



Before The
State Of Wisconsin
DIVISION OF HEARINGS AND APPEALS

In the Matter of the Application of Terry Family
Conservancy, LLC for a Permit to Place a Pier on
the Bed of Middle Lake, Town of La Grange,
Walworth County
(Permit No. IP-SE-2013-65-00762)

Case No. DNR-13-047

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND PERMIT

The Terry Family Conservancy, LLC, filed an application with the Department of Natural Resources (Department) to place a pier on the bed of Middle Lake of the Lauderdale Lakes. On July 12, 2013, the Department issued a Pier Permit with limitations. On August 9, 2013, the Department received a request for a contested case hearing and request for a stay from Attorney Teague D. Devitt on behalf of Lauderdale Lakes Lake Management District. By letter dated August 19, 2013, the Department granted a contested case hearing and stay pursuant to Wis. Stat. §§ 30.209 and 227.42. On September 30, 2013, the Division of Hearings and Appeals received the Request for Hearing from the Department. Pursuant to due notice, a hearing was held in Elkhorn, Wisconsin on January 22, 23, and 24, 2014, before Mark F. Kaiser, Administrative Law Judge. The parties filed written arguments after the hearing. The last brief was received on May 23, 2014.

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

Terry Family Conservancy, LLC, Terry Family, by

Attorney William O'Connor and
Attorney Jessica J. Shrestha
Wheeler, Van Sickle & Anderson, S.C.
25 West Main Street, Suite 801
Madison, WI 53703

Lauderdale Lakes Management District, petitioner, by

Attorney Teague D. Devitt and
Attorney Russell W. Devitt
Soffa & Devitt, LLC
332 West Whitewater Street
Whitewater, WI 53190

Wisconsin Department of Natural Resources, by,

Attorney Megan E. Correll and
Attorney Michael J. Kowalkowski
Wisconsin Department of Natural Resources
Post Office Box 7921
Madison, WI 53707-7921

Issues

The issues as determined by the Department of Natural Resources are whether the proposed project is reasonable and not detrimental to the public interest in navigable waters, specifically:

- Whether the placement of a pier will materially obstruct navigation, including for recreational purposes;
- Whether impacts to fish and wildlife habitat are sufficiently minimized;
- Whether the pier will have a detrimental impact on natural scenic beauty;
- Whether the Department adequately considered potential cumulative impacts of similar projects in the future.
- Whether the proposed project will adversely affect water quality.

FINDINGS OF FACT

The following findings include findings based on the evidence presented at the evidentiary hearing and findings stipulated to by the parties (see exh. 28):

1. The Terry Family Conservancy, LLC, (Terry Family) owns real property in the Town of La Grange, Walworth County. The legal description of the property is in the SE ¼ of the NE ¼ of Section 34, Township 4 North, Range 16 East. The Terry Family property abuts Middle Lake.

2. The Terry Family property is part of a larger parcel that was subdivided by Robert and Judith Wright. The Wrights divided property they owned which had previously been a farm into approximately five acre lots. The Terry Family purchased lots 1, 2, and 3 of the subdivided property as delineated on certified survey map 4066. (exh. 121) All three lots abut Middle Lake. Lot 3 has approximately 1568 feet of shoreline, Lot 1 has approximately 475 feet of shoreline, and Lot 2 has approximately 155 feet of shoreline.

3. Middle Lake is part of the Lauderdale Lakes, a chain of three lakes. As its name suggests Middle Lake is in the middle of the chain, connecting Green and Mill Lakes. Middle Lake is a long and narrow lake with the long axis oriented in a northeast to southwest direction. Middle Lake has a surface area of 259 acres and a maximum depth of 42 feet (exh. 1, page 7).

4. The Terry Family property is on a peninsula located at a stretch of Middle Lake near the southwest end of the lake. One side of the peninsula is adjacent to a shallow strait with a narrow navigational channel. The other side of the Terry Family property abuts a lagoon known as the "Back Bay." The Wrights retained a lot which also has shoreline along the Back Bay. The Wrights have placed a pier adjacent to their property on the bed of the Back Bay.

5. Portions of Lauderdale Lakes have been designated by the Department as sensitive areas pursuant to Wis. Admin Code chap. NR 107 (exh.71). The section of Middle Lake that the Terry Family property abuts is an environmentally rich area with diverse habitat. In the Department's report, the area including the Terry Family property is identified as "Sensitive Area Site 3." Prior to subdividing the property, the Wrights had considered developing it. In 2002, a site visit was conducted by Department staff (Robert Wakeman, James Jackley, Pam Schense, Heidi Bunk, and Sue Beyler) to evaluate the potential impacts of the proposed development envisioned by the Wrights, including the placement of piers and boats.

