires the Secretary to establish a standard numbering system for vessels subject to the act. Therefore, Congressman Cleveland is attempting to exempt those vessels used on the above named waters from the Coast Guard vessel numbering system.

3. The following language is suggested as sufficient to achieve Congressman Cleveland's objective:

"For the purposes of section 18 of the Federal Boat Safety Act of 1971, the waters of Lake Winnepesaukee, Lake Winnisquam, those portions of the Merrimack River which lie in New Hampshire, and all their interconnecting waterways in New Hampshire shall not be considered to be waters subject to the jurisdiction of the United States."

4. The suggested language would limit the exemption only to the vessel numbering system, and it would not limit Coast Guard jurisdiction in other areas under the FBSA (e.g. the reporting requirements under the vessel casualty reporting system established under section 37 of the FBSA).



[March 1976]

Honorable Thomas J. McIntyre  
United States Senate  
Washington, D.C. 20510



Dear Senator McIntyre:

This is in response to your letter of March 2, 1976, in which you request answers to several questions concerning the Coast Guard's determination regarding the status of Lake Winnepesaukee and interconnecting waterways. The answers to your questions appear in the order in which you asked them.

1. The legislative history of the Federal Boat Safety Act of 1971 (P.L. 92-75) (FBSA) can be found at 1971 U.S. Code Cong. and Adm. News at 1333; of the Federal Boating Act of 1958 at 1958 U.S. Code Cong. and Adm. News at 5228; and of the 1956 amendments to the Motorboat Act of 1940 at 1956 U.S. Code Cong. and Adm. News at 2654. The concept of "navigable waters of the United States" has evolved from numerous judicial decisions, from the mid 1800's to the present day. Please refer to answer 3 for a more complete discussion.

2. It is true that the Coast Guard had not stated its intent to exercise jurisdiction over Lake Winnepesaukee and its interconnecting waterways, where the jurisdictional basis is "navigable waters of the United States," until the present determination was made. This is because the Coast Guard does not have the resources to determine the juridical status of every waterbody in the United States. However, if the status of a waterbody is questioned, because of a particular program within the Coast Guard, then the Coast Guard will, for its purposes, determine the juridical status of the waterbody. In the case of Lake Winnepesaukee, a jurisdictional determination became necessary when the State of New Hampshire proposed to construct bridges over the waters in question. The applicability of 33 U.S.C. 401 and related statutes administered by the Coast Guard turned on whether or not the waters being crossed were navigable waters of the United States. Once the Coast Guard determines a waterbody to be part of the navigable waters of the United States for purposes of Coast Guard jurisdiction, it is part of the navigable waters of the United States for purposes of all laws the Coast Guard administers..

3. The specific tests used to support the finding that the waters are navigable waters of the United States are the tests enunciated in the following judicial decisions, among others: *The Daniel Ball*, 10 Wall 557 (1870); *U.S. v. Appalachian Electric Power Co.*, 311 U.S. 377 (1940); and *Economy Light and Power Co. v. U.S.*, 256 U.S. 113 (1920). Briefly, these cases hold that waters are navigable waters of the United States when they are or have been used, or are or have been susceptible for use, by themselves or in connection with other waters, as highways for substantial interstate or foreign commerce, notwithstanding natural or man-made obstructions that require portage. Also, a waterbody that is determined capable of improvement at a reasonable cost to provide, by itself or in connection with other waters, a highway for substantial interstate or foreign commerce, would be considered part of the navigable waters of the United States. With respect to the factual basis for the *Winnepesaukee* determination, the Coast Guard concluded that the major portion of the chain of waterways is navigable in fact; commercial navigation has been maintained in the past or is currently present on a large segment of the system; and prior plans and studies concerning both the dredging of the waterway and the construction of parallel canal works conducted by private individuals, private companies under State charter, and the U.S. Army Corps of Engineers, showed the economic feasibility of development of the entire waterway for purposes of interstate navigation. These facts met the tests stated above, thus the waters were determined to be part of the navigable waters of the United States. A copy of the Coast Guard determination is enclosed for your information.

4. Since the Coast Guard determination is solely for purposes of Coast Guard jurisdiction, I cannot predict with certainty what authority other Federal agencies will exercise over Lake *Winnepesaukee* and its interconnecting waterways. However, because the determination has been forwarded to many other Federal agencies as a routine matter in the normal course of business, it is highly probable that those agencies will agree with the Coast Guard determination and will exercise their authority over the waters in question.

5. Section 16(b) of the FESA allows certain persons under some circumstances immunity from civil damages. Also, admiralty limitations of liability have application for incidents occurring in navigable waters of the United States. See e.g., 46 U.S.C. 191 et seq. The Coast Guard cannot grant



a person or vessel limitation of liability under these statutes. That is a matter for resolution between private litigants in the courts.

6. Generally, the preemption provision relates to those state laws and regulations specified in section 19 of the FBSA, i.e., boat or associated equipment performance or other safety standards. Registration requirements are preempted by the Supremacy Clause of the Constitution, rather than by section 10 of the FBSA. Section 18 requires the Secretary to establish by regulation a standard numbering system for all vessels, and regulations at 33 CFR Part 173 implement section 18. It is the New Hampshire numbering system that does not meet the standards contained in the Part 173 regulations. Concerning the preemption of specific equipment and performance standards, the Coast Guard does not delimit preempted state laws. The final determination of what state laws are preempted results from litigation between private litigants that have been aggrieved by the state regulation.

The same principle governs the preemption of commercial vessel laws and regulations. In the area of commercial vessel safety, among the laws the Coast Guard administers are the inspection and certification of passenger vessels operating on the navigable waters, and the licensing of operating personnel. The Federal laws control, and the Coast Guard is working closely with the owners and operators of commercial vessels so as to bring that class of vessel into compliance with federal law.

7. The scope of the section 9 exemption authority of the FBSA was addressed in Senate Report 92-248, which states:

"This section permits the Secretary to exempt boats or classes of boats from particular provisions of the Act or from various regulations or standards."

This statement on Congressional intent should be considered in the context of the broader policy of Congress set forth in 46 U.S.C. 1451, "to encourage greater and continuing uniformity of boating laws and regulations as among the several states and the Federal Government, a higher degree of reciprocity and comity among the several jurisdictions, and closer cooperation and assistance between the Federal Government and the several states..." in the boating safety field.





4

Section 9 and its legislative history demonstrate that the Congress did not intend that this authority be used to exempt a state or a particular body of water from the entire Act. Exemptions have been granted equipment or labeling requirements because of a peculiar type of vessel configuration. If I were to exercise the exemption authority by excluding the application of all or part of the FESA to the waterbodies in question, it is possible that consumer related interests would successfully challenge my action in court. In my view, it would be difficult to defend against such a suit without a strained interpretation of section 9.

8. Governor Thompson's request for a moratorium on the enforcement of Federal laws on the lakes has been considered. It is my conclusion that I have no authority to grant either a moratorium or in some other way prevent the application of law to the operative facts. In the case of these New Hampshire lakes, the Coast Guard simply applied the judicial tests to the pertinent geographic and historic facts. Neither the Commandant of the Coast Guard nor I can alter either the pertinent judicial decisions, the geography, or the facts. It is only the Congress that has the power to change the legal test or the applicability of the FESA, and the courts that have the power to review the facts and determine whether a particular body of water is part of the navigable waters of the United States.

I trust the answers offered will enable you to sort out the options available to the Congress, and the affected state and local administrators.

Sincerely,

William T. Coleman, Jr.

Enclosure



[March 1976]

Honorable John A. Durkin  
United States Senate  
Washington, D.C. 20510

Dear Senator Durkin:

This is in response to your letter of March 2, 1976, in which you request answers to several questions concerning the Coast Guard's determination regarding the status of Lake Winnepesaukee and interconnecting waterways. The answers to your questions appear in the order in which you asked them.

1. The legislative history of the Federal Boat Safety Act of 1971 (P.L. 92-73) (FBSA) can be found at 1971 U.S. Code Cong. and Adm. News at 1333; of the Federal Boating Act of 1958 at 1958 U.S. Code Cong. and Adm. News at 5228; and of the 1956 amendments to the Motorboat Act of 1940 at 1956 U.S. Code Cong. and Adm. News at 2654. The concept of "navigable waters of the United States" has evolved from numerous judicial decisions, from the mid 1800's to the present day. Please refer to answer 3 for a more complete discussion.

