



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

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Application of Lars Carlson for a Permit for Rock Filled Crib Pier with L Extension on the Bed of Lake Superior, Town of Bayfield, Bayfield County, Wisconsin

Case No.: IP-NO-2005-04088LS

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

Lars T. Carlson, 87880 Brickyard Creek Road, Bayfield, Wisconsin, 54814, applied to the Department of Natural Resources for a Permit to construct a recreational dock on the bed of Lake Superior. The amended proposal provides for a dock that will extend into the lake to a depth of three feet. The applicant proposes that the dock will be 55 feet long and will consist of two (2) rock-filled oak log cribs, each twenty (20) feet long by twelve (12) feet wide. The dock will have a twenty (20) foot long by twelve (12) foot "L" and will have a bridge over a fifteen (15) foot wash-through from the shoreline to the first crib. The logs below the water will be untreated and the cribs will be covered by 2" x 6" timber decking. There will be two (2) metal ladders extending down into the water.

The proposed project is located in Lot 4 of Roy's Point Subdivision, Section 6, Township 50N, Range 3W, being a part of Government Lot 1, Bayfield County, Wisconsin.

Pursuant to said public notice a hearing was held on June 18, 2007, at the Bayfield County Courthouse, Washburn, Wisconsin, Jeffrey D. Boldt, Administrative Law Judge, presiding. The matter was heard in conjunction with another similar pier permit application, Application of John Loeffelholz for a Permit for Rock Filled Crib Pier with L Extension on the Bed of Lake Superior, Town of Bayfield, Bayfield County, Wisconsin, Case No. IP-NO-2005-04087LS. The parties submitted writings after the hearing, the last of which was received on June 22, 2007.

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

Wisconsin Department of Natural Resources, by

Attorney Michael Cain  
P. O. Box 7921  
Madison, WI 53707-7921

Lars T. and Mary E. Carlson (the applicant),  
and John L. Loeffelholz, by

Attorney Jack Carlson  
Spears and Carlson  
P. O. Box 547  
Washburn, WI 54891

Red Cliff Band of Lake Superior Chippewas (Red Cliff or the tribe), by

Attorney David M. Ujke  
Legal Department  
88385 Pike Road  
Bayfield, WI 54814

Cynthia A. Stokvis  
37640 Brickyard Creek Road  
Bayfield, WI 54814

#### FINDINGS OF FACT

1. Lars T. Carlson, 87880 Brickyard Creek Road, Bayfield Wisconsin, completed filing an application with the Department for a permit under Wis. Stat. § 30.12 to place a rock filled log crib dock on the bed of Lake Superior, Town of Bayfield, on or about December 9, 2005. Lars and Mary Carlson own riparian property located in Lot 4 of Roy's Point Subdivision, Section 6, Township 50N, Range 3W, being a part of Government Lot 1, Bayfield County, Wisconsin.

2. The original dock application proposed a dock that would have a maximum length of 100 feet with a 32 foot "L" at the end of the dock, and would reach a depth of six (6) feet at the end of the dock to accommodate a power boat. A public hearing was held pursuant to published notice on April 5, 2006, and on May 5, 2006, the original application was denied. A timely Petition for Administrative Review was filed with a request for a contested case hearing by the applicant.

3. Following the filing of the Petition for Administrative Review and the granting of the request for a contested hearing, the applicant submitted a proposal for a modified dock project with the DNR. The maximum depth at the end of the dock will be three (3) feet. This depth modification was made at the specific request of the local DNR office. The modified project is expected to extend 55 feet into the lake with two rock-filled log cribs measuring 20 feet by 12 feet each, a 20 foot by 12 foot wide "L" and a bridge over a 15 foot shoreline flow-through to the first crib. There will be two ladders extending down into the water from the dock.

4. Applicant and his wife purchased the land, on which their home is located in February, 2002. The home was built and occupied in 2003. The Carlsons have their legal residence in the State of Florida but are full-time residents of Bayfield, Wisconsin from mid-May to mid-October. The property on which their home is located consists of 1.5 acres of land with 151 feet of shoreline on Lake Superior. The property is located between Roy's Point Marina and Red Cliff off of Highway 13 and in an area along the West Channel between the mainland and Basswood Island referred to as "Buffalo Bay".