6. The Department staff's evaluation found the area to be one of the highest quality shorelines in southeast Wisconsin due to the extreme diversity of aquatic habitat and the amount of undisturbed, pristine shoreline. The area contains a minimum of twenty different aquatic plant species, including wild rice. Wildlife utilizing the area included ducks, geese, cranes, egrets, bitterns, herons, sandpipers, songbirds, turtles, frogs, muskrats and mink. The water lilies, logs, stumps, and vegetation are used for cover by fish and wildlife. The vegetation provides spawning habitat as well as nursery and feeding areas for bluegills, sunfish, northern pike and largemouth bass. (exh. 4)

7. Based on the evaluation, Department staff recommended limiting the shoreline development within the designated sensitive areas in the Lauderdale Lakes. The recommendations included one that no piers be allowed. (see *e.g.* exhs. 3 and 4)

8. On May 16, 2012, Attorney William O'Connor, on behalf of the Terry Family, filed an application pursuant to Wis. Stat. § 30.12(3m) for a permit to place a pier on the bed of Middle Lake adjacent to the Terry Family property (exh. 123). Middle Lake is a navigable water body. No bulkhead exists at the project site. The application filed on May 16, 2012, will be referred as the "original application." The original application proposed placing the pier along the shoreline of the Terry Family property in the Back Bay.

9. The Back Bay is a shallow water body. The bed of the Back Bay is soft sediment that is easily disturbed by any boat traffic in the bay. A slow, no wake speed limit is set for the Back Bay. A navigational channel has been established through the Back Bay primarily by motor boats accessing the Wright pier. Any motor operating in the Back Bay churns up bottom sediment even in the navigational channel. During their site visits, Department staff noted that the motor on the Department boat was raised as high as possible to minimize disturbance to the sediment but to allow for forward motion. Despite these precautions, the boat stirred up large amounts of sediment as it entered the bay and as it approached the shoreline of the proposed pier area. (exh. 66)

10. The water depths in the bay ranges from one to three feet with an average of 1.5 feet. Soft sediments depths ranged from 1.25 feet to 3.5 feet. The proposed pier would have been located in a bay that is ringed by spatterdock, white water lily, swamp loosestrife, sedges, and soft-stem bulrush. The bed of the lake within the bay is covered with chara, Illinois pondweed, white water lily, spatterdock and spiny naiad. Other vegetation in the location of the proposed pier includes cattails, blue-green algae and filamentous algae. This area of the lake is largely undeveloped and serves as a refuge for amphibians, reptiles, shiners, aquatic insect larvae, young-of-the-year game fish, waterfowl, non-game forage fish such as darters, and shorebirds. (exh. 66)

11. In response to the filing of the original application, Department staff conducted a site visit on or about June 14, 2012. Department Fisheries Biologist Doug Welch commented that the Back Bay was a shallow, vegetated bay with a primarily silt and muck bottom substrate. Some sand and gravel was present. Several native species of floating, submergent and emergent aquatic vegetation were present. The project area provided spawning, nursery, cover and feeding habitat for northern pike, largemouth bass, bluegill, pumpkinseed and yellow perch. Walleye, smallmouth bass and black crappie also used the site for feeding. Establishment of piers and associated boating activities will disturb and re-suspend sediment and uproot aquatic vegetation resulting in permanent loss of spawning, nursery, cover and feeding habitat for these species. (exh. 65)

12. Departmental concerns about the adverse impacts of the proposed pier placement in the original application include:

1. Boats will further disturb the sediment and plant life as they move between the pier and open water.
2. Removal of plants will negatively impact and disturb aquatic insect larvae, non-game forage fish, young-of-the-year game fish and waterfowl.
3. Removal of native aquatic plants as well as boating to other parts of the lake will allow nonnative aquatic plant species to become established in the bay.
4. Suspension of sediment will disturb feeding of animals and impact oxygen uptake by aquatic animals.
5. Boat traffic will disturb shy shorebirds such as green-backed heron and may interrupt nesting.
6. The impact to native plants is not limited to the pier footprint; the pathway for ingress/egress will impact native aquatic plants.
7. The water is too shallow for navigating and is not the standard 3 feet common for other piers.