2. It is true that the Coast Guard had not stated its intent to exercise jurisdiction over Lake Winnepesaukee and its interconnecting waterways, where the jurisdictional basis is "navigable waters of the United States," until the present determination was made. This is because the Coast Guard does not have the resources to determine the juridical status of every waterbody in the United States. However, if the status of a waterbody is questioned, because of a particular program within the Coast Guard, then the Coast Guard will, for its purposes, determine the juridical status of the waterbody. In the case of Lake Winnepesaukee, a jurisdictional determination became necessary when the State of New Hampshire proposed to construct bridges over the waters in question. The applicability of 33 U.S.C. 401 and related statutes administered by the Coast Guard turned on whether or not the waters being crossed were navigable waters of the United States. Once the Coast Guard determines a waterbody to be part of the navigable Waters of the United States for purposes of Coast Guard jurisdiction, it is part of the navigable waters of the United States for purposes of all laws the Coast Guard administers.

GERALD R. FORD



3. The specific tests used to support the finding that the waters are navigable waters of the United States are the tests enunciated in the following judicial decisions, among others: The Daniel Ball, 10 Wall 557 (1870); U.S. v. Appalachian Electric Power Co., 311 U.S. 377 (1940); and Economy Light and Power Co. v. U.S., 256 U.S. 113 (1920). Briefly, these cases hold that waters are navigable waters of the United States when they are or have been used, or are or have been susceptible for use, by themselves or in connection with other waters, as highways for substantial interstate or foreign commerce, notwithstanding natural or man-made obstructions that require portage. Also, a waterbody that is determined capable of improvement at a reasonable cost to provide, by itself or in connection with other waters, a highway for substantial interstate or foreign commerce, would be considered part of the navigable waters of the United States. With respect to the factual basis for the Winnepesaukee determination, the Coast Guard concluded that the major portion of the chain of waterways is navigable in fact; commercial navigation has been maintained in the past or is currently present on a large segment of the system; and prior plans and studies concerning both the dredging of the waterway and the construction of parallel canal works conducted by private individuals, private companies under State charter, and the U.S. Army Corps of Engineers, showed the economic feasibility of development of the entire waterway for purposes of interstate navigation. These facts met the tests stated above, thus the waters were determined to be part of the navigable waters of the United States. A copy of the Coast Guard determination is enclosed for your information.

4. Since the Coast Guard determination is solely for purposes of Coast Guard jurisdiction, I cannot predict with certainty what authority other Federal agencies will exercise over Lake Winnepesaukee and its interconnecting waterways. However, because the determination has been forwarded to many other Federal agencies as a routine matter in the normal course of business, it is highly probable that those agencies will agree with the Coast Guard determination and will exercise their authority over the waters in question.

5. Section 16(b) of the FBSA allows certain persons under some circumstances immunity from civil damages. Also, admiralty limitations of liability have application for incidents occurring in navigable waters of the United States. See e.g., 46 U.S.C. 191 et seq. The Coast Guard does not grant



a person or vessel limitation of liability under these statutes. That is a matter for resolution between private litigants in the courts.

6. Generally, the preemption provision relates to those state laws and regulations specified in section 10 of the FBSA, i.e., boat or associated equipment performance or other safety standards. Registration requirements are preempted by the Supremacy Clause of the Constitution, rather than by section 10 of the FBSA. Section 18 requires the Secretary to establish by regulation a standard numbering system for all vessels, and regulations at 33 CFR Part 173 implement section 18. It is the New Hampshire numbering system that does not meet the standards contained in the Part 173 regulations. Concerning the preemption of specific equipment and performance standards, the Coast Guard does not delimit preempted state laws. The final determination of what state laws are preempted results from litigation between private litigants that have been aggrieved by the state regulation.

The same principle governs the preemption of commercial vessel laws and regulations. In the area of commercial vessel safety, among the laws the Coast Guard administers are the inspection and certification of passenger vessels operating on the navigable waters, and the licensing of operating personnel. The Federal laws control, and the Coast Guard is working closely with the owners and operators of commercial vessels so as to bring that class of vessel into compliance with federal law.

7. The scope of the section 9 exemption authority of the FBSA was addressed in Senate Report 92-246, which states:

"This section permits the Secretary to exempt boats or classes of boats from particular provisions of the Act or from various regulations or standards."

This statement on Congressional intent should be considered in the context of the broader policy of Congress set forth in 46 U.S.C. 1451, "to encourage greater and continuing uniformity of boating laws and regulations as among the several states and the Federal Government, a higher degree of reciprocity and comity among the several jurisdictions, and closer cooperation and assistance between the Federal Government and the several states..." in the boating safety field.



4

Section 9 and its legislative history demonstrate that the Congress did not intend that this authority be used to exempt a state or a particular body of water from the entire Act. Exemptions have been granted equipment or labeling requirements because of a peculiar type of vessel configuration. If I were to exercise the exemption authority by excluding the application of all or part of the FBSA to the waterbodies in question, it is possible that consumer related interests would successfully challenge my action in court. In my view, it would be difficult to defend against such a suit without a strained interpretation of section 9.

3. Governor Thompson's request for a moratorium on the enforcement of Federal laws on the lakes has been considered. It is my conclusion that I have no authority to grant either a moratorium or in some other way prevent the application of law to the operative facts. In the case of these New Hampshire lakes, the Coast Guard simply applied the judicial tests to the pertinent geographic and historic facts. Neither the Commandant of the Coast Guard nor I can alter either the pertinent judicial decisions, the geography, or the facts. It is only the Congress that has the power to change the legal test or the applicability of the FBSA, and the courts that have the power to review the facts and determine whether a particular body of water is part of the navigable waters of the United States.

I trust the answers offered will enable you to sort out the options available to the Congress, and the affected state and local administrators.

Sincerely,

William T. Coleman, Jr.

Enclosure





DEPARTMENT OF TRANSPORTATION

# COAST GUARD NEWS

PUBLIC AFFAIRS OFFICE  
First Coast Guard District  
150 Causeway Street  
Boston, MA 02114

Release No 152-76

Contact CDR John Egan  
(207) 75-3131 ext. 251

Date 12 March 1976

Time of Release Immediate

## COAST GUARD BEGINS ENFORCEMENT ON NEW HAMPSHIRE LAKES

Boston--Rear Admiral James P. Stewart, Commander, First Coast Guard District, announced today the Coast Guard's initial plans to implement the recent determination that declared Lakes Winnepesaukee and Winnisquam, the Merrimack River, and their interconnecting waterways navigable waters of the United States. The State of New Hampshire retains concurrent jurisdiction over these same waters so, in the initial phase, only those state laws affecting the regulation of commercial vessels and the numbering of undocumented power driven vessels are preempted by this determination. State laws regarding water quality protection and those that relate to equipment required on recreational boats and the operation of these boats remain in effect. These state laws are enforceable by state officials at their discretion.

In the area of commercial vessel safety, this poses two requirements which must be met before the beginning of the navigation season. First - all personnel who are in charge of the navigation of vessels carrying passengers for hire are required to have a Coast Guard license. Second - all vessels carrying seven or more passengers for hire are required to be inspected and carry a certificate issued by the U. S. Coast Guard. The inspection of vessels carrying seven or more passengers for hire, that operate on the navigable waters of the United States, has been a requirement since 1957.



When the new regulations came into effect at that time they had a considerable impact on the Coast Guard workload because of the large number of vessels that suddenly had to be inspected. The inspection and certification of those vessels was accomplished with an initial liberal enforcement policy where it could be shown that there was a record of safe operation. Basically the same situation now exists in the Lake Winnepesaukee - Lake Winnisquam area. As in 1957, the Coast Guard intends to be as liberal and flexible as possible under the law in applying the regulations to existing vessels on the Lakes. Unless a vessel is obviously unsafe the owner will be issued a temporary certificate and given a reasonable period of time to correct deficiencies. Experienced personnel from the U. S. Coast Guard Marine Safety Office, Portland, Maine, will come to the Lakes' area for a 5-day period to explain the applicable rules and regulations to the owners and operators of all commercial vessels that operate on Lake Winnepesaukee and Lake Winnisquam. At that time they will take applications for vessel inspection and will process applications for licenses. For further information contact Commander John EKMAN, U. S. Coast Guard, at the following telephone number: (207)775-3131, ext. 251.

