



**Before The
State Of Wisconsin
DIVISION OF HEARINGS AND APPEALS**

In the Matter of an Application by M&S
Adventures II, LLC for a Marina Permit to Place
Piers on the Bed of Klein Creek, Town of Quincy,
Adams County, Wisconsin

Case No. IP-WC-2007-1-0385CW

In the Matter of the Abatement Action on the
Motion of the Department of Natural Resources to
Reconfigure and Reduce the Density of Alleged
Illegal Piers Maintained by M&S Adventures II,
LLC Located on the Bed of Klein Creek, Town of
Quincy, Adams County, Wisconsin

Case No. ENF-WC-2008-1-68586

FINDINGS OF FACT, CONCLUSIONS OF LAW, ORDER AND PERMIT

PROCEDURAL HISTORY AND ALLEGATIONS

In January, 2000, M&S Adventures II, LLC (M&S Adventures) applied to the Department of Natural Resources for a Marina Permit to Place Piers on the Bed of Klein Creek. The proposed project is located in the SW $\frac{1}{4}$ of the NW $\frac{1}{4}$ of Section 28, Township 17 North, Range 5 East, Town of Quincy, Adams County, Wisconsin. The application to the Department was withdrawn on March 2, 2001, at the applicant's request.

Beginning in May of 2007, the Department of Natural Resources received public complaints about M&S Adventures' piers. The complaints alleged that the piers had been unlawfully placed without permits.

On May 10, 2007, Department of Natural Resources staff conducted a field investigation and observed 15 pier structures comprising about 108 berths on about 998 feet of frontage. M&S Adventures was informed that the marina exceeded the reasonable use threshold. M&S Adventures was advised to either downsize to meet pier planner requirements or submit an after-the fact individual permit application to the Department of Natural Resources.

The Department issued a Notice of Noncompliance to M&S Adventures on July 26, 2007, alleging that the M&S Adventures property contained 15 pier structures that could accommodate an estimated 108 boats, that the piers had been placed without the required DNR permits, that the piers exceeded the reasonable use standards for numbers

of berths for the amount of shoreline, and appeared to interfere with adjacent owners' and the public's rights of navigation. M&S Adventures were asked to submit an after-the fact individual pier permit by July 27, 2007, or the Department would file for an abatement hearing pursuant to Wis. Stat. § 30.03(4). On July 31, 2007, the Department received an application for an after-the-fact permit from M&S Adventures.

A public informational hearing was requested and held by the Department on April 29, 2008.

On May 30, 2008, the Department made a determination to only approve a portion of the after-the fact application that was submitted.

On June 18, 2008, the Department received a petition for a contested case hearing from Attorney Donald Leo Bach and Shawn Bula, on behalf of M&S Adventures. The Department granted a contested case hearing pursuant to Wis. Stat. §§ 30.209 and 227.42. Further, pursuant to Wis. Stat. § 30.209, the Department referred the request for stay to the Division of Hearings and Appeals.

On September 9, 2009, the DNR forwarded all of these related matters to the Division of Hearings and Appeals for hearing. On October 8, 2009, a telephone prehearing conference was held at which the DNR and MS Adventures advised that they were close to a settlement of all issues in their dispute. On October 23, 2009, the DNR and M&S Adventures II, LLC reached a tentative Stipulated Settlement Agreement, which was forwarded to all parties. The settlement provides for a total of 79 slips on a total of seven piers, in a reconfigured location described in Attachment One. Pursuant to the Scheduling Order, any objections to the Stipulation were required to be filed by October 30, 2009. Several objections were received. The objecting parties were determined to have the burden of proof to oppose the Stipulated Settlement, pursuant to Wis. Admin. Code HA 1.12(3)(b).

Pursuant to due notice, a hearing was held at Adams, Wisconsin on December 7, 2009. The hearing was completed with closing arguments taken by telephone on January 6, 2010.

In accordance with Wis. Stat. §§ 227.47 and 227.53(1)(c), the PARTIES to this proceeding are certified as follows:

Wisconsin Department of Natural Resources, by

Attorney Edwina Kavanaugh
Department of Natural Resources
P. O. Box 7921
Madison, WI 53707-7921

M&S Adventures II, LLC, by

Attorney Donald Leo Bach
DeWitt, Ross and Stevens, S.C.
Two East Mifflin Street, Suite 600
Madison, WI 53703-2865

Attorney Stanley Thomas
Mallery & Zimmerman, S.C.
P. O. Box 626
Stevens Point, WI 54481-0626

Lakewood Homeowners Association, by

Judith Sachs, Secretary/Treasurer
P. O. Box 7
Arkdale, WI 54613

Petenwell-Castle Rock Property Owners Association, Inc., by

Virgil Miller
2072 Wisconsin Street
Friendship, WI 53934

William Schernmerhorn
1870 Van Thiel Road
Friendship, WI 53934-9693

William A. Roberts
2329 West 18th Drive
Friendship, WI 53934

Kenneth E. Levake
2003 Czech Lane
Arkdale, WI 54613

Ron Lyman
709 West 17th Drive
Arkdale, WI 54613

Terrance King
8460 19th Avenue
Necedah, WI 54646

ADOPTED FINDINGS OF FACT

1. On July 31, 2007, the Department received an after-the-fact application for a marina pier permit under Wis. Stat. § 30.12 and Wis. Admin. Code ch. NR 326 from M&S II, LLC, a limited liability company. On January 4, 2000, the Department had received an earlier marina pier permit application for the same site from M&S Adventures, LLC, another limited liability company, but on February 28, 2001, M&S withdrew that application. Mark. S. Bula, 349 County Highway M, Coloma, WI 54930, is the registered agent for both LLCs.

