



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

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Application of Don Anderson for a Permit to Place  
a Structure (88 Slip Marina) on the Bed of Lake  
Wisconsin, Town of Lodi, Columbia County,  
Wisconsin

Case No. 3-SC-99-4013LW

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**FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER**

Don Anderson, 5856 Easy Street, Waunakee, Wisconsin, 53597, filed an amended application on July 9, 2001 with the Department of Natural Resources for a permit to place four piers on the bed of Lake Wisconsin. The proposed piers are from 68 to 72 feet long and would accommodate up to 88 slips. The proposed project is located in the SW ¼, SW ¼, Section 8, Township 10 North, Range 8 East, Town of Lodi, Columbia County, Wisconsin.

On June 7, 1999, the Department of Natural Resources denied a previous permit application. The Division of Hearings and Appeals received a Request for Hearing from the Department on October 27, 2000. A hearing date was set and then adjourned to allow the applicant time to revise his plan. A revised plan was submitted on July 9, 2001.

Pursuant to due notice hearing was held on September 26 and 27, 2001, at Lodi, Wisconsin, Jeffrey D. Boldt, administrative law judge (the ALJ) presiding. The parties requested an opportunity to submit written closing arguments and the last was received on October 9, 2001.

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

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#### FINDINGS OF FACT

1. Don Anderson, 5856 Easy Street, Waunakee, Wisconsin, 53597, filed an amended application on July 6, 2001 with the Department of Natural Resources (DNR) for a permit to place four piers on the bed of Lake Wisconsin. The proposed piers are from 68 to 72 feet long and would accommodate up to 88 slips.
2. The applicant owns riparian property located in the SW 1/4, SW 1/4, section 8, Township 10 North, Range 8 East, Town of Lodi, Columbia County, Wisconsin.
3. The applicant proposes to construct a marina at the above-described site that would accommodate 88 boats. The applicant owns a three-acre, triangle-shaped, parcel which consists mostly of wetlands. The parcel also includes a 25-foot wide strip (also consisting mostly

of wetlands) that runs south along a railroad corridor. The parcel abuts Lake Wisconsin in the Town of Lodi. Nearly the entire stretch of riparian frontage except the extreme north end consists of wetlands. The upland area is proximate to an existing bar/restaurant which is not part of the applicant's property. Approximately 1500 feet of frontage is proximate to Lake Wisconsin, although the record is unclear as to how much of this is "riparian property" due to erosion along the bank. The upland property at the site totals approximately .72 acres. This consists of .58 acres on parcel A and .14 acres along the railroad corridor. (Ex. 32)

4. The proposal seeks to concentrate the pier slips in a single area, close to the developed area next to an existing bar/restaurant. The neighboring bar for many years supported a local water-ski show and habitat in that area is considerably degraded. Most of the Anderson parcel includes high-quality wetland habitat. The pier complex would extend approximately 360 feet laterally along the shore. The piers would extend up to 180 feet from the current water-shore line, and up to 210 feet below the ordinary highwater mark. (OHWM) No boats would be moored in the first approximately 50 feet below the existing water line, which is at or about the three feet water-depth. Instead, the four piers would be attached to a T-shaped frame in an effort to allow light penetration in the first fifty feet of the near shore area. There would be one 72-foot long pier, one 70-foot long pier and two 68-foot long piers. Each pier would moor approximately 22 boats. The piers extend well into the waters of the bay, to the 74-inch water depth. No jet skis would be allowed at the marina. Instead, the applicant expects to moor primarily pontoon boats.

5. The total footprint of the marina complex would occupy nearly 2 acres of the public waters of Lake Wisconsin. This is an area which would be largely denied to the public to fish, boat or otherwise make use of public waters. The applicant would allow public fishing from piers and would provide some public benefit by providing mooring opportunities. However, any public benefit is limited in this case because the lake already exceeds maximum public access criteria as set forth in Wis. Admin. Code NR 1.91(5). (Larson) DNR Fisheries Biologist Tim Larson testified that the public boat access criteria are not binding on the instant private marina permit application. However, the administrative code presumes that, when maximum public boating access numbers are exceeded, provision of further access "materially impairs navigation and is detrimental to the public interest." (Id.) Accordingly, the instant private marina does not provide a significant public benefit by providing mooring slips to the public.