The Federal Boat Safety Act of 1971 (Public Law 92-75) requires all undocumented vessels and boats, used on the navigable waters of the United States, and equipped with propulsion machinery of any type to have a number issued by the proper issuing authority in the state in which the vessel or boat is principally used. As the state of New Hampshire is not an approved issuing authority for boats numbered on the navigable waters, this means that numbers must be obtained from the Coast Guard until such time that the state applies for and receives approval of a standard numbering system. Note that where a person lives is not the determining factor as to where a



boat is registered. The state of principal use is defined as where the vessel or boat is used most during a calendar year. Recognizing that it will be difficult to number all boats properly for the 1976 boating season the Coast Guard intends to be lenient when violations of this requirement are found this year. There is no desire to harass boat owners nor deprive them of their enjoyment of water recreation. Since New Hampshire and federal boat equipment and safety requirements are essentially the same this should not pose a problem. Copies of these regulations can be obtained at boat shows or through the below address. Boat number applications can be obtained from post offices in the Lakes Region or from the following address:

Chief, Boating Safety Division  
First Coast Guard District  
150 Causeway Street

Boston, MA 02114

4444



JLW

Cites Hampton Phase-Out

# Preston Criticizes CG Control of N.H. Lakes

CONCORD — State Sen. Robert F. Preston (D-Hamp-ton) yesterday severely criticized the Coast Guard take-over of Lake Winnepesaukee.

According to Preston, who is chairman of the Senate Recreation and Development Committee, the Coast Guard several yers ago phased out the permanent facility which had been located in Hampton in order to consolidate their activities.

Then, Preston continued, a couple of years ago, they phased out the Hampton-Sea-brook Harbor seasonal facilities to save money and manpower.

"Now they propose to take over supervision of New Hampshire lakes," Preston said.

"In my opinion, New Hamp-

shire has an excellent record of boating safety and no need exists for federal supervision. I'm concerned that a greater influx of boats and new rules could lead to greater pollution of our lakes which are currently well-controlled."

He said the federal effort is an attempt to supersede state laws and regulations and could result in a loss of licensing fees in excess of \$200,000.

Preston attended a meeting in Washington recently with Senators McIntyre and Durkin and Congressmen D'Amours and Cleveland and other New Hampshire officials. He said legislation will be sponsored by D'Amours and Cleveland to prevent the Coast Guard take-over, but this is a slow process and, according to

PRESTON

Page 18

## PRESTON

(Continued from Page One)

Preston, "by that time, the Feds will be on the scene".

Continued Preston, "We've had occasions this past year where foreign vessels have violated the 12-mile limit and destroyed fishing gear of New Hampshire fishermen and the Coast Guard's effectiveness is questionable.

"As far as I'm concerned, the search and rescue efforts for minor mishaps off our coast are being conducted, in part, by the commercial fishermen in their assists to the recreational boaters.

"I would suggest that the Coast Guard use its manpower and resources off our coastline to do a better job, as we now consider a 200-mile limit dealing with foreign vessels who would deplete our valuable coastal resources and leave New Hampshire lakes to us."

# Coast Guard Takes Lakes Next Week

G-M  
-W  
-L  
-R

BOSTON — A Coast Guard representative will be in Laconia next week to begin implementation of federal regulations governing commercial vessels on Lake Winnepesaukee and Lake Winnisquam. Lt. Comdr. Glenn Haines, from the Coast Guard Marine Safety Office in Portland, Maine, will be at Brickyard Mountain Inn on March 22 and 23 to explain the applicable regulations and begin the required administrative work.

Starting at 10 a.m. on Monday, LCDR Haines will answer questions that commercial vessel owners and operators may have regarding federal laws and their application to commercial vessels on these two New Hampshire lakes. He will also begin processing applications for operator licenses and vessel inspections on Lake Winnepesaukee and Lake Winnisquam.

A person must be licensed if he is responsible for the navigation of a vessel which carries passengers for hire. In addition, all vessels carrying seven or more passengers must be inspected and carry a certificate issued by the U.S. Coast Guard. The Coast Guard says it intends to be as lenient and as flexible as possible in applying the regulations to commercial vessels on these lakes. Unless a vessel is obviously unsafe, the owner will be issued a temporary certificate and given a reasonable amount of time to correct any deficiencies.



CCGD1: 26 FOOT F/V (US) - MAN OVERBOARD - NEW HAMPSHIRE

On Saturday this 26 foot lobster boat was reported underway with no one on board near Hampton. Utility boats from Coast Guard Station PORTSMOUTH-  
~~HAERB02~~  
~~HAERB02~~ and MERRIMACK and an HH3 helicopter from Coast Guard Air Station CAPE COD plus six local lobster boats searched until dark, but were unable to locate the missing lobsterman. ACTIVE SEARCH SUSPENDED PENDING FURTHER DEVELOPMENTS.

---

FOR OPS HI LITES 22 MAR 76

BS/GHA



CC WC D  
E

BC

INFO: G-OFF G-APA  
(17) G-O G-B  
G-OP G-BBT  
G-OSR G-BD  
G-OSR-1 G-C  
G-000 G-CC  
G-V G-L  
G-VEP G-A  
N R C

R 210040Z MAR 76

RECEIVED

FM CCGDONE BOSTON MA

TO CC/COMLANTAREA COGARD NEW YORK NY

INFO WC/COMDT COGARD WASHINGTON DC: 59

BT

UNCLAS

OSR TO AOSR

SITREP ONE AND FINAL MAN OVERBOARD, HAMPTON, N.H.

1. SITUATION:

CENTER

A. 201520R L/B JAMIE LEE REPORTED TO STA PORTSMOUTH HBR THAT HE HAD JUST LOCATED HIS SON'S 26FT L/B U/W WITH NO POB. REPORTING SOURCE STOPPED 26FT L/B AND HAD COMMENCED SEARCHING FOR MISSING POB WHO WAS ONLY POB.

B. POSITION OF INCIDENT: 1 MILE EAST OF GREAT BOARS HEAD, HAMPTON, N.H.

C. WX O/S: WIND SW/05, SEA CALM, VIS 10NM.

2. ACTION:

A. CGAS CAPE COD MH3F, STA PORTSMOUTH HBR UTR, STA MERRIMACK RIVER MLB, AND SIX L/B UTILIZED TO SEARCH AREA UNTIL SUNSET WITH NET SIGHTINGS.

B. L/B HAULED TRAPS OF MISSING MAN AND FOUND ONE STRING PARTIALLY BAITED. AT THE POINT OF THE LAST BAITED TRAP THE LINE WAS BADLY FOULED AND NO TRAPS FURTHER ALONG STRING HAD BEEN BAITED. POSITION OF FOULED LINE 42-54.5N, 070-45.5W APPROX TWO MILES OFF BEACH. FATHER OF MISSING MAN REPORTED ALL PFD'S STILL ON MAN'S BOAT.

C. AREA OF SEARCH WELL DEFINED AND SEARCH COMPLETED WITH A COVERAGE FACTOR OF 0.8 FOR MAN IN THE WATER.

D. 201811R SUSPENDED ACTIVE SEARCH PENDING FURTHER DEVELOPMENTS. ALL L B WHICH WERE SEARCHING SECURED APPROX 201754R.

3. FUTURE PLANS:

A. LOCAL DIVERS PLAN TO DIVE 210700R IF WX PERMITS.

B. PLAN NO FURTHER CG ASSISTANCE AT THIS TIME.

4. CASE SUSPENDED.

BT

21/0047Z S A R L A N T

TAPE

NNNN

575-76

*Memorandum*

G-C

DATE: 24 March 1976

SUBJECT: INFORMATION:  
Meeting Regarding Coast Guard Enforcement on Lake Winnepesaukee  
Between Rear Admiral Stewart and Governor Thomson

FROM : Commandant, U. S. Coast Guard

TO : The Secretary

Rear Admiral J. P. Stewart met with Governor Thomson for approximately one-half hour on 12 March regarding Coast Guard's plans for enforcement on the navigable waters of New Hampshire. He showed the Governor the Press Release that was planned for release that afternoon regarding the arrival of Coast Guard personnel to answer questions, issue application blanks, and in those instances where it was possible, to issue licenses.