2. In its 2007 application, M&S II sought an after-the-fact permit for 15 piers and 1 wharf (95 berths total) along 1075 feet of frontage on Klein Creek in the Town of Quincy, Adams County, also described as the SW1/4 NW1/4, Section 29, Township 17 North, Range 5 East, Town of Quincy, Adams County. The property address is 2332 County Road Z, Friendship, WI 53934. M&S II later expanded its plan to 101 berths on 4- to 6-ft.-wide floating piers of aluminum and plastic attached to shore, anchored to the creek bed with spud poles, and configured as follows: six cluster piers along the east-facing shore off the north part of the property, with main stems ranging from 44 ft to 115 ft in length and with 4 to 10 transverse fingers, each 20 ft long; one 6 ft by 10 ft wharf off the end of the peninsula or dredge remnant; nine linear piers (no fingers) arrayed off the south-facing shore along the south part of the property, with main stems ranging from 25 ft to 32 ft in length.

3. On April 29, 2008, and pursuant to Wis. Stat. § 30.208(3), the Department held a public informational hearing in the Quincy Town Hall. Twenty-seven persons filled out appearance slips. M&S II and a previous property owner gave statements regarding the proposed piers, the property's history, and its past and current use. Seven members of the public and an Adams County Land and Water Conservation Department representative made statements.

4. On May 30, 2008, the Department issued Permit # IP-WC-2007-1-0385CW to M&S II authorizing 13 piers with 38 berths total and requiring the piers to be concentrated along the shoreline to minimize impacts on navigation and habitat.

5. On June 18, 2008, M&S II requested a contested case hearing under Wis. Stat. § 30.209(1m) (a)2. and judicial review under Wis. Stat. § 227.52 to review permit conditions that required it to change the configuration and reduce the berthing density of certain piers and remove other piers to attain the configuration and berthing density authorized in the permit.

6. By letter dated July 18, 2008, DNR granted the request for a contested case hearing before an Administrative Law Judge ("ALJ") in the Department of Administration Division of Hearings & Appeals ("DHA"). By order issued July 28, 2009, pursuant to a stipulation between M&S II and DNR, the circuit court stayed the judicial review proceeding in view of the grant of a hearing.

7. Effective April 16, 2008 – 45 days before DNR issued Permit # IP-WC-2007-1-0385CW – 2007 Wis. Act 204 created Wis. Stat. § 30.12 (1k). Sub. (1k) exempts certain piers placed by riparian owners from permit requirements under Wis. Stat. § 30.12, creates a process by which riparian owners may register such piers, and prohibits DNR from taking enforcement action against such piers unless enforcement action was initiated by DNR before February 6, 2004 and remained pending on April 16, 2008.

8. DNR and M&S II disagree as to whether: (a) DNR initiated enforcement before February 6, 2004, and (b) the M&S II piers qualify for exemption and registration. DNR and M&S II concede that litigating that issue and the 16 issues for which M&S II was granted a contested hearing would consume substantial time and resources of DNR, M&S II, DHA, and the circuit court. Accordingly, in the interest of resolving the matter without litigation, DNR and M&S II agreed to postpone sending the case to DHA pursuant to Wis. Stat. § 30.209(1m)(g) to try to settle the case by stipulation pursuant to Wis. Stat. § 227.44(5). On September 4, 2009, DNR sent the case to DHA to schedule a pre-hearing telephone conference in the event the parties could not stipulate to settlement. DHA scheduled the conference call for October 8, 2009.

9. During settlement discussions, DNR and M&S II discussed and evaluated the historical use and number of piers and berths that existed at the site, the activities and actions undertaken by DNR and M&S and M&S II representatives from January 2000 to the present, the changes in Wis. Stats. ch. 30 during that period, various pier configurations and berthing densities to address DNR concerns about navigation and habitat, and the position of the U.S. Army Corps of Engineers (“COE”) regarding the project. (On August 31, 2009, the COE issued Letter of Permission #2000-02128-KDZ authorizing M&S II to maintain the marina piers in the same berthing density and configuration allowed by this stipulation.)

10. Based on these facts and after discussion, DNR and M&S II agreed, pursuant to Wis. Stats. § 227.44(5), to resolve the petitions for administrative and judicial review by stipulation and settlement in the interest of avoiding litigation and the time, risks, and expenses that litigation entails.