6. The proposed piers would materially obstruct navigation in Okee Bay. DNR Warden Steven Schlimgen testified that the proposed piers would extend much farther out into the bay than other piers in the area and would pose a safety hazard, both during boating season and in the winter. There is substantial boating activity within Okee Bay, including water skiing and recreational boating by large fast boats. (Schlimgen; Exs. 18, 66) The proposed piers would extend 130 feet farther out in the waters of the bay than the currently existing piers. (Id.) Schlimgen was persuasive that any piers extending more than 100 feet from the existing shoreline would pose a hazard or unduly restrict boating in the bay.

7. There is aquatic vegetation in the areas in and around the proposed pier. The DNR conducted a field investigation in July, 2000, and found abundant sago and curly leaf

pondweed, as well as seven other aquatic plant species that provide significant habitat value to fish and waterfowl. (Ex. 14) The applicant's experts conducted field investigations much later in the season, and found much more sparse aquatic vegetation. Ms. Thompson sampled transects on September 20, 2001. (Ex. 7) Mr. Miller on September 21, 2001. However, such variability is not unexpected, especially given the life cycle of sago pondweed. (Sessing) The DNR was persuasive that the roughly two acre foot print of the proposed piers would have an adverse impact on the rich aquatic plant community and associated invertebrates due to shading by the large piers. (Larson, Marshall, Sessing) Further, the boat traffic related to use of the marina, even if mostly pontoon boats, would have a detrimental impact upon aquatic plants by cutting plants and increasing water turbidity. (Id.) Pontoon boats will have a greater tendency to shade out aquatic plants.

The applicant has not carried his burden of proof in demonstrating that there will not be detrimental impacts to aquatic plant communities.

8. The parcel is at the edge of a DNR designated "sensitive area" but is not included on the final sensitive area map. (Ex. 63) DNR Water Resources Specialist Mark Sessing testified that the Anderson parcel was left off the 1992 map by error, and that the parcel will be included on future maps. (Ex. 61) The sensitive area determination primarily relates to restrictions on use of chemicals on aquatic plants. However, there is no question that both the wetland vegetation above the OHWM and the lakebed aquatic plant communities in the area where the proposed piers would be placed provide a rich habitat for wildlife and fish. Sago and long leaf pondweed, and white water lily all provide waterfowl food and fish food and cover. (Ex. 14) The "macrophyte population of the Okee Bay" area has been identified as an "outstanding feature" of Lake Wisconsin in connection with Federal Energy Regulatory Commission (FERC) licensing matters. (Ex. 20) In the 1980's, well prior to Mr. Anderson's purchase of the property, the DNR considered developing the Anderson parcel as a public access site boat launch site. The DNR determined that the site was not appropriate for development because of potential impacts to wetlands. (Larson; Ex. 72) The record supports treating the Anderson parcel as contiguous to a unique and "sensitive area" of Lake Wisconsin.

9. The DNR has issued a guidance document relating to marinas and similar mooring facilities. (Ex. 2) The guidance provides that the reasonable use of a riparian parcel has a direct relationship with the amount of riparian frontage owned. The guidance provides that a threshold calculation allows for two berths for the first 50 feet of frontage and one for each additional feet of shoreline in common ownership.