The meeting was very cordial although it was apparent that the Governor did not agree with the Coast Guard's position. Admiral Stewart informed the Governor as to when Coast Guard personnel would be arriving to assist the personnel who operate vessels on Lake Winnepesaukee and Lake Winnisquam, and explained why our steps were necessary. The instance cited as an example was the COMET case, in which the Coast Guard was taken to task for not keeping charter boats in port when they were unable to meet Coast Guard inspection. In this case, the Coast Guard was not found liable, but only because it was not found to be the proximate cause of the accident. The Governor was informed that there would be no boating safety patrols on the lakes this year.

At 1000 Monday, 22 March, Coast Guard officers were on scene at ~~Brake~~<sup>Brick</sup> Yard Mountain Inn at Lake Winnepesaukee to answer questions and assist charter boat operators on the regulations in meeting Coast Guard requirements. At this time the Coast Guard personnel assigned to the Marine Safety Office in Portland, Maine were available to issue temporary inspection certificates to vessels which could come near enough to compliance that the Coast Guard would allow additional time to meet issue compliance requirements and answer questions regarding enforcement procedures. It was stressed at all times that operators on the lakes would be given time to meet full compliance of Coast Guard regulations.



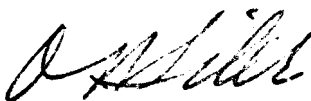


Commandant to  
The Secretary

G-C  
24 March 1976

Subject: INFORMATION: Meeting Regarding Coast Guard Enforcement  
On Lake Winnepesaukee Between Rear Admiral Stewart and  
Governor Thomson

The MT. WASHINGTON, the large passenger vessel operating on Lake Winnepesaukee, will be contacted today, 24 March. She is presently authorized by the state to carry 1250 passengers. Inasmuch as we are not familiar with the vessel's operation or its construction, we are not sure what steps are necessary to bring this vessel into compliance sufficiently to allow it to operate.



O. W. SILER



THE WHITE HOUSE

WASHINGTON

March 24, 1976

MEMORANDUM FOR THE PRESIDENT

FROM : JIM CANNON *J. Cannon*  
SUBJECT : U.S. Coast Guard in New Hampshire

Secretary Coleman sent you today the attached report on U.S. Coast Guard action relating to Lake Winnepesaukee and other waters in New Hampshire.

In brief -

1. Rear Admiral Stewart, Coast Guard Commander for the New England area, met with Governor Thomson on Friday, March 12 and informed Governor Thomson that the U.S. Coast Guard would begin to exercise jurisdiction over Lake Winnisquam, Lake Winnepesaukee, and the Merrimack River.
2. In addition, Coast Guard personnel began informing private boat owners in the area they would be subject to Coast Guard regulations.
3. Unfortunately, on Saturday, March 20, 1976, a New Hampshire lobsterman was lost at sea off the New Hampshire coast and the Coast Guard was asked to help find him. Governor Thomson, with whom I talked twice today, complained that the Coast Guard gave up the search after only three hours.

Because of the New Hampshire media reports on these two events, the Coast Guard is perceived as interfering unnecessarily in State waters but not attending to its important responsibility to save lives.

Governor Thomson asked me to talk with his Attorney General, who may file a suit to block the Coast Guard from taking over Lakes Winnepesaukee, Winnisquam and the Merrimack River.



State Attorney General David Souter would like to meet with Secretary Coleman to attempt to resolve the issue.

Secretary Coleman's report on these two incidents is attached at Tab A.

At Tab B is a copy of your statement given in New Hampshire on this subject.

Attachments



THE SECRETARY OF TRANSPORTATION

WASHINGTON, D.C. 20590

March 24, 1976

MEMORANDUM FOR THE PRESIDENT

Enclosed are two exhibits which describe recent actions by the Coast Guard which have caused you some concern. Exhibit A describes the circumstances of the Coast Guard's determination that Lakes Winnepesaukee and Winnisquam and the Merrimack River in the State of New Hampshire are navigable waters of the United States. Exhibit B describes the events and circumstances surrounding the search for a New Hampshire citizen lost overboard from his 26 foot lobster boat.

Both actions have received great play in the New Hampshire press and have made possible strong anti-Administration statements by Governor Meldrim Thomson. I have reviewed all facts in both cases and believe the Coast Guard's actions to be proper.

*Bill*  
William T. Coleman, Jr.

Enclosures



Department of Transportation  
Exhibit A

A recent editorial of the Manchester UNION LEADER, reprinted in the President's Daily News Summary, seems to indicate that a Coast Guard Admiral acted in a highhanded and arbitrary manner in announcing that the Coast Guard would take over control of Lake Winnepesaukee and Lake Winnisquam and the Merrimack River in New Hampshire. This has been played up in the UNION LEADER as an unwarranted expansion of authority of the Federal Government.

This is a gross misstatement of fact and intent. The facts are these:

1. After a long drawn out process, it was determined that those bodies of water in question were in fact navigable waters of the United States for purposes of Coast Guard jurisdiction. This determination was made by the Commandant of the Coast Guard on September 3, 1975. To make this determination, there are three tests which must be satisfied:
  - a. That the major portion of this chain of waterways between Lake Winnepesaukee and the point where the Merrimack River drains into the Atlantic Ocean is navigable in fact.
  - b. Commercial navigation has been maintained in the past or is currently present on a large segment of the system.
  - c. Private plans and studies concerning both the dredging of the waterway and the construction of parallel canal works conducted by private individuals, private companies under State charter, and the U. S. Army Corps of Engineers indicated the economic feasibility of development of the entire waterway for purpose of interstate navigation.
2. These findings of fact were communicated to the Governor of New Hampshire in December 1975. Governor Thomson then appealed to me to declare a moratorium on the enforcement of Federal law on these bodies of water. I advised him in turn that I would consider such action and suggested other alternatives which included the possibility of a Federal statute exempting these bodies of water, a court test or State action which would substitute other kinds of revenue for that lost by the finding of these lakes and river to be navigable waters.





3. On March 11 after completing my analysis of the situation I wrote Governor Thomson indicating that I have no authority to grant either a moratorium or in some other way to prevent the application of law to the operative facts. A copy of this letter was furnished to Rear Admiral Stewart, Commander, First Coast Guard District in Boston, Massachusetts, in whose jurisdiction these lakes and river lie.
4. Admiral Stewart met with Governor Thomson on March 12. The report I have of the meeting indicates that it was cordial even though the Governor disagreed with the Coast Guard's position. Admiral Stewart explained the Coast Guard's plan for exercising its statutory responsibilities as the result of a determination that the Lakes and River involved were navigable waters in New Hampshire, indicating that Coast Guard personnel would be available in New Hampshire to answer questions, issue application blanks, and licenses where possible. The Governor was informed that there would be no boating safety patrols on the Lakes this year.
5. On March 22 Coast Guard officers went to a local inn near Lake Winnepesaukee to meet with and answer questions of charter boat operators, to explain the regulations which the Coast Guard would expect to enforce. All concerned were informed that the Coast Guard would allow additional time to meet issue compliance requirements for proper licensing.

There is no question that this is an unpopular action as far as the State administration is concerned. No longer will they be able to charge fees for out-of-state boat operators to use this Lake. But the Coast Guard feels that it has been more than helpful in providing assistance to the State to determine alternative funding sources and even to help draft statutes which, if passed by Congress, would exempt the Lakes from the provisions of the law.

I am informed that the State of New Hampshire will seek a court injunction against the Coast Guard's determination that these waters are in fact navigable waters of the United States.

An option available to Department of Justice is to take no action to resist the granting of a preliminary injunction



until the court disposes of the matter on the merits. The Department of Justice, of course, would defend the determination of the U. S. Coast Guard on the merits at final hearing and would ask for an early hearing to get the matter disposed of on the merits promptly.

*Bill*  
William T. Coleman, Jr.





THE SECRETARY OF TRANSPORTATION  
WASHINGTON, D.C. 20590

MEMORANDUM FOR:

The President

SUBJECT:

Alleged Poor Coast Guard Response  
to Search and Rescue Incident Off  
Hampton, New Hampshire

The loss of Mr. Irving F. Jones, Jr., operator of the fishing vessel SEA HAWK off of Hampton, New Hampshire on Saturday, 20 March 1976, occurred sometime between 1 and 2:30 PM while Mr. Jones was engaged in rebaiting a lobster trapline. Weather conditions were as follows: air temperature 57°F, water temperature 38°F, sea calm, wind southwest at 5 knots and visibility 10 miles or better. Mr. Jones was clad in a yellow rain jacket and may have been wearing boots but was not wearing any form of personal flotation device.