11. The project, as permitted by this Stipulation, Attachment A, Attachment 1, and the attached proposed DHA Order Approving Stipulation and Settlement and Issuing Marina Permit, will comply with all applicable requirements of Wis. Stat. §§ 1.11 and 30.12 of the Wisconsin Statutes and Wis. Admin. Code ch. NR 326. DNR and M&S have completed all procedural requirements.

12. DNR and M&S II agree that DNR has authority under the above indicated statutes and administrative codes to issue a permit for the construction and maintenance of this project. DNR and M&S II also agree that the Division of Hearings and Appeals has authority to hear contested cases, informally dispose of contested cases without hearing by stipulation, and issue necessary orders related to applications for marina permits pursuant to Wis. Stat. § 227.43(1)(b), 227.44(5), and Wis. Admin. Code ch. NR 326.

12. DNR and M&S II agree to ask the ALJ to issue an order approving this stipulation and settlement and issuing revised permit # IP-WC-2007-1-0385CW pursuant to the terms of this Stipulation and Settlement, and have attached a proposed DHA Order Approving Stipulation and Settlement and Issuing Marina Permit. M&S II owns riparian property in the SW1/4 of the NW1/4 of Section 29, Township 17 North, Range 5 East, Town of Quincy, Adams County, Wisconsin. The property fronts on a tributary of the Wisconsin River known as Klein Creek. The water level at this location is higher than the natural, historic level, and the water surface is expanded, because of the impoundment created by the Castle Rock Dam. The property consists of one non-riparian parcel and three riparian parcels, acquired at various times since 2000. The northern of the three riparian parcels, designated as # 26-750 in Adams County land records, contains 1.98 acres and 213 ft of shoreline frontage. The middle riparian parcel, designated as # 26-751 in Adams County land records, contains 0.96 acres and 137 ft of shoreline frontage. A peninsula, sometimes referred to as a “dredge remnant,” extends eastward from this lot. Evidence provided by M&S II indicates that some of the southwest part of the peninsula is included in this parcel. If the rest of the peninsula is shown to be included in the parcel, the shoreline frontage would increase to 310 ft. The southern of the three riparian parcels, designated as # 26-752 in Adams County land records, contains approximately 1.38 acres and 557 ft of shoreline frontage. The total shoreline frontage claimed by the applicant is 1075 ft.

13. M&S Adventures, LLC (“M&S”), another limited liability company that previously owned the southernmost (# 26-752) of the 3 parcels, had applied for a permit for piers at that parcel in January, 2000. The configuration applied for comprised about 43 berths on that parcel. On February 22, 2000, the U.S. Army Corps of Engineers issued a general permit for three piers with eight finger piers each, extending no more than 75 feet from the shore. M&S revised the plan several times in the following months. On February 28, former counsel for M&S informed DNR that M&S was withdrawing its permit application, and on March 8, 2001, the Department advised M&S that the application was withdrawn. In July, 2001 the U.S. Army Corps of Engineers, at the applicant’s request, withdrew the February 2000 general permit and issued a permit for six piers of various shapes comprising about 48 berths, to extend no more than 66 ft from the shore.

14. In May 2007, the Department began receiving complaints about piers at the 3 parcels now owned by M&S II. The complainants alleged that the piers had been illegally placed without permits; interfered with navigation; caused air, water, and noise pollution; resulted in increased boat traffic that interfered with swimmers and small craft such as canoes and paddle boats; unreasonably appropriated public waters for private purposes; constricted the channel; and resulted in increased shading and boating activity that damaged aquatic vegetation and habitat.

15. On May 10, 2007, DNR Water Management Specialist Terry Kafka visited the site, saw 15 pier structures with approximately 108 boat slips, and informed

M&S II that the marina was not exempt from permitting and needed a marina pier permit to remain in place.

16. On June 26, 2007, the Department issued a Notice of Noncompliance to M&S II alleging that the property contained 15 unpermitted pier structures that could accommodate an estimated 108 boats, that the piers were not exempt from permitting, and that if M&S II did not submit a permit application DNR would seek an abatement hearing under Section 30.03, Wisconsin Statutes, and ask the Administrative Law Judge (“ALJ”) to order the piers reduced to a size and configuration that would be exempt from permitting.

17. In July, 2007, the Department received a petition dated May 18, 2007, from 64 persons alleging that the existing piers had destroyed shoreline vegetation and spawning areas; impaired public rights to fish in the waterway; and created a safety concern because of crowding. The petitioners also alleged that shoreland vegetation had been removed to allow access to the piers, thereby destroying the natural scenic beauty of the shoreline.

18. On or about July 25, 2007, M&S II submitted an after-the-fact permit application for piers featuring 16 pier structures and 95 berths on 1075 ft of frontage after consulting with the Department. By e-mail dated October 16, 2007, to other DNR staffers, DNR Water Management Specialist Terry Kafka noted that “for water dependent commercial use, we have allowed up to 10 slips per 100 feet of riparian frontage. M&S could potentially place 100 slips ... but the limiting factor at this site is that the current configuration poses a hazard to navigation as well as the water quality and fishery impacts.”