5. The shoreline at the project site is characterized by a steep grade down to the lake with large boulders along the shoreline itself. The bottom of the lake bed consists of boulders and rocks. The water depth in the area is fairly shallow and it is expected to be three feet deep at the end of the proposed pier. The bay is a high energy area with the greatest wave action coming from winds coming out of the northeast. (Shram)

6. The rock-filled crib design is typical of Lake Superior solid dock structures, and of the dock structures already located on Lake Superior in the Bayfield area. (Dobson) A number of similar structures have been approved on Lake Superior in Bayfield County in recent years. (Ex. 270) There are approximately seventeen docks and four marinas built between Bayfield and Red Cliff Bay, along a five mile stretch of shoreline that includes Buffalo Bay. (Carlson)

There are few piers in the immediate area of the proposed pier, which presents a largely natural appearance. (See: Ex. 42) A majority of the property owners in the subdivision oppose placement of the applicant's pier and that of his neighbor John Loeffelholz. (Stokvis)

7. Lake Superior is navigable in fact. Navigation at the project site is limited to kayaks, canoes and similar small craft due to the shallowness of the water in the bay. The primary boat traffic in the area is located in the channel along Basswood Island. Most of the kayak traffic in the area crosses directly over to Basswood Island or north along the coast to primary destinations on the other islands and not along the shoreline between Red Cliff and Roy's Point Marina.

8. The proposed structure will not materially obstruct navigation on Lake Superior and will not be detrimental to the public interest. The usual pattern of boat traffic in the area, consisting primarily of kayaks and small craft, will not be obstructed by the modified dock which will have a depth at the end of the dock of approximately three feet at the present, very low, Lake Superior water level.

9. The shoreline in the vicinity of the Roy's Point Marina has a narrow strip of sandy beach. This area is located approximately 600 feet from the project site. There is no sandy beach located in the immediate vicinity of the project. The applicants propose to include a fifteen (15) foot shoreline flow-through to minimize the risk of any significant shoreline alteration. DNR area water management specialist John Spangberg testified that he had some concerns about the possible accretion of material and erosion at nearby areas as a result of littoral drift exacerbated by placement of piers in the area. Ms. Stokvis also expressed concerns that there might be a build-up of sand and other material due to run off from a ravine on the northwest side of the proposed pier. To address these concerns, Spangberg added a specific

condition that provides that the DNR may order modifications to the pier, including the removal of the pier, if the presence of the pier is found to be causing accretion of material on the shoreline, or if the pier is found to be contributing to an erosion problem. Given this condition, the pier will not have a detrimental impact upon either accretion or erosion occurring as a result of either littoral drift or runoff from upland areas.

10. Given the significant wave action at the site, and the predominant rock and cobble lake bottom, there is little aquatic vegetation at the project site. (Ex. 33) As a result, the proposed piers are not likely to have any detrimental impact on aquatic vegetation as a result of shading impacts from the proposed piers. (Spangberg)

11. Brickyard Creek flows into the lake just to the west of Roy's Point Marina. This creek has been designated as a class 2 trout stream. The creek is approximately 600 feet from the project site and is not likely to be impacted by the proposed pier.

12. The proposed dock is not likely to have an adverse impact on trout or other fish spawning. The DNR established that the project site was "not a major spawning area" for any fish species, including the lake-dwelling coaster brook trout. (Shram; Ex. 30) Northeast winds create large waves and a "high energy" area along the shore that make this area largely unsuitable for fish spawning. (Id.) The Red Cliff established that coaster brook trout likely make use of the area. (Symbal) Significant efforts have been made to reintroduce these lake-dwelling trout back into the area. If the tribe is able to demonstrate to the satisfaction of the DNR that the piers are having a detrimental impact on spawning activities of any trout species, a condition in the permit as issued requires that the piers be modified or removed.

13. Fishing activity in the area is limited and will not be adversely or materially affected by the proposed dock. Some members of the Red Cliff Band of Ojibwa do conduct home use fishing with gill nets set perpendicular to the shore and extending out into the bay. These nets have not been set in the immediate area where the dock is proposed to be constructed, but in any event the proposed dock will not adversely affect the band members' ability to set their gill nets in the bay.

14. There is no commercial fishing in the area due to the depth of the water in the bay. The tribe established that there is subsistence fishing in the area, where anglers make use largely of gill nets. (Symbal; Schram) The usual pattern of placement is in water depths of 8 to 10 feet and not in the near shore area where the pier will be placed. (Shram)

15. The proposed dock will not have a detrimental impact on fishery or wildlife values. Schram testified that the proposed pier would actually provide cover to fish and perhaps habitat to invertebrates with little downside because there is no significant aquatic vegetation in the area. Log cribs have been shown to enhance fish habitat by providing fish with extra protection from predators.