At approximately 2:30 PM the unoccupied SEA HAWK was found underway about 3/4 mile off of Hampton Beach by Mr. Irving F. Jones, Senior, the operator of the fishing vessel JAMIE LEE. After apparently conducting a search for his son, Mr. Jones called the Coast Guard Station at Portsmouth Harbor for assistance at 3:20 PM. Coast Guard forces consisting of two boats and a helicopter were dispatched who, upon arrival on scene, joined six fishing boats in a search for the missing man. The search was continued until sundown.

The existing temperature of the water limited the safe immersion time of a person to twenty minutes and would have been 97% lethal after 2 hours. There was very little possibility that Mr. Jones could have survived by the time that the first information was made known to Coast Guard forces. However, an excellent and thorough search was conducted on the slim chance that Mr. Jones somehow may have been alive in the water.

All efforts subsequent to 20 March 1976 to locate Mr. Jones fall under the category of a body search. Insofar as Coast Guard policy with regard to searching can be defined, a search will be prosecuted as long as there is any possibility of survival. While we certainly sympathize with the family and friends of persons lost, we do not commit Coast Guard resources to body searches which might result in making those resources unavailable to other search and rescue cases



Subj: Alleged Poor Coast Guard Response to Search and Rescue Incident  
Off Hampton, New Hampshire

in which survival would possibly be involved. At the discretion of the local Coast Guard Commander, when resources are available and the search does not interfere with other primary duties, he may assist local law enforcement agencies with body searches if requested to do so. Such a request was made by the Hampton Police for the following day, but when the assigned Coast Guard boat arrived on scene, it could not locate any other searchers and subsequently ceased searching and returned to base. On the night of 20 March personnel from the Merrimack Station responded to a report of a body sighting just off Hampton Beach but was unable to locate the object reportedly sighted.

A chronological sequence of events is appended for your possible use.

*Buc*

William T. Coleman, Jr.

Enclosure



Sequence of Events - Lost Operator, F/V SEA HAWK

The following is a sequence of events recorded in the case of the fishing vessel SEA HAWK:

Saturday, 20 March 1976

1 to 1:30 PM - Operator of F/V SEA HAWK last seen baiting lobster traps by 3 other lobster fishermen approximately 1 mile east of Great Boars Head, Hampton, New Hampshire.

2:30 PM - Father of operator of SEA HAWK, in F/V JAMIE LEE located unoccupied SEA HAWK underway 3/4 mile off Hampton Beach.

3:20 PM - Operator of JAMIE LEE reported to Coast Guard Station Portsmouth Harbor that operator of SEA HAWK was missing and presumed overboard 1 mile east of Great Boars Head. Incident reported to Rescue Coordination Center (RCC) Boston. Forty foot utility boat dispatched from Portsmouth Harbor Station, 44 foot motor lifeboat dispatched from Merrimack Station and H3F helicopter dispatched from Air Station Cape Cod to assist in search.

4:01 PM - Forty foot utility boat on scene, joined 6 lobster boats in search for the missing man.

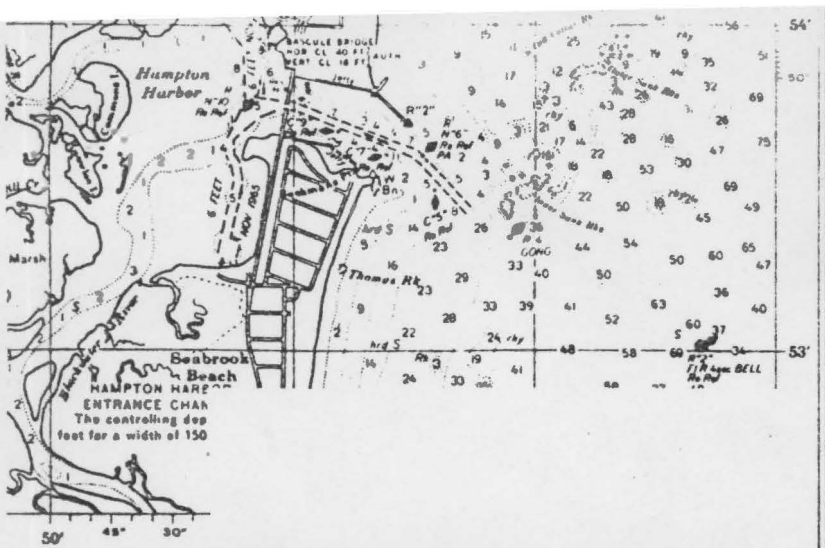
4:07 PM - Forty four foot motor lifeboat on scene, joined search.

4:15 PM - H3F helicopter on scene. Assumed on scene command and reoriented search to parallel track pattern with 1/4 mile leg spacing, 2 mile square about datum at 42 degrees 54.5 min north, 70 degrees 45.5 min west, approximately 2 miles off the beach and site of fouled lobster trapline which appeared to be last trap belonging to the missing man which had been baited. Search boundaries extended 2 1/2 miles north and south and to the beach.

5:45 PM - Sundown, Coast Guard and civilian search units secured search.







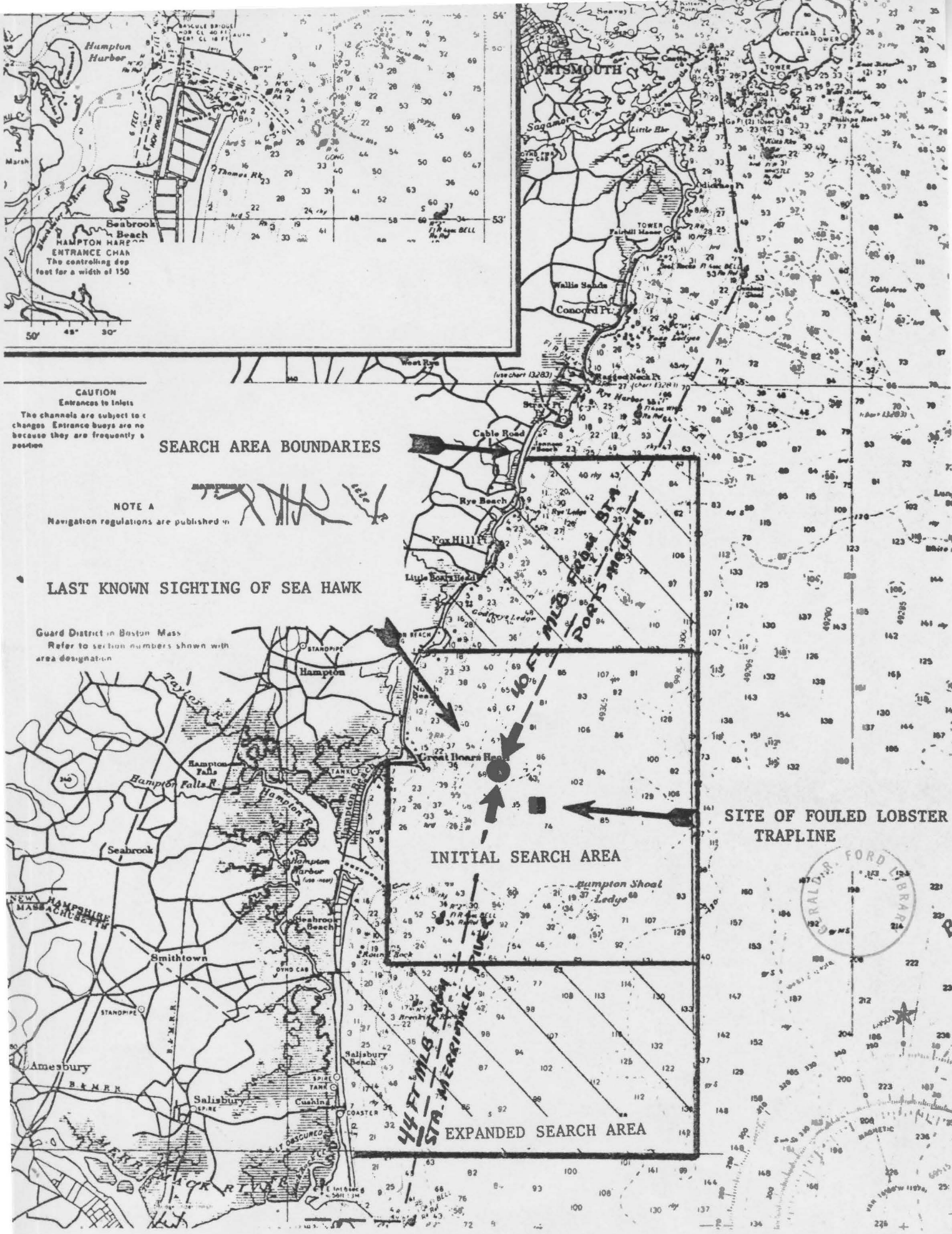
**CAUTION**  
Entrances to Inlets  
The channels are subject to changes. Entrance buoys are no because they are frequently a position

**SEARCH AREA BOUNDARIES**

**NOTE A**  
Navigation regulations are published in

**LAST KNOWN SIGHTING OF SEA HAWK**

Guard District in Boston, Mass.  
Refer to section numbers shown with area designation



2/7/76

now in and out of Government that we can't make up in a few years for all the environmental evils we perpetrated on the country over a period of a hundred years.