19. M&S II revised its plans in December 2007 and January 2008 to a configuration comprising 101 slips. By e-mail dated January 10, 2008, Kafka told M&S “I reviewed the [December 2007] pier layout you submitted.... Please provide ... the total number of boat slips ... The total number cannot exceed 100 slips or 10 slips per 100 feet of linear shoreline owned.... When I receive the updated design layout ... [that] meets ... [this] criteria, I will issue a letter of complete application with a Public Notice.”

20. Beginning in March, 2008, the Department received letters favoring the current pier configuration and alleging that the property, including the piers, is better maintained than in the past; most boat traffic in Klein Creek does not originate at the M&S II piers; the M&S II facilities support the local economy and relieve pressure on public boat launches; fishing is good in Klein Creek; and many fish are caught around and under the M&S II piers.

21. On April 29, 2008, and pursuant to Wis. Stat. § 30.208, the Department held a public informational hearing on the permit application in the Quincy Town Hall. Twenty-seven persons filled out appearance slips. M&S and a previous property owner provided statements relative to the proposal for the piers, the history of the property, and

its past and current use. Seven members of the general public and a representative of the Adams County Land and Water Conservation Department made statements.

22. In May 2008, DNR staff evaluated the M&S II site and concluded that:

Favorable physical conditions for plant growth, (sun exposure, depth, and lack of dredging disturbance) were best developed in the area of Klein Creek where the M&S II piers are located;

Shading by piers and boats in this shallow area impaired the aquatic plant community, and thus the aquatic habitat;

On large systems with limited littoral area like the Castle Rock flowage, tributaries like Klein Creek provide exceptional areas for fish and wildlife, protect water quality due to their ability to support high quality aquatic plants, serve as concentrated nurseries for young of the year fish and wildlife for the flowage, and protect water quality by filtering nutrients and sediment to prevent them from entering the flowage;

The piers then in place would tend to suppress aquatic plant growth;

The Klein Creek bay habitat is important to the Castle Rock Flowage because it is protected from wind and waves, allowing aquatic vegetation to grow in the shallows; such vegetation is important for forage species, panfish, northern pike, large- and smallmouth bass, and walleye; in the early 1980s more than 40 fish cribs were installed in the areas; and the area is very popular for ice- and open water anglers;

The piers significantly reduced the area where boats could navigate in the vicinity, especially near the public boat landing immediately north of the M&S II property.

23. On May 30, 2008, the Department issued Permit # IP-WC-2007-1-0385CW to M&S II authorizing 38 boats on 13 pier structures concentrated along certain areas of the shoreline to minimize impacts on navigation and habitat.

24. On June 18, 2008, M&S II challenged such permit as arbitrary, unreasonable, and confiscatory, both in Adams County circuit court and by way of a request for an administrative contested case hearing before the Wisconsin Department of Administration Division of Hearings and Appeals.

25. Subsequently, M&S II and DNR engaged in extensive settlement discussions. They viewed aerial photos of the 3 parcels to try to determine past configurations and densities of piers at the site, and discussed: whether amendments to Section 30.12, Wisconsin Statutes, effective April 16, 2008, would allow the number of boat slips M&S II wished to place; the historical uses of the site; the benefit of free public

access to the site for shore-fishing; the configurations and densities of other permitted marinas in the Castle Rock area; various documents in DNR files; representations that M&S alleged had been made by DNR staff during the permit application process; and whether and where piers could be placed and configured to reduce impacts on aquatic vegetation, habitat, and navigation, especially near the public boat ramp north of the M&S property. This permit is issued as a result of those settlement discussions.

26. As part of the settlement, M&S II has limited and substantially revised its original application to place 16 pier structures with 101 boat slips on the bed of Klein Creek and has agreed to allow public access to the site without charge for shore-fishing. DNR has agreed to increase the total number of permitted boat slips from 38 to 79, provided most of the piers are concentrated along the southern shore to provide longer undisturbed stretches of shore where aquatic vegetation and habitat could be retained and regenerated, and provided that the density, length, and location of the pier nearest the public boat landing is revised to reduce the impacts of that pier on navigation near the boat ramp. The number and configuration of these piers as revised and approved by the Department is shown in Attachment 1.

Department staff have investigated the project site and have evaluated the application, historic use of the site, the value to fish and other aquatic life, navigation issues, and the public benefits of the marina, and have determined that the project, if constructed in accordance with this permit, will not adversely affect water quality or materially reduce flood flow, will not increase water pollution in surface waters, will not obstruct navigation, will not cause environmental pollution as defined in Section 281.02(6m), Wisconsin Statutes, and will not be detrimental to the public interest.

27. DNR and M&S II agree that issuance of a permit by the ALJ shall resolve both the M&S II request for an administrative hearing and stay under Wis. Stat. § 30.209 and ch. 227 and the DNR request for an administrative order after hearing pursuant to Wis. Stat. s. 30.03(4). DNR and M&S II agree that issuance of such permit by the ALJ shall constitute their assent to withdraw the original Permit # IP-WC-2007-1-0385CW, lift the circuit court stay, and dismiss with prejudice the M&S II petition for judicial review of the original Permit, and that M&S II or DNR may ask the circuit court to issue a dismissal order based on such assent. DNR and M&S II agree to waive any and all administrative and judicial appeal or review rights related to the revised permit and this stipulation and settlement. DNR and M&S II agree that if anyone other than DNR or M&S II obtains administrative or judicial review of this stipulation and settlement or the permit issued pursuant thereto, neither DNR nor M&S II shall seek to modify this stipulation or the permit issued pursuant thereto in such proceeding unless DNR and M&S jointly agree to such modification.