8. Shading out 504 square feet (the area of the proposed pier) of the lake bed will prevent and inhibit native aquatic plant growth. Allowing this pier will set a precedent and lead to cumulative impacts as more and more piers are added to this area.

(exh. 66)

13. Members of the public submitted written comments on the application to the Department Water Management Specialist Ms. Pam Schense in July and August of 2012. (exh. 77)

14. The Department held a public informational hearing on the original application on September 17, 2012. (exh. 81). At the September 17, 2012 hearing, members of the public submitted testimony on the original application. (exh. 79)

15. Because of the concerns raised regarding the placement of a pier as proposed in the original application, the Terry Family requested that the original application be withdrawn. By letter dated October 25, 2012, the Department acknowledged that the original application had been withdrawn. (exh. 122)

16. During the 2012 pier proposal permit review, Department staff reviewed the shoreline of all three lots owned by the Terry Family to determine if there was a location where the placement of a pier could potentially be authorized. A potential site was located at a “point” coming out of the bay, where the vegetation becomes sparser. Using a range finder, it was determined that the distance from the shore to the nearest border of the maintained navigational channel was approximately 46 yards. Staff determined that a pier could potentially be authorized in this location depending on the details of any subsequent pier proposal.

17. On March 18, 2013, the Terry Family submitted a cover letter and a revised application with supporting exhibits seeking an individual pier permit pursuant to Wis. Stat. § 30.12(3m) to place a pier on the at the site identified by the Department staff This application will be referred to as the “revised application.” (exhs. 51A-51O)

18. In the revised application, the location of the proposed pier is changed from the site in the Back Bay to a site on the “Point” at the southeasterly corner of Lot 3 of the Terry Family property. The precise location is shown on exhibit 51G. The proposed project includes the installation of a new pier with a maximum of two watercraft moored at the pier, including but not limited to boats and personal watercraft. The pier is proposed to be a maximum of five feet wide and approximately 140 feet long. (As discussed below, the permit provides that the exact length of the pier will be determined on-site as it is constructed and with Department approval.) The pier will be allowed to extend out to the nearest border of the maintained navigational channel, but may not extend into or impede navigation within the channel. Only two boats or personal watercraft can be moored at the pier and they must be moored on either side of the pier at the waterward end.

19. By letter dated April 15, 2013, the Department provided the Terry Family with a “Date of Closure Notification” indicating that the revised application was deemed complete. (exh. 52)

20. By letter dated April 18, 2013, the Department provided the Terry Family with a combined “Notice of Pending Application/Notice of Public Hearing” for publication in the Elkhorn Independent, indicating that the Department had made a tentative determination to approve the permit with modifications to the proposed activity. (exh. 53)

21. By letter dated May 14, 2013, attorneys for the Terry Family provided the Department with proof of publication of the “Notice of Pending Application/Notice of Public Hearing”. (exh. 54)

22. On May 14, 2013, the Department held a public information hearing on the revised application. (exhs. 54 and 76). At the May 14, 2013, hearing, members of the public submitted oral and written testimony on the Revised Application. (exhs. 76 and 78)

23. By letter dated July 12, 2013, the Department approved the revised application with conditions and provided the Terry Family with a copy of the permit. (exh. 55)

24. By facsimile transmission dated August 7, 2013, the Lauderdale Lakes Lake Management District (LLMD) filed a request for a Contested Case Hearing with the Department. (exh. 56) The LLMD is a municipal entity existing and operating under Chapter 33 of the Wisconsin Statutes, with offices located at N7498 Country Club Drive, Elkhorn, Wisconsin, 53121.

25. By letter dated August 19, 2013, the Department granted LLMD’s request for a Contested Case hearing and its request for a stay of the project. (exh. 57)

26. The proposed pier, if constructed according to the conditions in the following permits, will not materially obstruct navigation.¹ The area of Middle Lake adjacent to the Terry Family property is designated as a “slow, no-wake” zone and is shallow, limiting the amount of boating activity. Initially, Conservation Warden Jason Roberts recommended that the pier be placed seasonally so that it would not be a safety hazard for recreational users on the lake during ice conditions, such as snowmobilers. However, after the hearing, the parties engaged in further discussions regarding this condition. The concern was raised that placing and completely removing the entire pier structure annually was unnecessary and the disturbance to the bed of Middle Lake resulting from this activity would negatively impact that vegetation and habitat of