So there is, I think, a little more flexibility on the part of EPA. If you have a specific case, I would recommend that you communicate it to us. I think there is some flexibility, if there is a hardship involving the closing of a plant and the loss of jobs. It depends on the kind of damage to the environment in each case.

On some occasions—we have just had a tragic thing happen down in Virginia. You may have read about it, this Kepone, a chemical. For some reasons or another that was not promptly and adequately handled by either the State or the Federal authorities. So you almost have to handle each case on an individual basis.

Now as to the tax incentive, there is a provision in the Internal Revenue Code that gives to business a tax write-off up to a certain percentage for the funds they expend in improving their plant and equipment to meet EPA standards.

I know that some small companies that have a bad cash flow have not been able to utilize that but it is available and I think it is 20 percent, as I recall. But anyhow there is such a provision and I think a good many companies I know have used it. But there are some, I am sure, that for economic reasons, can't finance it.

But the concept is good. Whether it can meet every particular plant's problem or not depends on the individual plant.

Q. Part of our problem, Mr. President, is not solely with the existing plant but with our problem of trying to make a turnover of jobs available as we have the ebb and flow of companies moving in and out and trying to attract new industries and new companies, that they come in and are immediately faced with this type of a problem. And this is why I address the administration part of it. And are there things we could do from the administrative part rather than through the channel of amendments, which takes a longer process?

THE PRESIDENT. We will take a look at it. But I do know, as I said a moment ago, there is, I think, a more understanding and flexible attitude today than there was, say 3 years ago.

Q. Thank you, Mr. President.

THE PRESIDENT. Yes, sir.

Q. Mr. President, John McDonald, State representative from Manchester, the home of the McIntyre Ski Area. [Laughter]

Mr. President, both of our New Hampshire Senators are actively pursuing legislation which would, in effect, cut one of the links in the marketing chain of the major oil companies wherein they would not be controlling oil from the wellhead to the pump. If such legislation is passed, Mr. President, would you sign this type of legislation or veto it?

THE PRESIDENT. You are talking about the proposals for divestiture?

Q. That is correct.

THE PRESIDENT. Either horizontal or vertical, and there are a number of proposals in the Congress. I think there is one that has been reported by a Senate committee or subcommittee that would provide for divestiture. I have no sympathy for the giant oil companies as such. In fact, we are being blamed because FEA and others are watching them too closely.

But anyhow, I don't think divestiture is the way to solve the problem. It seems to me that a well-managed oil company, big or small, is the best way to solve our energy problem. And to just tear them apart I don't think answers the problem.

We have, as I recall, about 10 to 15 major oil companies. They reaped a financial bonanza a year or so ago. They are having a less desirable year at the present time, but to tear them up, in my opinion, is not the best way to get them to get in and help us solve the energy problem.

So I am against just the kind of legislation that I think you are talking about.

Q. Thank you, Mr. President.

Q. Mr. President, Representative McLaughlin from Nashua.

Would you care to comment on the U.S. Coast Guard's encroachment on the inland waters of the State of New Hampshire. [Laughter]

THE PRESIDENT. I think you are talking about problems involving Lake Winnepesaukee?

Q. Yes, sir.

THE PRESIDENT. And there is another one I cannot pronounce. Well as I understand the history of this situation, several years ago a highway had to be built across the channel. At that time, it was decided by the Coast Guard that they had to give a permit and they determined that those were Federal waters. Now I have never been to those lakes, so I can't describe the situation in detail, but the matter has gone personally to the Secretary of Transportation. He has written to the Governor and he makes two suggestions for the solution.

Number one, there is a possibility of remedying the situation by the State. Instead of putting a State tax on the boats, puts a State tax on the use of ramps on the two lakes. That is one possibility.

The other possibility is for the Congress to pass legislation which is being drafted by the Department of Transportation, which excludes those two lakes from Federal jurisdiction. I am sure the Department of Transportation will be working with your Members of the House as well as the Senate. It seems to me the better way to solve the problem is to get Congress to make an exception in this case.

As I understand the geography, until they put this highway bridge across there, they were never considered navi-



gable waters. But some bureaucrat decided that they had to grant permission under the existing highway legislation, so they granted the permit on the basis they were navigable waters. And once they are navigable waters then the Federal Government has jurisdiction and your State tax is illegal.

I think the better way to do it is one of the two alternatives recommended by Secretary Coleman to get specific legislation, which I believe can be passed without too much trouble, and it would exclude those two lakes from the category of navigable waters. If that is done by the Congress, I will sign the legislation.

Q. Thank you, sir.

Q. Mr. President, I am John Scorpo, selectman from Hudson, and I am happy to hear you are going to continue to try to expand the general revenue sharing because that has allowed Hudson to obtain very good services without having to increase our tax rate almost 10 percent.

However, when we try to get some assistance to comply with the Water Pollution Control Act, we seem to run into all kinds of restrictions. I noticed in your proposed budget that you are recommending a 60 percent increase in sewage treatment facilities. But then as I read further down the line, you mention there is pending legislation that might reduce the Federal commitment from 333 billion down to 45 billion on a long term basis. I was wondering if you would comment on that.

THE PRESIDENT. Well, Congress 5 years ago, as I recollect, passed an \$18 billion program for Federal aid to local units of Government for sewage treatment plants. The law expires, I think, next year, if I recall it correctly.

Now, under the present law, you are correct that there will be \$6,900 million spent on local water pollution units, which is 60 percent more than last year. And I think it is 90 percent more than 2 years ago.

Now, under the proposed law, we are recommending some changes and one, for example, we don't think that Federal money should go into a local water treatment plant and participate in a 10-year growth factor.

Under the present law and under the present funding, the Federal Government pays for a 10-year growth factor. The Federal responsibility should be to catch up so that the local community at the present time is able to handle the sewage treatment problem up to the standards at the present time.

Now, the community ought to look down the road at the growth factor and, when you crank that factor in that I have discussed, it does account for a significant part of the reduction in the funds that we are proposing. And there are some other modifications which we think, in the long run, are proper, now that we are going to be more or less caught up in the local communities around the country. There will still be a lot of money there, but it won't be as much because of the one or two factors that I have described. There will be money there. And we have recommended it, and I think it will be adequate to handle

those communities that didn't qualify or didn't apply under the current program.

I can assure you that we believe that a Federal contribution is right, but it has to be tailored to meet the need at the end of this law, or at the termination of this law not just the same amount as we have had for the last 5 or 6 years.

Q. Thank you, Mr. President.

Q. Mr. President, Costas S. Tentas, chairman of the New Hampshire State Liquor Commission. I also want to welcome you to New Hampshire. It's nice to see you again.

THE PRESIDENT. Thank you.

Q. And I want to convey to you the best regards of my counterpart in Michigan, Stan Thayer.

THE PRESIDENT. We both have monopolies.

Q. We certainly do.

THE PRESIDENT. It makes a lot of money for Michigan I don't know about New Hampshire.

Q. More so in New Hampshire. One of the areas of concern to not only New Hampshire but all the sister controlled States, which are 18 plus one county, Montgomery County in Maryland, is the amount of Federal taxes that are tied up in State funds. Our association which is the National Alcoholic Beverage Control Association, which is based in Washington, has been reviewing and at the present time there is some \$115 million tied up in all these 18 controlled States. Specifically for New Hampshire, of our \$10 million inventory, we have some \$6 million of excise taxes tied up.