The total expanse of this parcel is 1500 feet, although parts of the 25-foot strip have been subject to erosion and there may no longer be any riparian property above the ordinary high-water mark in those areas. Further, the fact that so much of the parcel is high quality wetland must be taken into account when considering the reasonable use of this parcel. (Biersach) Finally, the aquatic habitat is unusually rich in much of the near shore area of the Anderson parcel. This argues for a lesser number than the "threshold" reasonable use calculation of 30 or 31 slips. The DNR Aquatic Habitat Expert Pam Biersach, presented testimony that the reasonable use of the 1,500 feet of frontage would be one pier and two slips based on her belief that the 1,500 feet of frontage was part of only five- percent sensitive area left in the lake. Ms.

Biersach's testimony assumed that this wetland parcel should be considered a "sensitive area" of Lake Wisconsin.

The applicant offered testimony that marinas are afforded more than the basic calculation because they provide public access. (Ex. 2) This is, as general statement, true. However, in this case there was testimony that the lake already exceeds maximum public access criteria. (Larson) Accordingly, the value of increased public access is very limited. Further, the proposal has significant impacts to other public rights in navigable waters identified in the Marina Guidance cited by the applicant. (Ex. 2)

Balancing all of these factors, the reasonable use of this parcel would be seven or eight boat slips. Because there is no proposal before the Division limited to this number of slips, it would not be appropriate to issue such a permit in connection with the Order set forth below. However, the record would support issuance of a permit for eight slips and one pier if a proposal addresses the following unresolved issues:

- a. Placement of one pier and no more than 8 slips within 100 feet of the OHWM;
- b. Provision for a stormwater retention pond with an appropriate buffer from wetland areas;
- c. Placement of a parking lot to accommodate 4 cars on an upland portion of the parcel;
- d. Compliance with county parking lot size requirements;
- e. Access to the pier shall be from an upland portion of the parcel or by a boardwalk over wetlands at the north end of the parcel if there is not sufficient available upland.

10. The proposed project would have detrimental impacts on wetland functional values. The applicant proposes a boardwalk roughly at the center of parcel A. (Exs. 4 and 32) The applicant's own wetland expert, Alice Thompson, opined that she would prefer to see the boardwalk closer to the upland area at the northern property line to limit impacts to wetlands. The applicant proposes a parking lot large enough to serve 44 cars, or half of available boat slips. (Anderson) There is likely to be a significant detrimental impact to wetland vegetation as a result of runoff from either a paved or gravel parking lot. (Trochell) A stormwater retention pond would likely mitigate direct impacts to wetlands. (Thompson, Trochell) However, given the small amount of available upland, it would be difficult to locate both the parking lot and a pond on the site. (Trochell) There are practicable alternatives available which would have less impact on wetlands, including developing the lot for a residence. (Trochell)

11. The proposed large marina complex would have detrimental direct and cumulative impacts on maintaining fishery values in Okee Bay. (Larson) DNR Fisheries Biologist Tim Larson provided largely un rebutted testimony describing in great detail negative

impacts to fishery associated with large pier structures placed in good quality fish habitat. (See: Exs. 75-83) Further, the DNR twice sampled fish populations in the immediate area of the proposed piers. On July 7, 2000, the DNR identified nine fish species in the waters at the site. The DNR also found a Special Concern fish, the pugnose minnow, when surveying in June of 1999. Developing this site would undermine fisheries reproduction, nursery habitat and overall fish production in a lake with limited littoral zone habitat due to cumulative effects of development elsewhere on the lake and poor light penetration for aquatic plants. (Larson, Marshall; Ex. 14)

While fish can be attracted to shaded areas associated with piers, this fact is misleading for at least two reasons. First, the same shading which attracts adult fish may inhibit plant growth necessary for both spawning (Ex. 83) and cover and nursery for immature fish. Further, Larson testified that recent studies have concluded that developed areas that include large pier structures have been associated with a significant decline in fish species diversity. (Ex. 76) The scientific literature also indicates that environmental impacts to fish populations associated with pier construction are particularly detrimental when placed in "sensitive" habitat areas. (Ex. 85)

The applicant has not carried his burden of proof in demonstrating that the proposed project will not have a detrimental impact upon the public interest in maintaining fishery values.