¹ The LLMD cites the testimony of kayakers that paddle in the near shore area by the Terry Family property and argues that the pier will obstruct the ability of canoeist and kayakers to navigate in this area. Obviously any structure will prevent any incident of navigation from occurring in the physical space where the structure exists. By statute a structure does not “materially obstruct navigation” if it does extend beyond the “line of navigation,” which is defined as a three foot depth of water. Wis. Admin Code § NR 326.03(4) provides “Line of navigation” means the 3 foot depth contour or a greater depth contour if required for boats in use or appropriate for use on the waterway, based on the normal summertime low levels on the waterway or summer minimum levels where established by department order.

the near shore area. No stipulation for amending the permit was reached by the parties; however, the Department and the Terry Family jointly requested the permit conditions be amended to require that only the waterward 32 feet of the pier be annually removed and the shoreward portion of the pier be placed permanently. Reflectors or other lighting material are required on the permanent section of the pier to make the pier visible to users of Middle Lake during the night in the winter.

27. The shoreline of the Terry Family property is currently undeveloped. The proposed pier will be the only structure along that shoreline. However, the opposite shoreline is highly developed and includes numerous piers. The Department determined that reasonable riparian use for the entire shoreline area owned by the Terry Family (Lots 1, 2, and 3) is one pier with two boats or personal watercraft. This determination balances the private rights of a riparian owner with the public rights in navigable waters. The placement of a Deed Restriction on Lot 3 and Deed Notices on Lots 1 and 2 and the restrictions placed on the project as detailed in the conditions of this permit will reduce potential cumulative impacts of similar projects that may be proposed in the future.

28. Although the entire shoreline of the Terry Family property is within a designated sensitive area because of the presence and diversity of native aquatic plants and high quality fish habitat, the site chosen for the pier in the revised application has relatively sparse vegetation and was identified by Department staff as the spot along the entire Terry Family property shoreline which will have the least negative impacts on the public interest in Middle Lake. Additionally, the Department has placed stringent conditions on the permit to further limit potential negative impacts from the placement and maintenance of a pier. Adverse impacts to fish and wildlife habitat have been sufficiently minimized by the location selected for the pier and the conditions imposed on the placement and maintenance of the pier.

29. The proposed project, if constructed in accordance with the following permit, will not adversely affect water quality, will not increase water pollution in surface waters and will not cause environmental pollution as defined in s. 283.01(6m), Wis. Stats. The permit also includes stringent monitoring conditions intended to prevent the introduction of invasive aquatic species to the area.

30. The proposed project will not impact wetlands if constructed in accordance with the following permit.

31. The Department and the Terry Family have completed all procedural requirements and the project as permitted will comply with all applicable requirements of Wis. Stat. §§ 1.11 and 30.12(3m) and Wis. Admin Code chapters NR 102, 103, 150 and 326.

Discussion

The environmental richness and value of the area of Middle Lake that includes the shoreline owned by the Terry Family is well documented. This matter is about balancing the public's interest in protecting an environmentally rich and sensitive shoreline with a riparian's

right to place a pier for access to a navigable water body. Because of the sensitive nature of the shoreline of Middle Lake in the area including the Terry Family property, the Department has imposed stringent conditions on a permit for a pier to be placed on the bed of Middle Lake adjacent to the Terry Family property. The Terry Family has accepted these conditions despite the cost and extraordinarily rigorous efforts it will take to comply with them.

The LLMD opposes the pier permit for two legitimate reasons and primarily three speculative reasons. The two reasons that are supported by the evidence presented at the hearing are:

- 1) Negative impact on the aesthetics of the shoreline; and
- 2) Negative impact on the bed of Middle Lake resulting from the seasonal placement and removal of the pier.

The reasons that are speculative are:

- 1) Negative impacts on springs in the area that the pier will be placed;
- 2) Obstruction to the navigational channel; and
- 3) Negative impacts to the aquatic habitat and spawning beds.

With respect to the reasons that are considered legitimate concerns, the placement of a pier at the proposed location will undoubtedly have a negative impact on the aesthetics of the shoreline. The shoreline currently is completely natural. The placement of a pier will interrupt this natural appearance of the shoreline when viewing it from the opposite shoreline. However, the opposite shoreline is highly developed with numerous piers. From the water the natural appearance of the shoreline is already compromised. One additional pier will have minimal impact. A condition that the Department imposed on the pier permit is that the Terry Family place a deed restriction on Lot 3 and deed notices on the Terry Family's other two lots advising potential purchasers of the lots that permits are not likely to be issued for the placement of piers on the shoreline of these lots. Restricting the placement of any additional piers along the shoreline of the property currently owned by the Terry Family will sufficiently minimize the adverse impact on the natural scenic beauty of Middle Lake resulting from the placement of the permitted pier.