We have been looking at it carefully with DISCUS which is the Distilled Spirits of the United States, that if at some time will the Federal Government look quite favorably to either the deferment of taxes or possibly the return of some of these funds to the individual controlled States and the open States?

THE PRESIDENT. Let me see if I understand the problem. When your Commission or the one in Michigan buy liquor, they have to pay the Federal tax and you have the inventory on hand until you sell it through your various channels.

Q. Which includes the Federal taxes.

THE PRESIDENT. Right. I wish I could say yes.

Q. I wish you could, too. [Laughter]

THE PRESIDENT. But we would be treating you, you State differently than we would any other wholesaler. And that is what you are, you are a wholesaler. If we treated Michigan and New Hampshire differently as a wholesale than we treat others, I think we would have a significant number of complaints.

Q. Our proposal would be that all States be treated equally, that the deferment of taxes be made and then the creation of bonded warehouses within each respective State to monitor those taxes that are due the Federal Government.



THE WHITE HOUSE  
WASHINGTON

March 24, 1976

MEMORANDUM FOR THE PRESIDENT

FROM : JIM CANNON *J. Cannon*  
SUBJECT : U.S. Coast Guard in New Hampshire

Secretary Coleman sent you today the attached report on U.S. Coast Guard action relating to Lake Winnepesaukee and other waters in New Hampshire.

In brief -

1. Rear Admiral Stewart, Coast Guard Commander for the New England area, met with Governor Thomson on Friday, March 12 and informed Governor Thomson that the U.S. Coast Guard would begin to exercise jurisdiction over Lake Winnisquam, Lake Winnepesaukee, and the Merrimack River.
2. In addition, Coast Guard personnel began informing private boat owners in the area they would be subject to Coast Guard regulations.
3. Unfortunately, on Saturday, March 20, 1976, a New Hampshire lobsterman was lost at sea off the New Hampshire coast and the Coast Guard was asked to help find him. Governor Thomson, with whom I talked twice today, complained that the Coast Guard gave up the search after only three hours.

Because of the New Hampshire media reports on these two events, the Coast Guard is perceived as interfering unnecessarily in State waters but not attending to its important responsibility to save lives.

Governor Thomson asked me to talk with his Attorney General, who may file a suit to block the Coast Guard from taking over Lakes Winnepesaukee, Winnisquam and the Merrimack River.



State Attorney General David Souter would like to meet with Secretary Coleman to attempt to resolve the issue.

Secretary Coleman's report on these two incidents is attached at Tab A.

At Tab B is a copy of your statement given in New Hampshire on this subject.

Attachments



THE SECRETARY OF TRANSPORTATION  
WASHINGTON, D.C. 20590

March 25, 1976

NOTE FOR JIM CANNON

FROM: Bill Coleman

Enclosed herewith is the legal memorandum supporting the Coast Guard's determination that said lakes and river are navigable waters within the meaning of the U.S. Constitution.

Enclosure

cc: Dr. James Connor





THE WHITE HOUSE

WASHINGTON

March 25, 1976

MEMORANDUM TO THE FILE

"CONVERSATION WITH THE PRESIDENT"

SUBJECT: Lake Winnepesaukee

I asked the President for his guidance on the Lake Winnepesaukee issue.

1. Secretary Coleman indicated that he felt it was not legal for him to direct the Coast Guard to reverse its finding that these waters are navigable.
2. Coleman is willing to meet with New Hampshire Attorney General David Souter (on Monday) and attempt to resolve the matter--out of court, if possible; through a court decision, if necessary.

*i.e.,* The President indicated that <sup>the</sup> this was agreeable to him that Secretary Coleman and Attorney General of New Hampshire resolve the matter out of court.

If, however, the President said, they cannot resolve it promptly, he wants to get Senator McIntyre and Senator Durken and Representative Cleveland to inform them that he will get legislation passed to exempt these waters from Coast Guard jurisdiction.

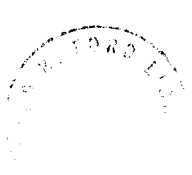
I raised the question of whether we might consider changes in the federal laws relating to navigable waters, and the President said he felt this was something we should consider. I told him we would put together a memorandum of options on possible changes. ~~Later, I related these matters to Secretary Coleman.~~ Specifically, I suggested that ~~broad~~ changes might relate to:

- (a) the level of commercial activity,
- (b) finding to be made by third party,
- (c) finding to be made in consultation with an elected official such as the governor.

*into the White House*

*this conversation*

*in the navigable water laws*



MEMORANDUM

THE WHITE HOUSE

WASHINGTON

March 25, 1976

MEMORANDUM FOR: JAMES M. CANNON  
FROM: DAWN D. BENNETT *deb*  
RE: Navigable Waters

As per our conversation of earlier today:

A navigable waterway is one which, in its natural or improved state, is either used or suitable for use as a highway for commerce, over which customary travel and trade may proceed. Though it is not necessary that improvements be completed or even authorized, there must be a balance between the cost of the improvement and the need, at the time that the improvement would be useful. All navigable waters are subject to United States jurisdiction. U.S. v. Appalachian Electric Power Co. 311 U.S. 377(1940); Commerce Clause of the United States Constitution.

14 U.S.C. 2 mandates that the Coast Guards shall perform their duties "upon the . . . waters subject to the jurisdiction of the United States."

*Dawn — Thanks — Would  
many and Dick  
you talk to me on  
Monday about this @  
Thanks. Jim*



THE WHITE HOUSE

WASHINGTON

March 25, 1976

MEMORANDUM TO THE FILE

"CONVERSATION WITH THE PRESIDENT"

SUBJECT: Lake Winnepesaukee

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*into the White House*

*this conversation*

*in the navigable water laws*

THE WHITE HOUSE

WASHINGTON

March 29, 1976

MEMORANDUM FOR: JIM CANNON  
FROM: MAX FRIEDERSDORF *MF*  
SUBJECT: New Hampshire Coast Guard Problem

I am sending you a letter received today from Senator McIntyre concerning the Coast Guard situation in New Hampshire.

Senator McIntyre attempted to call the President this afternoon and we returned the call and ascertained that the subject of the call was contained in this letter which we picked up in the Senator's office.

I request that you expedite a substantive response to the Senator's letter for the President's signature.



41  
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## United States Senate

COMMITTEE ON ARMED SERVICES

WASHINGTON, D.C. 20510

March 29, 1976

The Honorable Gerald R. Ford  
The President  
The White House  
Washington, D. C.

Dear Mr. President:

I directly appeal to you to declare a moratorium on the U.S. Coast Guard's assumption of concurrent jurisdiction over certain waters in New Hampshire, namely, Lakes Winnisquam and Winnepesaukee, the connecting waterways, and the in-state portion of the Merrimack River.

I make this appeal, Mr. President, because a moratorium may be the only action that can insure safe, responsible boating on these waters in the season about to commence.

Wholesale public confusion over respective State and Federal responsibilities under concurrent jurisdiction--and over the specific obligations of individual boatsmen in meeting legal requirements under the new jurisdictional arrangement--may create a dangerous situation on these waters unless the changeover process is suspended immediately and through the balance of the 1976 boating season.

The Coast Guard tells me that even under concurrent jurisdiction it retains pre-emptive authority in three areas: boat numbering, boat manufacture standards, and boat safety equipment requirements. But the Coast Guard also has announced that in deference to the New Hampshire situation it will be "liberal, lenient and flexible" this season. And while I appreciate this gesture of good will on the part of the Coast Guard, I fear that a lenient enforcement policy, coupled with confusion over individual responsibilities under the new system, and further confusion over just what State water patrols can--or can't--enforce in the way of boat safety equipment will leave a dangerous vacuum in authority that invites conscious or innocent violations, accidents, perhaps even tragedy.

Legislation to exempt these waters by declaring them non-navigable and thus not subject to Coast Guard jurisdiction was introduced in the Senate last week, Mr. President, and I appreciate your New Hampshire Primary campaign pledge to sign such legislation

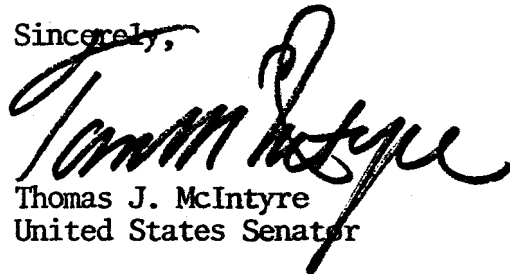


if it reaches your desk. What concerns me, however, is the possibility that such legislation cannot be passed and signed into law before the boating season begins.