28. This stipulation and settlement is intended to be and shall be construed as a compromise for valuable consideration of the disputed claims of DNR and M&S II.

29. As provided by Wis. Stat. § 30.298, any violations of the issued revised permit or the terms of this stipulation and settlement shall be treated as violations of Wis.

Stat. ch. 30 and enforced in accordance with the provisions therein and in Wis. Stat. § 814.75.

30. This Stipulation and Settlement shall be effective and binding upon DNR and M&S II upon signing by the undersigned and the subsequent issuance of the attached revised permit by the Administrative Law Judge.

31. This Stipulation applies to DNR and M&S II and all their employees, contractors, agents, servants, officers, and successors in interest.

ADDITIONAL FINDINGS OF FACT

32. The only issue of any significant merit raised by the objectors related to possible boating traffic congestion near the site. However, DNR Area Water Management Specialist Will Stites, Phd., testified that he was confident that there was sufficient clearance to allow for ingress and egress of boats from the piers without materially obstructing navigation on the existing pattern of boating traffic on Klein Creek. Dr. Stites noted that there was more clearance than there appears to be between the end of Pier F and the culvert opening that allows boating traffic to navigate between Klein Creek and the Castle Rock Lake Flowage. (See: Attachment 1) Stites referenced a 2005 aerial photo which demonstrated that Pier F does not extend to the culvert opening, but only as far as the end of the wing-wall on the County Road Z bridge structure where the culvert is located. (See: Ex. DNR 61, p.2) Even with a large eight-foot wide boat moored at the end of Pier F, there would still at least three feet of clearance for boating traffic. Further, boating traffic passing under the bridge is limited to slow-no-wake speed. (Stites; Ex. DNR 61, p.3) Stites was not concerned about any material obstruction of boating traffic under the configuration approved in Attachment 1 below. Further, the U.S. Army Corps of Engineers, which has much expertise in navigational issues, also approved the same configuration in a permit issued on August 29, 2009. (Ex. 16) The objectors have not shown that the new pier configuration will materially obstruct navigation on Klein Creek, nor between the creek and the Castle Rock Lake flowage. (Stites)

33. The objectors presented no expert testimony to rebut the preponderance of the evidence produced by the DNR and M&S Adventures that the reconfigured pier would meet all Chapter 30 and related requirements. (Stites) Dr. Stites was persuasive that the reconfigured pier layout would be better for shoreline habitat because of reduced shading and the fact that the piers are concentrated along the southern shore. First, the new configuration allows for a larger section of the best habitat areas between piers B and C to be open and undisturbed by either shading or boating activity. Secondly, the new area where the majority of boats will be concentrated does not have as significant a habitat value as the earlier configuration. While the Stipulated Permit allows for a greater number of boats, it has fewer pier structures and concentrates them in an area that does not have the same aquatic vegetation or habitat value as areas occupied by piers under the terms of the Proposed 2008 Permit, or as placed at the time the DNR undertook its investigation.

34. The Division adopts the Stipulated Settlement between the DNR and M&S Adventures Association, Inc because neither the Petenwell-Castle Rock Property Owners nor the other objectors have demonstrated that the pier configuration in the agreement and the permit as issued below does not meet the standards set forth in Section 30.12(3m), Wisconsin Statutes. Rather, the DNR and M&S Adventures Association, Inc have demonstrated that the pier structures will not materially obstruct navigation and will not be detrimental to the public interest.

35. The structures will not materially reduce the flood flow capacity of Klein Creek.

DISCUSSION

The principal parties to this proceeding, the DNR and M&S Adventures, have reached a reasonable resolution of their differences which meets all Chapter 30 permit standards. They presented unrebutted expert testimony that the public marina would continue to provide public access while at the same protecting valuable fishery habitat areas without materially obstructing navigation.

The objectors appeared at hearing as well-intentioned users of the creek and lake, but they fell far short of carrying their burden of proof in this matter. They made much of the fact that the DNR had originally permitted only 38 slips on 13 pier structures in its May 30, 2008 determination, while the Stipulated Permit approved below allows for a total of 79 pier slips on 7 pier structures. It should first be noted that in 2007, when this matter was commenced, the DNR found that there were 15 piers accommodating up to 105 boats. The permit below is thus far less of an encroachment on public waters.