16. The proposed structure will not reduce the effective flood flow capacity of Lake Superior.

17. The proposed project will not impact wetlands. There was no testimony regarding any impact on wetlands.

18. There are no known easements or restrictive covenants on record to prohibit the placement of the proposed dock at this site, or that would limit the riparian rights of the applicant.

19. Ms. Stokvis provided heartfelt testimony that the proposed pier, along with that of Mr. Loeffelholz, would have a detrimental impact on natural scenic beauty, particularly as seen from the shore to the water. She presented testimony and pictures (e.g. Ex. 42) to this effect on behalf of other neighbors who also oppose the placement of these piers, primarily on the grounds of its impact on natural scenic beauty.

Any dock is to some extent an intrusion into the beauty of the natural landscape. This project will be located between two large commercial marinas: the Roy's Point Marina and the Buffalo Bay Marina and Campground. The mainland area is currently being developed for summer and year-round cottages and homes. The Applicant's home is situated on one of thirteen lakeshore lots and there are five other homes already built along the shoreline. In addition, there are two pre-existing commercial operations located in the bay to the west of the applicant's property and near the Buffalo Bay Marina: Peterson's Fishery which has a dock with moorings for its commercial fishing boats, and Living Adventure, a commercial kayak outfitter.

In this context, the proposed pier does not have a detrimental impact upon natural scenic beauty sufficient to warrant denial of the permit on this basis alone.

20. The proposed pier project will not result in detrimental cumulative impacts to the Buffalo Bay area. First, given the objections of neighbors to the placement of piers, and the existence of some new restrictive covenants prohibiting the placement of piers in the riparian zones proximate to five nearby lots, it is unlikely that there will be a proliferation of piers sufficient to cause detrimental impacts to natural scenic beauty. Secondly, a permit condition has been required in the permit issued below that provide for modification or rescission of the pier permit if the piers have a detrimental impact upon on either the possible accretion of material and erosion at nearby areas as a result of littoral drift or on the spawning activities of any trout species. (Condition #13)

21. The applicant has been advised by the U.S. Army Corps of Engineers in a letter dated June 25, 2006, that the dock project is eligible for Federal authorization under Army General Permit GP-001-W1 in the event that the pending DNR permit is approved.

22. The proposed structure will not adversely affect water quality nor will it increase water pollution in Lake Superior. The structure will not cause environmental pollution as defined in Wis. Stat. § 281.01(10).

23. The DNR has complied with the procedural requirements of Wis. Stat. § 1.11 and Wis. Admin. Code Ch. NR 150 regarding assessment of environmental impact. The proposed

project does not fall within the definition of a "major state action significantly affecting the quality of human environment".

## DISCUSSION

Riparian rights in Wisconsin involve a balancing of the rights of a private riparian to gain access to the water with the rights of the public to protect the public interest in navigable waters. It is well established that riparian rights are qualified, subordinate and subject to the paramount interest of the state and the paramount rights of the public in navigable waters. *State v. Bleck*, 114 Wis. 2d at 467; *Mayer v. Grueber*, 29 Wis. 2d 168, 173-74 (1965); *Ashwaubenon v. Public Service Comm.*, 22 Wis. 2d 38, 49, 647 (1963); *Att'y Gen. ex rel. Becker v. Bay Boom W.R. & F. Co.*, 172 Wis. 363, 375 (1920); *State ex rel. Thomas Furnace Co. v. Milwaukee*, 156 Wis. 549, 553-54 (1914).

The general proposition pertaining to the hierarchical relationship between riparian and public rights specifically applies to the construction of a pier or similar structure in aid of a riparian's navigation. Wisconsin courts have consistently held that a riparian owner's right of access to and from the water and right to build a pier to effectuate such access are limited and subordinate to public rights. *Delaphaine v. C. & N.W. R'y. Co.*, 42 Wis. 214, 226 (1877) (riparian owner has right to build piers to navigable waters not interfering with the public use). In *Cohn v. Wausau Boom Co.*, 47 Wis. 2d 314, 322 (1879) the Wisconsin Supreme Court held:

"It is settled in the state that a riparian owner on navigable water may construct in front of his land, in shoal water, proper wharves, piers and booms, in aid of navigation, at his peril of obstructing it, far enough to reach actually navigable waters." (Emphasis added)

In *Bond v. Wojahn*, 269 Wis. 235, 239 (1954) the Wisconsin Supreme Court held:

