



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

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In the Matter of an Application of Trenton Island  
Marina to Amend DNR Permit # IP-WC-1988-48-  
17105, to Extend an Existing Pier Finger Thirty  
Feet to Accommodate a Larger Boat on the Bed of  
the Mississippi River - Pool No. 4, Town of  
Trenton, Pierce County

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Case No. IP-WC-1988-48-17105

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

Pursuant to due notice, hearing was held at Ellsworth, Wisconsin on August 2, 2012,  
Jeffrey D. Boldt, administrative law judge presiding.

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

Trenton Island Marina, by

Paul Hayden  
Trenton Island Marina  
P.O. Box 188  
Hager City, WI 54014

Duane Ferguson  
201 West 107<sup>th</sup> Street  
Bloomington, MN 55420

Department of Natural Resources, by

Attorney Megan Correll  
Department of Natural Resources  
P. O. Box 7921  
Madison, WI 53707-7921

David R. Kvalsten  
526 Minnesota Street  
Red Wing, MN 55066

The hearing was granted on the following issues:

Disputed Issue of Material Fact:

*Impacts on Public Interest and Navigation:* What additional individual or cumulative adverse impacts, if any, will extending the last southwestern (upriver) finger pier 30 feet farther waterward to a total length of 81.70 feet have on the public interest and the ability of the public to safely navigate and exercise incidents of navigation in the Mississippi River?

Disputed Conclusions of Law:

*Detriment to Public Interest and Material Obstruction of Navigation:* Will any additional individual or cumulative adverse impacts from extending the last southwestern (upriver) finger pier 30 feet farther waterward to a total length of 81.70 feet cause the finger pier or boat moored to it to detrimentally affect the public interest and materially obstruct the ability of the public to navigate the Mississippi River?

*Reasonable Use of Navigable Waters:* Is extending the last southernwestern (upriver) finger pier 30 feet farther waterward to a total length of 81.70 feet a reasonable use of the Mississippi River by you as a riparian?

## FINDINGS OF FACT

1. On October 31, 1991, the Department of Natural Resources (Department) issued a marina permit to Trenton Island Marina, c/o Paul Hayden and Duane Ferguson, N671 825<sup>th</sup> Street, Hager City, Wisconsin, 54015. On September 4, 2009, the Department issued an amendment to that permit. On April 13, 2010, Trenton Island Marina applied to the Department for a second amendment to the original marina permit to extend an existing pier finger thirty feet waterward in order to accommodate a larger boat on the bed of the Mississippi River – Pool No. 4, located in the NW ¼ of the NW ¼ of Section 14, Township 24 North, Range 18 West, Town of Trenton, Pierce County.

2. On May 27, 2010, the Department denied Trenton Island Marina's permit application to amend the original marina permit. On June 18, 2010, the Department received a request for contested case hearing from Paul Hayden on behalf of Trenton Island Marina. By letter dated August 6, 2010, the Department granted a contested case hearing pursuant to Wis. Stat. §§ 30.12(3m), 30.209 and 227.42.

3. On May 25, 2012, the Division of Hearings and Appeals received the Request for Hearing from the Department of Natural Resources.

4. On August 21, 2008, the Department of the Army, Corps of Engineers (USACOE) after conducting an investigation, contacted Trenton Island Marina by Paul Hayden

to advise him of its concern with a large houseboat that was protruding into the upper Mississippi River navigational channel and creating a visual concern for towboat pilots. (Ex. DNR 5)

5. On September 2, 2008, the DNR informed Mr. Hayden and Mr. Ferguson that its present pier configuration was not in compliance with its amended permit. (Ex. DNR 6) This was as the result of a joint inspection by the USACOE, the DNR and Pierce County Zoning Administrator. This inspection came about after a complaint from the barge industry that the large houseboat was an obstruction to navigation.

6. The U.S. Coast Guard took photos of the navigation channel in response to a complaint from the barge industry. (Ex. DNR 4) These photos demonstrated the packed channel in the area of the Trenton Island Marina.

7. The testimony of towboat operator, Ross Marcks, was compelling that the houseboat does materially obstruct barge navigation at and around the marina site. Marcks has been navigating the river for thirty years. Barges are challenging to navigate, especially when fully loaded with up to 23,000 tons of cargo. Marcks narrated a U.S. Coast guard video demonstrating the complexity of operating a large, fully loaded barge in this area. The towboat operator has a large blind spot of between 400 to 800 feet to work. Marcks testified that the area around the Trenton Marina near Red Wing was among the most difficult to navigate on the entire river and that the large houseboat was a major factor which obstructed navigation. He opined that extension of the pier to allow for mooring the large houseboat would take away any margin for error or safety in operation of barges in the area and would materially obstruct navigation.