12. The area of Okee Bay that includes the Anderson parcel provides significant habitat to a wide variety of reptiles and amphibians, quadrupeds, waterfowl and migratory birds. (Kaiser; Exs. 23 and 54) The 360-foot length of the pier to some extent creates a structural barrier that deters use by wild mallards and other migratory waterfowl. (Kaiser; Ex. 54) Kaiser opined that the marina project would likely result in a decrease use by waterfowl of the area including the proposed marina. (Id.) Direct impacts to wildlife would be relatively minimal. (Miller; Kaiser) However, the cumulative impact of destroying remaining good quality wildlife habitat on Lake Wisconsin is significant. (Kaiser) The direct impacts to wildlife are not sufficient in themselves to result in denial of the permit. However, the applicant has not carried his burden of proving that there would not be cumulative impacts to wildlife due to the loss of two acres of wildlife habitat.

13. The proposed marina project would have some detrimental impact on natural scenic beauty. There is no question the four large piers would detract from the natural beauty of the area. However, this is not in itself a sufficient basis to deny the permit application. The area immediately next to the area of the proposed piers has been used as a commercial property for many years and supported the water-ski show. The applicant has made an effort to concentrate the proposed piers in the two acres near this area of the shoreline.

14. The testimony of Town of Lodi Chairperson Charlene Brereton, indicates that the size of parking lot proposed by the applicant is insufficient to meet the size requirements of county ordinances relative to parking facilities. (See Ex. 87) This further exacerbates the problems outlined above relative to the small amount of upland available for all of these marina-related facilities.

15. The applicant is financially capable of constructing, maintaining, monitoring or removing the structures if it should be found in the public interest to do so.

16. The existing structures will not reduce the effective flood flow capacity of Lake Wisconsin.

17. The proposed structures will adversely affect water quality but will not significantly increase water pollution in Lake Wisconsin. The structure will cause some minimal environmental pollution as defined in Wis. Stat. § 218.01(10). The increased boat traffic associated with the mooring of 88 boats is likely to increase turbidity by raising sediments from the lake bottom. (Marshall; Ex. 54) However, impacts to water quality are not a sufficient basis in themselves to result in denial of the permit.

18. The Department of Natural Resources has complied with the procedural requirements of Wis. Stat. § 1.11 and Wis. Admin. Code chapter NR 150 regarding assessment of environmental impact.

## DISCUSSION

The applicant owns and operates another marina on Lake Wisconsin, Moon Valley. He believes there is a demand for pier slips in the Okee Bay area in the Town of Lodi, because access there is more convenient for boaters from Dane County. Based upon the record at hearing, there is every reason to believe Mr. Anderson is capable of operating a marina in an efficient and environmentally responsible manner. However, this primarily wetland parcel is not adequate to allow for a project on the scale that Mr. Anderson believes is necessary to be financially viable. Anderson testified that anything less than 60 slips would not make financial sense. At best, this parcel could support a “mini-marina” of 7 or 8 slips, especially given the county ordinance relating to size requirements for parking lots, (Ex. 87) and the need for stormwater retention pond as the applicant’s own wetland expert conceded would be required. (Thompson)

The proposed project is far too large for this wetland dominated riparian parcel. There was no showing by a greater weight of the credible evidence of exactly how much riparian frontage the applicant owns. Much of the parcel consists of a 25 foot buffer strip between a rail corridor and the lake. Significant erosion has occurred in some areas, leaving a serious question of whether all of the property remains “riparian.” The “reasonable use” of a riparian parcel is based in part on the environmental “value” of the subject parcel. *Sterlingworth v. DNR*, 205 Wis. 2d 702, 732, 556 N.W.2d 791 (Wis. Ct. App. 1996) The proposed project area constitutes an important community of aquatic plants and provides significant fish and wildlife habitat. Further, the reasonable use calculation is not a strict mathematical formula. Wetland parcels have limited uses and greater habitat value, and should be viewed differently than upland parcels.