The Department imposed several specific conditions designed to minimize adverse impacts in the sensitive area in the pier permit. Based on the extensive resource evaluations conducted by Department staff, the size, design, construction and location of the pier and number of allowable boats and personal watercraft is strictly controlled. These conditions will minimize impacts to wildlife habitat, fisheries habitat and water quality. Impacts to fish and wildlife habitat will be minimized by not allowing the allowable watercraft to be moored in the shallow, near shore area. This condition will also protect water quality by minimizing the disturbance to the lake bed sediment. Studies by the Department and others have shown that shading by piers and similar structures drastically reduce plant biomass, especially when the structures are more than five feet wide. Accordingly, the pier is only allowed to be up to five feet wide,

The Department evaluated the public interest functions and resource values along the total shoreline footage and adjacent littoral zones of all three lots owned by the Terry Family. The Department then determined that placing the permitted pier with two berths on Lot 3 was the maximum riparian use of the total shoreline and littoral zone of Lots 1, 2, and 3 that would be reasonable and not detrimental to the public interest in the entire shoreline littoral zone adjacent to the Terry Family property. Any future structure permit applications received for Lot 1 or 2 shall constitute good cause for the Department to re-open this permit to reevaluate its determination that the permitted pier is a reasonable riparian use that will not be detrimental to the public interest.

The permitted pier, as does every pier, will have impacts on the aquatic vegetation and habitat in the area where the pier is placed. Because of the environmental richness and pristine nature of the shoreline adjacent to the Terry Family property, the impacts of the permitted pier are more consequential than a typical pier. However, the Department has imposed stringent conditions on the placement and maintenance of the pier. These conditions will sufficiently minimize the adverse impacts of the pier so that the pier will not be detrimental to the public interest in Middle Lake.

In response to testimony presented during the hearing, the Department and the Terry Family have proposed several modifications to the conditions in the permit. These amendments are intended to further minimize the adverse impacts of the placement and maintenance of the pier or to clarify the conditions. These amendments are all adopted in the permit that is included in this decision. Firstly, the Terry Family's rebuttal witness, James Bowers, testified regarding the installation of floating sections as a part of the pier design. After the hearing, Department staff met with the Mr. Bowers to modify the pier design by limiting the placement of posts on lakebed, requiring decking material that allows at least 30% light penetration, and including floatable deck material. The use of float decking with light penetration will reduce shading of aquatic plants and reducing the placement of posts to approximately every third section of decking will result in less disturbance of the lakebed's aquatic habitat. The revised pier design is incorporated in Condition 23 of the permit and Exhibit A.

Secondly, the pier as originally approved by the Department would have been completely removed on a seasonal basis to address winter recreational safety concerns. During the hearing, evidence was presented regarding the adverse impacts on the bed of Middle Lake expected to result if the pier was completely removed and re-installed seasonally. Following the hearing, Department staff reviewed the seasonal removal requirement with the Terry Family and concluded that the landward section of the pier could remain in the lake year round provided that the most waterward portion (32 feet) was removed and reflectors or lights placed on the permanent portion of the pier. This amendment to the permit conditions is an effort to further protect the littoral zone in the area of the pier from unnecessary disturbance. The amendment is an attempt to balance safety and environmental concerns. All permits are subject to change if the conditions adversely impact the public interest. This condition should be considered a trial condition. If leaving any portion of the pier placed permanently is determined to be hazardous to persons engaged in snowmobiling or other recreational activities, the condition can be modified in the future.

Thirdly, the Terry Family is required to conduct periodic inspections for invasive rooted aquatic plant species and to remove them by hand when found. This requirement will prevent the spread of invasive species into the area around the pier and preserve the native vegetation community. At the request of the Department and the Terry Family, this condition has been modified slightly from the permit issued by the Department. The Department's permit required monitoring for invasive species. The condition is amended to specify that the Terry Family only need to monitor the site for invasive *rooted* aquatic species. This amendment is made to clarify that the Terry Family is not required to monitor and manage for invasive species not observable to the naked eye.