Further, the purpose of Chapter 30 is to protect the public rights and public interest in public waterways and balance the same with the rights of private riparians. The public marina provides a public benefit by renting out slips on a seasonal basis which allows non-riparians to gain access to public waters. The Department has long allowed more slips to public marinas that provide this benefit than to purely private riparians that do not provide public access. The permit also requires that the private riparian allow public fishing at the site and provides for 4 to 6 (based upon the size of the boats) public access convenience slips which will not be rented out on a seasonal basis. Further, the M&S Adventures structures as authorized in the Stipulated Permit approved below have less impact upon the public interest in maintaining fishery, plant and habitat values than did the 2008 permit which authorized fewer boats but more pier structures. The reconfigured design concentrates the piers in the least valuable habitat area. The permit also requires that the pier nearest the heavily-used public boat ramp be moved and reduced in density and length. The public interest comes out very well in the balancing of public and private rights in this matter.

Both the M&S Adventures and the DNR recognized that there were risks of a less favorable outcome based upon recent changes to Chapter 30. These allow for a type of “grandfathering” which may have permitted an even greater number of slips to have been approved. Taking these litigation risks into account, the parties agreed to the Stipulated Permit approved below.

The only significant relevant issue raised by the objectors related to the potential for boating congestion now that the piers are concentrated in the south area closest to the culvert opening under the County Road Z bridge structure. Dr. Stites was convincing that the reconfigured piers would not materially obstruct navigation in this area. However, if mooring wide boats at the end of Pier F becomes a problem, it is expected that M&S Adventures will exercise common sense to protect these boats and others navigating Klein Creek. Given Stite’s assurances that there will be some cushion for such boaters, the Division will leave it to common sense and not a formal amendment of the terms of the permit as agreed to by the Department and M&S Adventures. Obviously, if this becomes a boating safety issue, the Department has also retained the authority to require an amendment of the permit under paragraph 9 below.

The Stipulated Permit meets all Chapter 30 standards and therefore must be issued.

CONCLUSIONS OF LAW

1. The Division of Hearings and Appeals has authority under Wis. Stat. §§ 30.12, 227.43(1)(b), and 227.44(5) and in accordance with the foregoing Stipulated Findings of Fact, to issue a permit for the construction and maintenance of structures subject to the conditions specified.

2. The Department and the applicant have completed all procedural requirements and the project as permitted will comply with all applicable requirements of Sections 1.11, 30.12, and 30.13, Wisconsin Statutes, and Chapters NR 102, 103, 115, 116, 117, 150, 299, and 326, Wisconsin Administrative Code.

3. Wisconsin Stat. § 30.12(3m) provides that:

The department shall issue an individual permit to a riparian owner for a structure or a deposit pursuant to an application under par. (a) if the department finds that all of the following apply: 1. The structure or deposit will not materially obstruct navigation; 2. The structure or deposit will not be detrimental to the public interest; 3. The structure or deposit will not materially reduce the flood flow capacity of a stream.

The proposed facility described in the Stipulated Findings of Fact constitutes a structure within the meaning of Wis. Stat. § 30.12.

4. M&S II has met the standards for issuance of the permit, with the conditions described herein.

5. This Revised Permit supercedes Permit # IP-WC-2007-1-0385CW dated May 30, 2008.

6. The marina pier project is a type III action under Wis. Admin. Code § NR 150.03(8)(f)(4). Type III actions normally do not have the potential to cause significant environmental effects. The Department has met its procedural obligations pursuant to NR 150 and § 1.

ORDER AND PERMIT

M&S Adventures II, LLC (“M&S II”), is hereby granted a permit under Section 30.12, Wisconsin Statutes for a marina, and authorized to place piers/wharves on the bed of Klein Creek in the Town of Quincy, Adams County, also described as being in the SW1/4 of the NW1/4 of Section 29, Township 17 North, Range 5 East, (street address: 2332 Cty Z, Friendship, WI 53934), subject to the following conditions:

1. You are authorized to place pier/wharf structures (7 structures; 79 boat slips) as shown in the attached “Marina Layout” diagram (Attachment 1).
2. You must reconfigure your present structure/pier slip configuration in accordance with Attachment 1 by May 28, 2010 or such other date agreed to by the Department. Prior to that time, you may place structures and slips in the configuration in place during the 2008 boating season; however, you shall limit use of the same to no more than 7 structures and a total of no more than 79 boat slips. 4 to 6 slips (based upon the size of the boats) shall be designated as public access convenience slips which will not be rented out on a seasonal basis.
3. You must notify Will Stites (or designee/replacement) at 715-421-7815 before work to reconfigure any structures and again not more than 5 days after reconfiguration is complete.
4. You are responsible for obtaining any permit or approval that may be required for your project by local zoning ordinances or by the U.S. Army Corps of Engineers.
5. Upon reasonable notice, you must allow access to the site during reasonable hours to any Department employee who is investigating the project’s construction, operation, maintenance or permit compliance.
6. This permit does not authorize any piers/wharves other than those specifically described in this permit. If you wish to alter the project or permit conditions, you must first obtain written approval of the Department.
7. This permit authorizes future maintenance of the piers/wharves; however, no change may be made to the type of materials, number of slips, or configuration without written approval from the Department or amendment of this permit.
8. The determination that the number of boat slips and pier configurations approved in this permit do not materially obstruct navigation, are not detrimental to the public interest, will not materially affect the flood flow capacity of a stream, and are a

reasonable riparian use of adjacent public waters is based partly on the amount of shoreland you own at this location when the permit is issued. If you reduce the amount of shoreland you own at this location, the Department may seek to modify this permit pursuant to s. 30.2095(2), Wis. Stats.