8. Marcks testimony was confirmed by DNR Conservation Warden Bradley Peterson, who is also on the river in this area on a regular basis. He noted that the narrow channel, the barge traffic, and the high number of recreational boaters “create a potential for a serious accident.” He testified that extending the last southerwestern (upriver) finger pier 30 feet farther waterward to a total length of 81.70 feet would not be a reasonable use of the Mississippi River by Trenton Island Marina under these circumstances, but would instead materially obstruct navigation. Warden Peterson opined that mooring the large houseboat in this location represents “a serious accident waiting to happen.” He also noted that there had been several unreported minor accidents in the area already.

9. Greg Genz, Vice President of the Upper Mississippi Waterway Association, testified that his group had polled barge industry and other members relating to safety and or navigational challenges on the Upper Mississippi. The Trenton Island Marina was identified as a significant concern by towboat pilots, as was the specific large houseboat at issue in this amended permit application.

10. Mr. Kvalsten testified that his houseboat boat has been in this location for a number of years and that there have been no serious accidents. However, as noted above, Warden Peterson described mooring this large houseboat in this location as “a serious accident waiting to happen.”

11. The applicant has not carried his burden of establishing that the proposed pier project would be not detrimental to the public interest in navigable waters. It would be an unreasonable use of the public waters by the riparian owner to extend the pier as set forth above.

12. The structure or deposit would “materially obstruct navigation” within the meaning Wis. Stat. § 30.12(3m)(c)1.

13. The proposed project has been evaluated under the Wisconsin Environmental Policy Act (WEPA), and it has been determined that the grant or denial of the permit would not be a major state action under WEPA.

## DISCUSSION

The applicant for a Chapter 30 permit has the burden of proof in a contested case proceeding. *Village of Menomonee Falls v. DNR*, 140 Wis. 2d 579, 587, 412 N.W.2d 505, 508 (Ct. App. 1987) In the instant case, the applicant has simply not carried his burden of demonstrating that the project would not detrimentally affect the public interest and would not materially obstruct the ability of the public to navigate the Mississippi River in the area in and around the Trenton Island Marina. The US Coast Guard, the USACOE, the Goodhue County Sheriff (Ex. DNR 17), the barge industry, and the Wisconsin Department of Natural Resources have all expressed serious concerns for boating safety in the area as a result of this large houseboat being moored at the far end of a pier that already extends into the river in a highly used area with a narrow channel.

The marina owners have been flexible and willing to work with these reasonable governmental and business groups, but they have been unable to find an alternative location for their longtime marina client, Mr. Kvalsten, and his massive 70 foot long houseboat. The Department granted a permit amendment to the Harbor Bar to allow it to accommodate Mr. Kvalsten’s boat, which involves some additional expense to both the Harbor Bar and Mr. Kvalsten.

It is up to Mr. Kvalsten and the Harbor Bar to determine if this expense is worth bearing.

But what is clear is that to extend the existing permit to sanction the mooring of this houseboat would not meet Chapter 30 requirements, because it would be an unreasonable use of riparian rights and would materially obstruct navigation in this heavily used narrow channel of the Mississippi River. The US Coast Guard, the USACOE, the Goodhue County Sheriff, the barge industry, and the Wisconsin Department of Natural Resources have all voiced concerns about the likelihood of a serious accident at this marina. Numerous witnesses provided essentially un-rebutted testimony relating to the challenges that this obstruction poses to navigation.

It would be a serious error to wait until after such an accident occurs before removing this material obstruction to navigation.

The amended permit application must be denied.

### CONCLUSIONS OF LAW

1. The Division of Hearings and Appeals has authority under Wis. Stat. §§ 227.43(1)(b) and Chapter 30.12 (3m) to hear contested cases and issue necessary Orders relating to individual permit requests.
2. The applicant for a Chapter 30 permit has the burden of proof in a contested case proceeding. *Village of Menomonee Falls v. DNR*, 140 Wis. 2d 579, 587, 412 N.W.2d 505, 508 (Ct. App. 1987)
3. The applicant has not carried his burden of demonstrating that the project would not be “detrimental to the public interest” within the meaning of § 30.12(3m)(c)2 because mooring the large houseboat would be an unreasonable use of public waters by this private riparian.
4. The extension of the pier would materially obstruct navigation on the Upper Mississippi River within the meaning of § 30.12(3m)(c)2.

### ORDER

WHEREFORE IT IS HEREBY ORDERED, that the application for an amended permit be DENIED, as the applicant has not carried his burden of proof that the project complies with statutory requirements.

Dated at Madison, Wisconsin on September 5, 2012.

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 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.