Fourthly, testimony was presented regarding the LLMD's concern regarding not knowing the precise location and angle of placement of the proposed pier. Department staff testified that the Department would be amenable to inviting one representative of the LLMD on-site during the siting and installation of the pier to address those concerns. Condition 13 was added to the permit and requires the Terry Family to allow LLMD input into the locating of the pier. Finally, Mark Wolfram, a pier installer, testified for the LLMD that the permitted pier could not be installed without the use of a barge and dredging in the littoral zone of Middle Lake. The Department's permit required that the pier be installed by hand and without dredging. The Terry Family presented rebuttal testimony by Mr. Bowers regarding the feasibility and methods of installation that would comply with the original permit. However, after the hearing, the Terry Family requested that the permit conditions be clarified to allow a barge or other water craft within the navigational channel. Condition 14 retains the prohibition of a barge or other watercraft within the littoral area, but allows the flexibility to use watercraft in the navigational channel if necessary. The LLMD's witness was concerned that the use of a barge would harm the littoral zone of Middle Lake at the pier site. No evidence was presented to suggest that the use of a barge in the navigational channel would harm the bed of Middle Lake. As long as a barge is used as allowed in the permit, the use will not negatively impact the public interest in Middle Lake.

The concerns raised by the LLMD regarding the impacts on the public interest in preserving the natural scenic beauty of Middle Lake and by the disturbance to the bed of Middle Lake resulting from the act of placing and removing the pier are adequately addressed by the conditions attached to the permit as amended after the hearing. The other concerns raised by the LLMD are speculative. The precise length and orientation of the pier is not set forth in the permit. The permit requires that Department staff be present when the pier is placed. This condition is specifically intended to address concerns raised by the LLMD. For example, the LLMD's expert raised a concern about springs and the aquatic vegetation that will be disturbed at the site of the pier. The Department staff did not notice any springs in the area where the pier is proposed to be placed (see exh. 64); however, if it is determined that springs are present, the Department will require that the pier be oriented to avoid those springs and to minimize impacts on valuable aquatic vegetation.

Similarly, the LLMD alleges that the pier will obstruct the navigation channel. The permit expressly provides that the pier shall extend only to the navigation channel. The LLMD also provided a witness who testified that the pier could not be placed without dredging. The

permit expressly prohibits any dredging. If dredging is necessary to construct the pier, construction of the pier is not authorized.

The LLMD contends that the Back Bay site that the Terry Family sought to have permitted in its original application is a preferable site than the point site in the revised application. The issues that the Division can consider are those identified by the Department in the contested case referral. Those issues are fully set forth above, but briefly they are whether the pier as permitted by the Department is reasonable and not detrimental to the public interest in navigable waters. It is beyond the scope of the identified issues for the Division to consider whether a better site exists for a pier along the Terry Family's shoreline. If the Division determined that the pier as permitted by the Department would be detrimental to the public interest in Middle Lake, conceivably the Department could revisit the possibility of permitting a pier in the Back Bay. However, it is beyond the scope of the instant hearing to consider whether a pier in the Back Bay would be preferable to the one at the point as permitted by the Department.

The LLMD's efforts to protect an environmentally rich and sensitive area are commendable. Ideally, the designated sensitive area that includes the shoreline of the Terry Family property would be maintained in a completely natural state. However, as riparians, the Terry Family has a right to place and maintain piers on the bed of Middle Lake in aid of navigation without a permit. Because the area of Middle Lake including the Terry Family property has been designated a sensitive area, the Department has required the Terry Family to obtain a permit in order to impose conditions it considers necessary to protect the public interest in the sensitive area. The conditions set by the Department are stringent and reasonably calculated to minimize any negative impacts to the public interest in Middle Lake. The LLMD presented evidence casting doubt on whether a pier can be constructed and maintained in compliance with the conditions. However, in determining whether the permit should be issued, one must assume that the Terry Family will comply with all the conditions in the permit. The LLMD has not shown that a pier constructed and maintained in accordance with the conditions set forth in the permit will be detrimental to the public interest in Middle Lake. Accordingly, the Department's decision to issue the permit must be affirmed.

CONCLUSIONS OF LAW

1. The Terry Family is a riparian owner within the meaning of Wis. Stat. § 30.12.
2. The proposed pier on the bed of Middle Lake as described in the Findings of Fact constitutes a structure within the meaning of Wis. Stat. § 30.12.
3. As a riparian owner, the Terry Family is authorized to place a pier in aid of navigation on the bed of Middle Lake adjacent to their property. However, because the shoreline of Middle Lake adjacent to the Terry Family property has been designated a sensitive area, the Department properly invoked its authority under Wis. Stat. § 30.12(2m) to require the Terry Family to obtain a permit for a pier.

