



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

In the Matter West Shore Ventures, LLC's
Application to Place a Pier on the Bed of Lake
Beulah in the Town of East Troy, Walworth
County

Case No. DNR-14-015

FINDINGS OF FACT, CONCLUSIONS OF LAW AND PERMIT

Pursuant to due notice, hearing was held at Elkhorn, Wisconsin on January 14 and 15, 2015. Jeffrey D. Boldt, Administrative Law Judge presiding. The parties requested an opportunity to submit written closing arguments, and the last was received on April 13, 2015.

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

West Shore Ventures, LLC, by

Mr. John Stoss
West Shore Ventures, LLC
N8831 Stringers Bridge Road
East Troy, WI 53120

Lake Beulah Management District, by

Attorney Crystal H. Fieber
Hopp, Nuemann, Humke, LLP
2124 Kohler Memorial Drive, Suite 110
Sheboygan, WI 53081

Department of Natural Resources, by

Attorney Michael J. Kowalkowski
DNR
PO Box 7921
Madison, WI 53707-7921

FINDINGS OF FACT

1. West Shore Ventures, LLC (the applicant or West Shore Ventures) applied to the Department of Natural Resources (the Department) for a permit to place a pier/wharf on the bed of Lake Beulah, in the Town of East Troy, Walworth County. The proposed project is located in the NE ¼ of the NW ¼ of Section 18, Township 4 North, Range 18 East.

The proposed project would be 80 feet long and 28 inches wide with one L that is 12 feet long by 28 inches wide with two boats moored. A boat lift is proposed to be constructed on the West side of the pier.

2. By letter dated January 12, 2014, the Department approved West Shore Ventures, LLC's application with limitations.

3. On March 12, 2014, the Department received a petition for a contested case hearing and request for a stay from Attorney Crystal H. Fieber, on behalf of the Lake Beulah Management District.

4. On April 11, 2014, the Department granted the case hearing request with respect to the following issues:

- Whether "the use of the pier [will be] detrimental to the public interest due to the adverse environmental effects that the pier will likely have on Lake Beulah and its environments." The Petition also raises the issue of whether granting the pier permit violates the Public Trust Doctrine (PTD). This issue coincides with the first issue raised because chapter 30 has codified the PTD utilizing the term of art "public interest."
- Whether the pier will materially obstruct navigation because of its location, which has not been clearly defined.

5. Further, the Department granted the stay of the permit pursuant to Wis. Stat. §§ 30.209 and 227.42. On September 9, 2014, the Division of Hearings and Appeals received the Request for Hearing from the Department.

ADOPTED AND MODIFIED FINDINGS OF FACT

1. West Shore Ventures has filed an application for a permit to place a pier/wharf on the bed of Lake Beulah, in the Town of East Troy, Walworth County, also described as NE ¼-NW1/4 S18, T4N, R18E. The applicant owns 660 feet of lake frontage at the project site.

2. Piers have been placed in this location in the past and adjacent to this location, but not in recent years.

3. The proposed pier would be 80 feet long and 28 inches wide with one L that is 12 foot long by 28 inch wide with two boats moored. A boat lift would be constructed on the West side of the pier.

4. The Department completed an investigation of the project site and evaluated the project as described in the application and plans and issued a permit on February 12, 2014.

5. Lake Beulah is navigable water (and no bulkhead exists at the project site.)

6. The proposed project, if constructed in accordance with this permit will not adversely affect water quality, will not increase water pollution in surface waters and will not cause environmental pollution as defined in Wis. Stat. § 283.01(6m).

7. The proposed project will not impact wetlands if constructed in accordance with this permit.

8. The Department and the applicant 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 chs. NR 102, 103, 115, 116, 117, 150, 299 and 326.

9. The structure will not materially obstruct navigation because of its distance from the main navigational channel and the distance from the culvert. Further, to minimize navigational conflicts, the applicant shall submit a more detailed placement location plan acceptable to the Department prior to installation of the pier.