9. The Department may modify or revoke this permit pursuant to Section 30.2095(2), Wisconsin Statutes, if M&S II does not complete the same according to the terms of the permit, or if the Department determines that the activity is detrimental to the public interest. Revocation shall provide opportunity for hearing pursuant to Section 227.51(3), Wisconsin Statutes.
10. You must post a copy of this permit at a conspicuous location on the site, visible from the waterway, for at least five days prior to reconfiguration of the structures authorized by the permit, and remaining at least five days after reconfiguration. You must also have a copy of the permit available at the project site at all times until the reconfiguration is complete.
11. Your acceptance of this permit signifies that you have read, understood and agree to follow all conditions of this permit.
12. You must submit a series of photographs to the Department within one week of completion of reconfiguration. The photographs must be taken from different vantage points and depict all work authorized by this permit.
13. You, your agent, and any involved contractors or consultants may be considered a party to the violation pursuant to Section 30.292, Wis. Stats., for any violations of Chapter 30, Wisconsin Statutes or this permit.
14. Construction shall be accomplished in such a manner as to minimize erosion and siltation into surface waters. If needed, erosion control measures such as silt fence and straw bales must meet or exceed the standards in the Wisconsin Construction Site Best Management Practices Handbook.
15. All equipment used for the project including but not limited to tracked vehicles, barges, boats, silt or turbidity curtain, hoses, sheet pile and pumps, if any, shall be decontaminated for invasive and exotic viruses and species prior to use and after use. Specific disinfection measures are required on infested waters and must be taken prior to moving to another waterbody. The most current de-contamination protocols and a list of infested waters can be found at the following website <http://dnr.wi.gov/> under the Topic "VHSv."

If your project is on a non-infested water, the following steps should be taken every time you move your equipment to avoid transporting invasive and exotic viruses and species. To the extent practicable, equipment and gear used on infested waters should not be used on other non-infested waters.

Inspect and remove aquatic plants, animals, and mud from your equipment.

Drain all water from your equipment that comes in contact with infested waters, including but not limited to tracked vehicles, barges, boats, silt or turbidity curtain, hoses, sheet pile and pumps.

Dispose of aquatic plants, animals in the trash. Never release or transfer aquatic plants, animals or water from one waterbody to another.

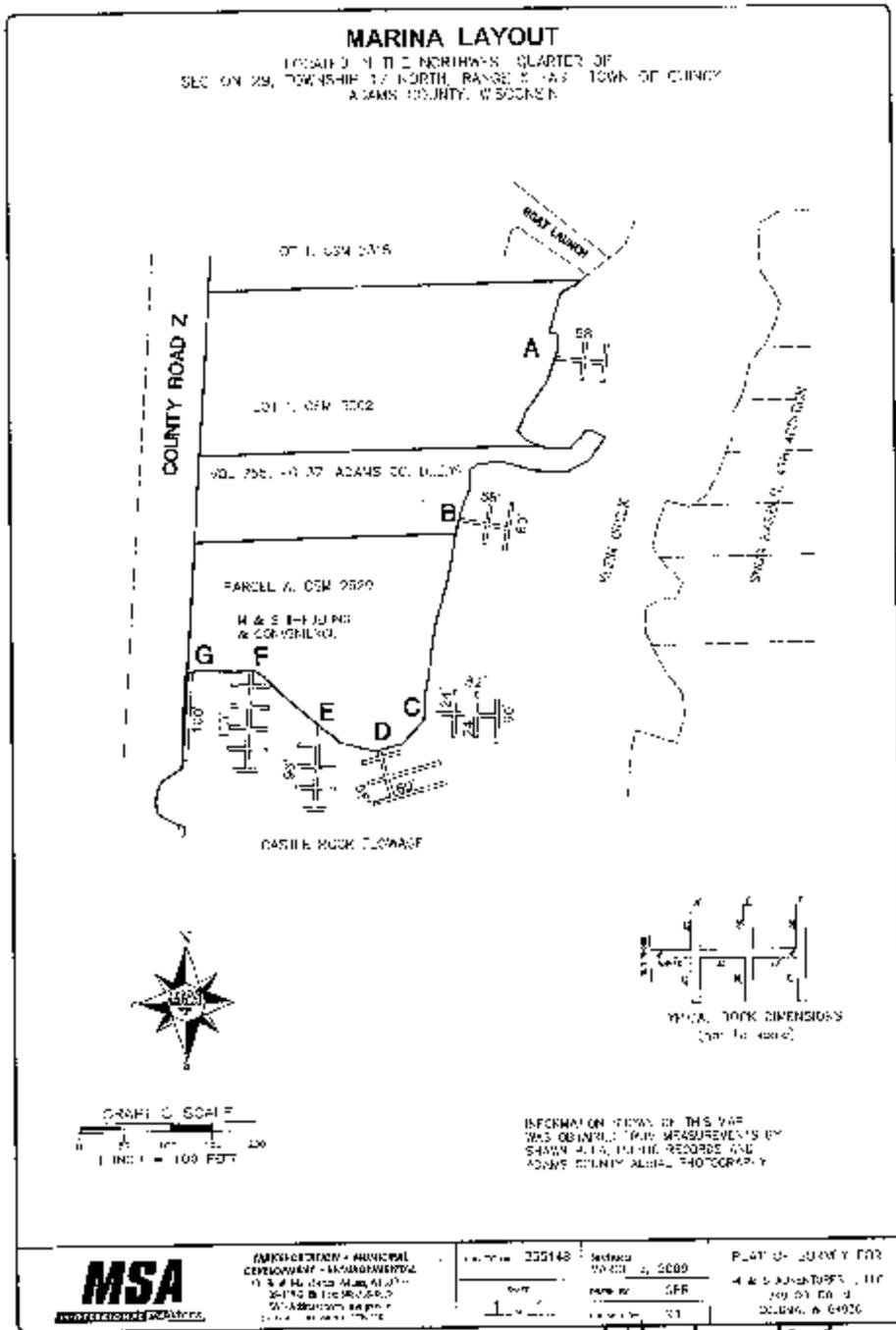
Wash your equipment with hot (>104° F) and/or high pressure water OR allow your equipment to dry thoroughly for 5 days.