4. Pursuant to Wis. Stat. § 30.209(2)(e), the LLMD has the burden of proof to show that the permit should be denied. The LLMD has not satisfied its burden.

5. A pier constructed and maintained according to the conditions in the following permit will not materially obstruct navigation or adversely impact the public interest in Middle Lake.

PERMIT

The Terry Family Conservancy, LLC, is hereby granted an individual permit under Wis. Stat. § 30.12(2m), to place a pier on the bed of Middle Lake of the Lauderdale Lakes, in the Town of La Grange, Walworth County, in the SE ¼ of the NE ¼ of Section 34, Township 4 North, Range 16 East, subject to the following conditions:

1. You must notify Pam Schense at phone (608)266-9266 or email Pam.Schense@wisconsin.gov before starting construction and again not more than 5 days after the project is complete.
2. This permit authorizes placement of a pier and two boat lifts, all as shown on Exhibit A. The permitted structures shall be placed as described in your application, except as modified by this permit. If you wish to alter the project or permit conditions, you must first obtain written approval of the Department. This permit does not authorize any work other than the placement of a pier and two boatlifts.
3. You must complete the project as described on or before 07/12/2016. If you will not complete the project by this date, you must submit a written request for an extension prior to expiration of the initial time limit specified in the permit. Your request must identify the requested extension date. The Department shall extend the time limit for an individual permit or contract for no longer than 5 years if you request the extension before the initial time limit expires. You may not begin or continue construction after the original permit expiration date unless the Department extends the permit in writing or grants a new permit.
4. *Note:* Before you start your project, you must first obtain any permit or approval that may be required for your project by local zoning ordinances and by the U.S. Army Corps of Engineers. You are responsible for contacting these local and federal authorities to determine if they require permits or approvals for your project. These local and federal authorities are responsible for determining if your project complies with their requirements. Upon reasonable notice, you shall allow access to your project site during reasonable hours to any Department employee who is investigating the project's construction, operation, maintenance or permit compliance.

You, your agent, and any involved contractors or consultants may be considered a party to the violation pursuant to Wis. Stat. § 30.292 for any violations of Chapter 30, Wisconsin Statutes, or this permit.

5. The Department may modify or revoke this permit for good cause, including if the project is not completed according to the terms of the permit or if the Department determines the activity is detrimental to the public interest.
6. You must post a copy of this permit at a conspicuous location on the project site, visible from the waterway, for at least five days prior to construction, and remaining at least five days after construction. You must also have a copy of the permit and approved plan available at the project site at all times until the project is complete.
7. Your acceptance of this permit and efforts to begin work on this project signify that you have read, understood and agreed to follow all conditions of this permit.
8. You must submit a series of photographs to the Department, within one week of completing work on the site. The photographs must be taken from different vantage points and depict all work authorized by this permit.
9. Construction shall be accomplished in such a manner as to minimize erosion and siltation into surface waters. Erosion control measures (such as silt fence and straw bales) must meet or exceed the technical standards of Wis. Admin. Code ch. NR 151. The technical standards are found at:
http://dnr.wi.gov/topic/stormwater/standards/const_standards.html.
10. All equipment used for the annual installation and removal of the pier, including but not limited to tracked vehicles, barges, boats, hoses, sheet pile and pumps shall be de-contaminated for invasive and exotic viruses and species prior to use and after use.

The following steps must 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 shall not be used on other non-infested waters.

- A. **Inspect and remove** aquatic plants, animals, and mud from your equipment.
- B. **Drain all water** from your equipment that comes in contact with infested waters, including but not limited to tracked vehicles, barges, boats, hoses, sheet pile and pumps.
- C. **Dispose** of aquatic plants, animals in the trash. Never release or transfer aquatic plants, animals or water from one waterbody to another.
- D. **Wash your equipment** with hot (>104° F) and/or high pressure water,
- OR -
Allow your equipment to **dry thoroughly for 5 days**.