More fundamentally, only five percent of high-quality aquatic vegetation and habitat remain on Lake Wisconsin. Much of what is left is in Okee Bay. The fundamental objection of the DNR to this dockage proposal is the potential effect on aquatic plant life as well as secondary impacts on wetland functional values. There is no question that a project on this scale would

have significant adverse impacts upon both lakebed weed banks and wetland functional values. (Biersach, Sessing, et al) The applicant did not submit a “practicable alternatives” analysis, as would be required to find the project in compliance with water quality standards for wetlands found in Wis. Admin. Code NR 103. In fairness, the DNR did not ask him to present one. This rich and beautiful area of Okee Bay provides outstanding habitat to fish and wildlife. Such areas are rare on Lake Wisconsin, and the DNR appropriately has sought to “preserve and protect” it. See: *Sterlingworth*, p. 722 Placement of piers in the area should be limited as set forth above, and only if and when the conditions described herein are met.

### CONCLUSIONS OF LAW

1. The Division of Hearings and Appeals has authority under Wis. Stat. §§ 30.12 and 227.43(1)(b) and in accordance with the foregoing Findings of Fact, to issue or deny a permit for placement of structures on navigable waters.

2. The piers described in the Findings of Fact constitute structures within the meaning of Wis. Stat. § 30.12.

3. The applicant is a riparian owner within the meaning of Wis. Stat. § 30.12. The applicant has not carried his burden of proving the exact amount of riparian frontage owned.

4. The applicant for a Wis. Stat. § ch. 30 permit has the burden of proof that the project will meet the standards in Wis. Stat. § 30.12(2), *Village of Menomonee Falls v. DNR*, 140 Wis. 2d 579, 605, 412 N.W.2d 505 (Wis. Ct. App. 1987). The applicant has not carried his burden of showing that the proposed project would not be detrimental to the public interest in navigable waters.

5. The placement of four large piers totaling 88 pier slips in this area would not be a “reasonable use” of this wetland-dominated riparian parcel. *Sterlingworth*, at p. 718. Placement of one pier less than 100 feet in total length and mooring no more than eight slips would be the maximum “reasonable use” of this riparian property.

6. The DNR and the Division must consider the cumulative impacts of permitting structures under Wis. Stat. § ch. 30. *Hixon v. Public Service Commission*, 22 Wis. 2d 608, 619, 146 N.W.2d 577 (1966) and *Sterlingworth v. DNR*, 205 Wis. 2d 710, 556 N.W.2d 791, (Wis. Ct. App. 1996) There would be detrimental cumulative impacts from placing numerous piers in areas which provides significant aquatic habitat.

7. The applicant has not carried his burden of proof in showing that the proposed project would not be “detrimental to the public interest in navigable waters” within the meaning of Wis. Stat. § 30.12(2).

8. The public trust doctrine protects the public interest in navigable waters, including the interest in maintaining a high-quality fishery for recreational purposes. *Muench v. PSC*, 261 Wis. 492, 501-502, 53 N.W.2d 514 (1952). The public trust duty requires the state not only to

promote navigation but also to protect and preserve its waters for fishing, recreation and scenic beauty. *Just v. Marinette Co.*, 56 Wis. 2d 7 (1972)

9. The project is a type III action under Wis. Admin. Code § NR 150.03(8)(f)4. Type III actions do not require the preparation of a formal environmental impact assessment.

### ORDER

WHEREFORE, the request for a permit to place structures on the bed of Lake Wisconsin is DENIED.

IT IS FURTHER ORDERED, that if the applicant files a request for a permit which meets the conditions set forth in Finding #9 above, limited to one pier and no more than eight slips, the DNR shall issue such a permit without need for a second contested case proceeding.

Dated at Madison, Wisconsin on November 7, 2001.

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By \_\_\_\_\_  
JEFFREY D. BOLDT  
ADMINISTRATIVE LAW JUDGE

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### 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 Department of Natural Resources 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 therefor 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. 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.