Therefore, I am appealing to you to please declare, by Executive Order, a moratorium on Coast Guard assumption of jurisdiction over these waters until the upcoming boating season is over for the year.

I thank you for your consideration, Mr. President.

Sincerely,

A handwritten signature in black ink, appearing to read "Tom McIntyre", written over the printed name and title.

Thomas J. McIntyre  
United States Senator

TJM:Om



**March 29, 1976**

**Dear Senator McIntyre:**

**Your letter to the President concerning your request involving the U.S. Coast Guard in New Hampshire has been received.**

**Please be assured that I will bring this to the President's attention without delay and I am sure that he will want to respond directly to you.**

**With kindest regards,**

**Sincerely,**

**Max L. Friedersdorf  
Assistant to the President**

**Honorable Thomas J. McIntyre  
United States Senate  
Washington, D.C. 20510**

**MLF:jg**

**✓bcc: Jim Cannon w/inc. for substantive response  
Judy Berg-Hansen - FYI**



March 29, 1976

MEMORANDUM FOR THE PRESIDENT

FROM: MAX FRIEDERSDORF

SUBJECT: Senator Thomas J. McIntyre

Senator McIntyre tried to call the President this afternoon and the call was returned by White House Congressional Relations.

The call concerned the Coast Guard matter in New Hampshire and we picked up a letter to the President concerning this issue which is attached.

I have asked Jim Cannon to draft a substantive response for the President's signature and wanted the President to have a copy of this letter in the event that he wanted to return the phone call.

I don't believe a return phone call is absolutely necessary because we have discussed the situation with Senator McIntyre and he understands that his letter was delivered to the President.

bcc: Jack Marsh  
Dick Cheney



THE WHITE HOUSE

WASHINGTON

March 29, 1976

MEMORANDUM FOR: JIM CANNON  
FROM: JUDITH RICHARDS HOPE  
SUBJECT: Lake Winnepesaukee

*[Handwritten signature]*

In response to your memo of March 25, 1976, Secretary Coleman met with David Souter today in an attempt to resolve Coast Guard jurisdiction over this Lake. Under the Federal Boating Act, Coast Guard jurisdiction is based on the fact that the Lake is a headwater for other bodies of water, including the Merrimac River, which flows inter-state and to the ocean. However, there is a 60 foot waterfall in the Merrimac River which Souter argues makes it, therefore, Lake Winnepesaukee, non-navigable. There is also a recent 2nd Circuit case which buttresses the contention of non-navigability in a similar factual situation.

DOT will make a formal response to Souter by April 6. They are also studying the history of attempts to amend the legislation by leading Senators (e.g., Senator Humphrey) to exclude Lakes within their own States. All such attempts have failed.

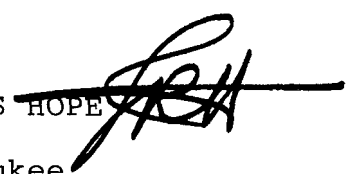
*Court & legal precedents w/ C.G.*

THE WHITE HOUSE

WASHINGTON

March 30, 1976

MEMORANDUM FOR: JIM CANNON

FROM: JUDITH RICHARDS HOPE 

SUBJECT: Lake Winnepesaukee

Secretary Coleman telephoned and spoke with the President at one o'clock today concerning the Lake Winnepesaukee issue. They agreed that:

1. The Secretary would reopen the decision on navigability, appoint a three person task force (a representative of the New Hampshire Attorney General, a Coast Guard representative, and an officer of the Department of Transportation's General Counsel Staff) to visit New Hampshire, investigate all geographical, historical and legal considerations, and report its findings to the Coast Guard Commandant and the Secretary of Transportation by April 16.

2. The Coast Guard would accept the invitation of New Hampshire's Attorney General to inspect commercial vessels currently in use on Lake Winnepesaukee, particularly the 1250-passenger ferry, Mount Washington.

The details of this proposal are currently being worked out at DOT by Secretary Coleman and Commandant Siler, and agreement should be reached by close of business today. Basically, the Commandant would reconsider and render his opinion by April 19. If his decision is contrary to the recommendation of any task force member, that member may appeal to Secretary Coleman by April 22, and Secretary Coleman would render a final decision by April 26.

Secretary Coleman expects to make his announcement tomorrow morning. A draft of his statement, worked out by me and DOT's General Counsel's office, is attached at Tab A. The proposed press release is at Tab B.

cc: Art Quern

A



RECONSIDERATION OF THE DETERMINATION BY THE COMMANDANT  
OF THE U.S. COAST GUARD THAT THE WATERS OF LAKES  
WINNIPESAUKEE AND WINNISQUAM, NEW HAMPSHIRE,  
THE MERRIMACK RIVER, AND INTERCONNECTED WATERWAYS ARE  
NAVIGABLE WATERS OF THE U.S. DATED SEPTEMBER 2, 1975

On September 2, 1975, at the request of the State of New Hampshire in connection with the construction of two bridges, the Commandant of the U.S. Coast Guard determined that the water system extending from the mouth of the Merrimack River at Newburyport, Massachusetts through a system of rivers and lakes to the north shore of Lake Winnepesaukee are navigable under the Constitution and laws of the United States.

Subsequent to that determination, the Attorney General of the State of New Hampshire has raised new historical and geographic facts that are material and relevant to the Coast Guard's determination of navigability. The State Attorney General has also raised certain questions of legal interpretation that should be considered and addressed in an administrative determination of navigability. Because the State Attorney General did not participate in the Coast Guard's initial determination, I have decided that it is in the interest of a just and fair resolution of this issue that the question of navigability be reopened in order to provide an opportunity to assess these new facts and evidence and to review further the applicable law in light of these new facts.

Because it is in the interest of all parties concerned that these questions be resolved quickly, I am hereby directing the establishment of a special task force, consisting of a representative designated by the Attorney General of the State of New Hampshire, a representative designated by the Coast Guard and a representative designated by the General Counsel of DOT. This task force will visit the State and undertake a thorough review of all the historical and geographic facts that are relevant to determination of navigability. The task force will also study the appropriate statutes and court decisions and provide advice on how the law should be applied to the facts.

The task force will report its findings of fact and law jointly to the Commandant of the Coast Guard and to me by April 16. Within three days from receipt of the report of the task force, the Commandant will decide whether to uphold, modify or reverse his initial determination. If the Commandant determines that all or part of the water system is navigable, and if such a determination is inconsistent with the recommendation of the task force or of any member thereof, then the task force or that member may appeal to me for reconsideration within three days. If necessary, I will render a final determination within three days after receipt of such an appeal.



This de novo review will be without any bias resulting from the September 2, 1975 determination of the Commandant. The findings of the task force will be made public, including any concurring or dissenting views of individual members.

The Attorney General of the State of New Hampshire has invited the Coast Guard to inspect commercial vessels currently in use on Lake Winnepesaukee. The Coast Guard has accepted that invitation and intends to inspect the appropriate vessels as soon as possible. This action is without prejudice to any final determination on navigability. The Coast Guard will not undertake any further action under the Federal Boat Safety Act until after the final resolution of this issue.

B



PRESS RELEASE

Secretary of Transportation William T. Coleman, Jr. announced today the establishment of a special task force to review and reconsider the issue of whether certain waters in the State of New Hampshire are navigable under the laws of the United States. These waters include Lakes Winnepesaukee and Winnisquam, New Hampshire, the Merrimack River, and interconnected waterways.

In deciding to reopen the issue for further consideration, the Secretary cited new factual evidence about the historical use and geography of these waters which were brought to his attention in a recent meeting with the Attorney General of the State of New Hampshire.

The task force will include representatives of the State Attorney General, the Coast Guard, and the General Counsel of the Department of Transportation. It will report on or before April 16 jointly to the Commandant and the Secretary.

In calling for the review, the Secretary said that "it is in the interest of a just and fair resolution of this issue that the question of navigability be reopened for reconsideration in order to provide an opportunity to assess these new facts and evidence and to review further the applicable law."

"It is important", the Secretary said, "in an issue involving the application of constitutional law to a complex set of facts that a complete and thorough review take place including the participation of those officials who have access to valuable historical information." Since the determination of navigability has substantial implications for the State, it is "only fair that the State have the opportunity to participate in a search for the facts and in the interpretation of the law."