Specific Pier Conditions

11. The approved pier shall be a straight pier not more than five (5) feet in width and approximately 140 feet long as shown on Exhibit A. The Department must be on-site during the installation of the pier to determine the appropriate length of the pier so that it extends to the nearest border of the existing navigational channel but does not extend into or impede navigation within the channel. No dredging is authorized by this permit.
12. The Department must be on-site prior to the installation of the pier to indicate the specific location along the shoreline where the pier shall be located and the appropriate angle of the pier as it comes off the shoreline to avoid the highest quality resource areas within the lake and to find the shortest distance to the nearest border of the navigational channel.
13. You must notify the Lauderdale Lakes Management District of the date on which the pier will be installed. The District may designate one person to observe the final placement of the pier and the landward boundary of the navigation channel adjacent to the site of the pier. The District's designated representative may provide information or observations regarding the placement of the pier, but the Department shall be solely responsible to determine the exact length of the pier, the specific location along the shoreline where the pier shall be located and the appropriate angle of the pier from the shoreline.
14. The use of watercraft, dredges or barges to facilitate the installation of the pier is prohibited, except within the adjacent navigation channel as determined by the Department.
15. The maximum number of boats or personal watercraft that can be moored at the permitted pier is two.
16. The two boats or personal watercraft authorized by this permit must be moored adjacent to the pier with one on either side of the pier at its waterward end as shown on Exhibit A.
17. You may install boat lifts at the locations specified in Permit Condition #16 to be used to moor the authorized boats or personal watercraft.
18. The final 32 feet of the pier, closest to the established navigational channel, and the boat lifts must be removed annually no later than December 1 and may not be installed before May 15.
19. You shall implement an Invasive Aquatic Plant Species Monitoring and Management Plan within the lake in an area to include 50 feet on either side of the pier and from the shoreline out to the waterward end of the pier. You shall perform monthly inspections between May and September annually of this area for invasive rooted aquatic plant species including but not limited to *Myriophyllum spicatum* (Eurasian watermilfoil), *Potamogeton crispus* (curly-leaf pondweed), *Lythrum salicaria* (purple loosestrife) and other species indicated on the Prohibited and Restricted lists within NR40, Wisconsin Administrative Code. All invasive rooted

aquatic plant species found during the inspections must be removed by hand and disposed of in an appropriate manner to prevent their spread. You must notify DNR of any invasive rooted aquatic plant species found, in what numbers and measures taken to remove them.

20. The pier shall be adequately marked with reflectors or other lighting material so that it will be visible to the recreational users of the lake at night and during snow cover. The Department must approve that the reflectors or lighting are sufficient.
21. You shall record a Deed Restriction on Lot 3 specifying that this shall be the only pier allowed for this lot. The exact language of the Deed Restriction must be reviewed and approved by the Department prior to its recording with the Walworth County Register of Deeds. You shall provide a copy of the recorded document showing what volume and page it is registered on to the Department within 15 days of recording.
22. You shall record a Deed Notice for each of Lots 1 and 2 to provide notice that the Department considered the total shoreline footage and public interest functions and values in the total adjacent littoral zone of Lots 1, 2, and 3 in determining that placement of the permitted pier with 2 berths on Lot 3 was a reasonable riparian use of the total shoreline and was not detrimental to the public interest. The exact language of the Deed Notice must be reviewed and approved by the Department prior to its recording with the Walworth County Register of Deeds. You shall provide a copy of the recorded document showing what volume and page it is registered on to the Department within 15 days of recording.
23. The pier shall be constructed using a combination of metal posts placed onto lakebed and foam floating deck material to support the pier. Metal posts may be placed as necessary to stabilize the pier, but not more than two posts per 20 feet of pier length. The decking material shall allow a minimum of 30% light penetration.
24. The flotation used to construct the pier must be completely coated or contained to resist deterioration from the elements and gasoline. A written description of the proposed material must be submitted to the Department for approval prior to use.
25. No mooring buoys are allowed to be placed within the riparian zone of Lot 3.
26. The pier must allow the free movement of water and must not entrap vegetation.
27. The pier must not enclose any portion of the navigable waterway.
28. This permit and plans must be encased in plastic and legibly displayed along the water's edge during construction and for 30 days after construction of this pier. The purpose of this condition is to allow Department staff and the public to monitor the project and to ensure compliance with the conditions of the project.
29. This permit authorizes future maintenance to the pier; however, no change can be made to the type of materials, number of slips, or pier configuration without written approval from the Department or amendment of this permit.

30. This pier must not interfere with the riparian rights of other riparians.
31. No permanent boat shelters are allowed. All boat shelters must comply with the standards under Wis. Admin. Code NR 326.055 for seasonal boat shelters.

Dated at Madison, Wisconsin on August 22, 2014.

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: _____
Mark F. Kaiser
Administrative Law Judge

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 served and 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.