"In some respects, the rights of riparian owners on navigable streams and navigable or meandered lakes differ, but one of the common rights is the right to build a pier in front of his land a sufficient distance to reach actually navigable water." (Emphasis added)

Similarly, "Exclusive use of the apportioned riparian tract only extends so far as to reach the line of navigability." *Nosek v. Stryker*, 103 Wis. 2d 633, 640 (1981)

The proposed pier as modified is not likely to have any detrimental environmental impacts on the public waters of the state. The two most likely environmental impacts have been anticipated by a permit condition that provide for modification or rescission of the pier permit if the piers have a detrimental impact upon either the possible accretion of material and/or erosion at nearby areas as a result of littoral drift or on the spawning activities of any trout species. (Condition #13) Given this permit condition, the most significant remaining issue with respect to public rights relates to either direct or cumulative impacts to natural scenic beauty as a result of placement of this pier, and another to a neighboring riparian.

These concerns are by no means trivial. Ms. Stokvis presented testimony and pictures (e.g. Ex. 42) to this effect on behalf of herself and other neighbors who also oppose the placement of these piers, primarily on the grounds of its impact on natural scenic beauty. However, given this opposition, and given restrictive covenants that will bar other nearby property owners from placing piers, the balancing must come down on the side of the rights of the riparian to place a pier to reach the waters of the Lake. The DNR suggested that it would be a better idea for subdivision residents in Buffalo Bay to share a pier rather than to place individual piers. The Division agrees. However, it also agrees with the Department that, given the insistence of the individual applicants to seek their own piers, there is not a sufficient legal basis in such a preference to deny the permit.

The applicants having established that they meet the statutory requirements, so long as they comply with the conditions set forth below, the permit must be granted.

### 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 a permit for the construction and maintenance of said structure to the conditions specified, to-wit a depth at the end of the dock of three (3) feet.
2. The applicant is a riparian owner within the meaning of Wis. Stat. § 30.12.
3. The proposed pier constitutes a structure within the meaning of Wis. Stat. §§ 30.01(5) and 30.12.
4. 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.
5. Applicant has carried his burden of demonstrating that the proposed project will not materially obstruct navigation, will not be detrimental to the public interest, will not reduce the effective flood flow capacity of Lake Superior and that the dock constitutes a reasonable use of his riparian rights. The permit conditions set forth below are necessary to protect public rights in public waters.

### PERMIT

A permit is hereby granted to the applicant for the construction of a structure as described in the foregoing Findings of Fact, subject to the conditions set forth below:

1. You must notify John Spangberg at telephone number (715) 685-2923 before starting construction and again not more than five (5) days after the project is complete.

2. You must complete the project as described on or before November 15, 2007. If you will not complete the project by this date, you must submit a written request for an extension prior to the expiration date of the permit. Your request must identify the requested extension date and the reason for the extension. A permit extension may be granted, for good cause, by the Department. You may not begin or continue construction after the original permit expiration date unless the Department grants a new permit or permit extension in writing.

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. You are responsible for obtaining any permit or approval that may be required for your project by local zoning ordinances or by the U.S. Army Corps of Engineers before starting your project.

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 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 completion of 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 part of the violation pursuant to Wis. Stat. § 30.292, for any violations of Wis. Stat. ch. 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 standards in the Wisconsin Construction Site Best Management Practices Handbook.

12. The pier shall be installed in accordance with the plans provided as part of the application for a permit.

13. The Department may order modifications to the pier, including the removal of the pier, if the presence of the pier is found to be causing accretion of material on the shoreline, if the pier is found to be contributing to an erosion problem, or if the pier is shown to cause harm to the spawning activities of any trout or other fish species.

Dated at Madison, Wisconsin on July 23, 2007.

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

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 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 therefore in accordance with the provisions of Wis. Stat. §§ 227.52 and 227.53. Said petition must be filed within thirty (30) days after service of the agency decision sought to be reviewed. If a rehearing is requested as noted in paragraph (2) above, any party seeking judicial review shall serve and file a petition for review within thirty (30) days after service of the order disposing of the rehearing application or within thirty (30) days after final disposition by operation of law. Since the decision of the Administrative Law Judge in the attached order is by law a decision of the Department of Natural Resources, any petition for judicial review shall name the Department of Natural Resources as the respondent and shall be served upon the Secretary of the Department either personally or by certified mail at: 101 South Webster Street, P. O. Box 7921, Madison, WI 53707-7921. Persons desiring to file for judicial review are advised to closely examine all provisions of Wis. Stat. §§ 227.52 and 227.53, to insure strict compliance with all its requirements.