10. An October 2, 2013, plant community survey, conducted by DNR Lakes Biologist Heidi Bunk, showed no nonnative species in the project area. Ms. Bunk recommended denial of the pier permit because of concerns about its impact upon plant communities. (Ex. 19)

11. The structure as previously permitted could have been detrimental to the public interest because it will be constructed in an environmentally sensitive area that is currently largely uninterrupted and because there were no restrictions on the number of boats that could be moored on a temporary basis. However, as amended by permit condition 21, the pier will not be detrimental to the public interest because the permit now limits the number of temporary boats which can be moored to two and therefore limits potential fragmentation of aquatic habitat to a reasonable use of this property.

12. DNR fisheries biologist Doug Welch documented on October 2, 2013, that the area showed quality spawning habitat for Yellow Perch and Northern pike that is vegetation based. Mr. Welch recommended granting the permit with special conditions, including doing the work in summer or fall to avoid impacts to spring fish spawning activity. (Ex 16)

13. Aquatic plants that have potential to provide food and cover for waterfowl and fish were found at the site.

14. Aquatic plants take up dissolved nutrients that otherwise can stimulate undesirable algae growth.

15. Studies by the Department and others have shown that shading by piers and similar structures drastically reduces plant biomass, especially when the structures are more than four feet wide. These structures also reduce the number of macroinvertebrates, which are important foods for game fish and other organisms. However, the proposed pier is very modest in size relative to the 660 feet of frontage owned by the applicant. The small footprint of the pier and the new restrictions on temporary moorings at the project site will ensure that the pier will not have a detrimental impact upon the diverse plant community at the project site.

16. The effects of piers and related structures on aquatic organisms are greater in the near-shore zone than offshore.

17. Unless piers, wharves, and related structures are held to reasonable limits, the near-shore area of many waterways will, in time, become largely occupied by structures and watercraft. Public use of such areas would become impracticable and public interests in aquatic habitat, water quality and natural scenic beauty would be adversely affected. The Department must consider such cumulative effects and exercise its regulatory authority to avoid significant adverse effects. The permit as modified represents an appropriate balancing of riparian and public rights after consideration of likely cumulative impacts.

18. Boating activity associated with the structure will have some impact on the vegetation based spawning habitat. The new restriction on temporary boat moorings will ensure that the pier does not have a detrimental impact sufficient to warrant denial of the permit.

19. The structure or deposit will not materially reduce the flood flow capacity of a stream because it will not impede any flow from the culvert under Stringers bridge road.

20. Placement of the modest pier will not have a detrimental impact upon natural scenic beauty. (Schroeder)

DISCUSSION

There is no dispute that the proposed pier, modest in scale relative to the amount of lake frontage owned by the applicant, is to be placed in a high-quality and undeveloped part of Lake Beulah. Experts on both sides agreed that the area features a diverse and valuable plant community and provides excellent fish habitat. The Lake Beulah Management District argues that no pier should be placed in this area, and point out that even the Department's permit as issued noted that it was detrimental to the public interest in the waters of Lake Beulah. The DNR concedes that finding in the permit as issued, but tried to diminish its importance by essentially calling it a typo.

The ALJ finds that a proper balance between these two positions would be to limit the additional number of boats that can be moored on a temporary basis to two. As noted, experts for both sides agreed that the project area is a richly diverse and largely undeveloped portion of Lake

Beulah. There is some potential that the diverse natural plant community could become vulnerable to Eurasian Water Milfoil (EWM) and other invasive plants with heavy boating activity. Limiting the number of additional boats that can be moored on a temporary basis to two will properly balance these concerns with the applicant's ability to gain access to the water from the project site.

The Petitioners frequently brought up their concerns that the parcel would be used for commercial purpose by bar patrons. There was no evidence to back these claims, and the restriction on the number of temporary boat slips will also ensure that this does not happen in the future.

The pier is proposed to be located in a "sensitive area" as designated by Wis. Admin. Code NR 107.05(3)(i) that is a rich and undeveloped part of the lake. However, it is not in a formally designated "area of special natural resources interest" (ASNRI) within the meaning of Wis. Stat. § 30.01(1am). Accordingly, the discretionary standards for pier placement in Wis. Stat. § 30.12(2m)(a) applies to this location.