16. No structures such as benches, covers, storage boxes, or shelters of any kind shall be constructed on or permanently attached to the piers/wharves.
17. Adequate lighting shall be provided either on shore or on the piers/wharves to promote safe access during darkness.
18. Electrical, fueling, and waste handling facilities must comply with applicable safety and environmental protection regulations.
19. You must charge no more than a reasonable fee for pier slip rentals. Reasonable fees are slip fees charged the general public at similar facilities in the vicinity adjusted for any unique features or facilities provided at your marina. You must maintain a first come first serve waiting list and advise those individuals on the list of any available slips. This waiting list must be made available to Department personnel upon request. You must seasonally advertise the availability of slips in the local paper whenever the waiting list is depleted.
20. M&S II agrees to provide free reasonable access to allow fishing by the public without charge at designated sites on its property, other than in the immediate vicinity of the fueling and convenience piers. In this regard, the parties intend that the immunity provided to owners of property provided by Wisconsin's recreational immunity statute, Section 895.52, Wisconsin Statutes, be applicable to include any use by the public for fishing and attendant recreational activities on M&S II property. M&S II may post signage, as appropriate, designating the hours and conditions upon which such site or sites may be accessed and used.

Dated at Madison, Wisconsin on February 5, 2010.

STATE OF WISCONSIN
DIVISION OF HEARINGS AND APPEALS
5005 University Avenue, Suite 201
Madison, Wisconsin 53705-5400
Telephone: (608) 266-7709
FAX: (608) 264-9885

By: _____
Jeffrey D. Boldt
Administrative Law Judge



Attachment 1

NOTICE

Set out below is a list of alternative methods available to persons who may desire to obtain review of the attached decision of the Administrative Law Judge. This notice is provided to insure compliance with Wis. Stat. § 227.48 and sets out the rights of any party to this proceeding to petition for rehearing and administrative or judicial review of an adverse decision.

1. Any party to this proceeding adversely affected by the decision attached hereto has the right within twenty (20) days after entry of the decision, to petition the secretary of the Department of Natural Resources for review of the decision as provided by Wisconsin Administrative Code NR 2.20. A petition for review under this section is not a prerequisite for judicial review under Wis. Stat. §§ 227.52 and 227.53.
2. Any person aggrieved by the attached order may within twenty (20) days after service of such order or decision file with the Division of Hearings and Appeals a written petition for rehearing pursuant to Wis. Stat. § 227.49. Rehearing may only be granted for those reasons set out in Wis. Stat. § 227.49(3). A petition under this section is not a prerequisite for judicial review under Wis. Stat. §§ 227.52 and 227.53.
3. Any person aggrieved by the attached decision which adversely affects the substantial interests of such person by action or inaction, affirmative or negative in form is entitled to judicial review by filing a petition therefore in accordance with the provisions of Wis. Stat. §§ 227.52 and 227.53. Said petition must be filed within thirty (30) days after service of the agency decision sought to be reviewed. If a rehearing is requested as noted in paragraph (2) above, any party seeking judicial review shall serve and file a petition for review within thirty (30) days after service of the order disposing of the rehearing application or within thirty (30) days after final disposition by operation of law. Since the decision of the Administrative Law Judge in the attached order is by law a decision of the Department of Natural Resources, any petition for judicial review shall name the Department of Natural Resources as the respondent and shall be served upon the Secretary of the Department either personally or by certified mail at: 101 South Webster Street, P. O. Box 7921, Madison, WI 53707-7921. Persons desiring to file for judicial review are advised to closely examine all provisions of Wis. Stat. §§ 227.52 and 227.53, to insure strict compliance with all its requirements.