As modified, the permit conditions ensure that the pier will not be detrimental to the public waters of Lake Beulah. To ensure that the pier will not materially obstruct navigation in the public waters of Lake Beulah, the Division has also amended permit condition #22 to require that the applicant provide more detail as to the precise location of pier placement and that the same be approved by the DNR prior to installation.

With these modified conditions, the permit must issue.

CONCLUSIONS OF LAW

1. The Division of Hearings and Appeals has authority to hear contested cases relating to the issuance of structures permits on navigable waters pursuant to Wis. Stat. §§ 227.43(1)(b) and 30.208-209.

2. The petitioning objections have the burden of proof in this proceeding pursuant to Wis. Stat. § 30.209(2)(e).

3. The pier is proposed to be located in a "sensitive area" as designated by Wis. Admin. Code NR 107.05(3)(i) that is a rich and undeveloped part of the lake. However, it is not in a formally designated "area of special natural resources interest" (ASNRI) within the meaning of Wis. Stat. § 30.01(1am). Accordingly, the discretionary standards for pier placement in Wis. Stat. § 30.12(2m)(a) applies to this location.

4. The Department has authority under the above-indicated Statutes and Administrative Codes, to issue a permit for the construction and maintenance of this project.

5. As modified, the permit conditions ensure that the pier will not be detrimental to the public waters of Lake Beulah.

6. The pier will not materially obstruct navigation in the public waters of Lake Beulah.

PERMIT

1. You must notify Travis Schroeder at phone (262) 574-2172 or email travis.schroeder@wi.gov before starting construction and again not more than five days after the project is complete.

2. You must complete the project as described on or before 10/01/15. 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 five 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.

3. This permit does not authorize any work other than what you specifically describe in your application and plans, and as modified by the conditions of this permit. If you wish to alter the project or permit conditions, you must first obtain written approval of the Department.

4. 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.

5. 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.

6. 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.

7. 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.

8. 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.

9. 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.
10. 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 Wis. Stat. Chapter 30, or this permit.
11. 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 .
12. If foam flotation is used, this material 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.
13. No mooring buoys beyond those expressly authorized by this permit are allowed without an amendment of this permit.
14. The pier must allow the free movement of water and must not entrap vegetation.
15. The pier must not enclose any portion of the navigable waterway.
16. This permit authorizes future maintenance to the piers; however, no change can be made to the type of materials, or pier configuration without written approval from the Department or amendment of this permit.
17. You must not cover the piers or slips, or allow any buildings or other structures to be placed or constructed on the piers.
18. You may dock up to two watercraft on this pier.
19. Pier may have one boat lift only and life shall be constructed immediately adjacent to the pier on the West side as shown on the approved pier plan that it attached dated July 24, 2013, and initialed.
20. No boat longer than 30 feet may be moored at the pier.
21. No more than two additional boats may be moored temporarily for no longer than 72 consecutive hours.
22. You must construct the pier in accordance with the approved pier plan that was submitted and dated July 24, 2013, with the application and attached to this permit. Prior to placement, the applicant shall provide a more detailed placement plan acceptable to the Department to minimize any impacts upon navigation near the project area.

23. All equipment used for the project 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.

1. **Inspect and remove** aquatic plants, animals, and mud from your equipment.
2. **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.
3. **Dispose** of aquatic plants, animals in the trash. Never release or transfer aquatic plants, animals or water from one waterbody to another.
4. **Wash your equipment** with hot (>104° F) and/or high pressure water, or allow your equipment to **dry thoroughly for five days**.

ORDER

WHEREFORE IT IS HEREBY ORDERED, that the permit be modified as set forth above and that the petition for review be dismissed.

Dated at Madison, Wisconsin on June 15, 2015.

STATE OF WISCONSIN
DIVISION OF HEARINGS AND APPEALS
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By: _____
Jeffrey D. Boldt
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.