



Before The  
State Of Wisconsin  
DIVISION OF HEARINGS AND APPEALS

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In the Matter of the Application by the Village of  
Egg Harbor for an Amendment to its Permit to  
Place Marina Piers on the Bed of Green Bay,  
Located in the Village of Egg Harbor, Door  
County

Case No. IP-NE-2008-15-0103LB

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FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

Pursuant to due notice including publication, hearing was held in Sturgeon Bay, Wisconsin, on April 19, 2010. The parties requested the opportunity to offer written closing arguments and the last submittal was received on May 6, 2010.

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. The Village of Egg Harbor, 7860 Highway 42, Egg Harbor, Wisconsin, 54209, applied to the Department of Natural Resources (the Department) for an amendment to its permit to place marina piers, and dredge on the bed, and grade over 10,000 square feet on the bank of Green Bay. The proposed project is located in the Village of Egg Harbor, Door County, at 7815 Dock Road, also described as Section 25, Township 30 North, Range 26 East.

2. By letter dated October 16, 2009, the Department approved the Village of Egg Harbor's amended permit application with certain conditions and limitations. (Ex. 202)

3. On November 12, 2009, the Department received a petition for a contested case hearing and request for a stay from Attorney Winston A. Ostrow on behalf of the Peninsula Shores Condominium Association, Inc.

4. On December 11, 2009, the Department granted the contested case hearing request, limited to the following two issues:

### Disputed Issues of Material Fact:

*Impacts on Navigation:* What additional adverse impacts, if any, will extending 2 floating piers 20 feet further south up to the extended property line and mooring boats to the end of the piers have on the ability of the public (including Peninsula Shores owners) to safely navigate and exercise incidents of navigation in the area of Green Bay south of the extended property line?

*Impacts on Natural Scenic Beauty:* What additional adverse impacts, if any, will extending 2 floating piers 20 feet further south up to the extended property line and mooring boats to the end of the piers have on natural scenic beauty in the area of Green Bay south of the extended property line?

5. On February 8, 2010, the Division of Hearings and Appeals received the Request for Hearing from the Department of Natural Resources.

6. The December 17, 2008, permit as issued by the ALJ and as adopted by the DNR was amended in several ways. (See: Ex. 202, p. 2, #3 A to O) However, the contested case hearing in the instant matter was granted only with respect to the two issues described in Finding #4 above. In the instant permit amendment, the DNR specifically found that "the proposed amendment to the permit will not affect the Findings of Fact and Conclusions of Law of the original permit." (Ex. 202, Findings of Fact, #8) Accordingly, the ALJ also adopts all facts found in the December 17, 2008, permit as issued by the Division of Hearings and Appeals except as modified on the amended permit issued October 16, 2009.

7. The parties referenced three separate dock layout possibilities in connection with this proceeding. For purposes of this decision, the proposal which is under consideration is the amendment dated October 16, 2009. This has been called Option C Revised Permit Amendment.

The ALJ issued permit was frequently referred to as Option C Revised, and dated October 28, 2008.

Finally, there is the Original Permit Option C, which was tentatively approved by the DNR and was the permit reviewed at the time of the original 2009 hearing. This was frequently referred to as Original Permit, Option C, dated July 21, 2008.

8. The Village compiled a layout comparison schematic diagram (Ex. 109-V), which graphically displays the three layout options.

Further, Ex. 110-V describes the locations of the options in connection with the approximate north and south property lines (P.L.).

Original Permit – Option C (July 21, 2008)	“A” Dock extends 43.7 ft. south of extended P.L.
	“B” Dock extends 36.5 ft. south of extended P.L.
	“B” Dock is 169.8 ft. offshore from exclusive riparian zone.
ALJ Issued Permit – Option C Revised (October 28, 2008)	“A” Dock stops 17.7 ft. north of extended P.L.
	“B” Dock stops 18.2 ft. north of extended P.L.
	“B” Dock is 164.6 ft. offshore from exclusive riparian zone.
Option C Revised Permit Amendment (October 16, 2009)	“A” Dock stops 1.7 ft. north of extended P.L.
	“B” Dock stops 0.1 ft. north of extended P.L.
	“B” Dock is 172.6 ft. offshore from exclusive riparian zone.

(Ex. 110-V)

9. Of the changes in the amended permit issued October 16, 2009, petitioner Peninsula Shores objected to the reconfiguration that allows the two larger floating piers to extend 20 feet closer to the common extended property line between the properties of petitioner and the Village. (Ex. 203-DNR p.2)

10. The additional 20 feet of pier length allowed by the amended permit issued October 16, 2009, for each of the two larger floating piers will not cause either pier to cross the common extended property line between the properties of petitioner and the Village or extend into the exclusive riparian zone of petitioner. (Exs. 200-DNR and 208-DNR; Webb)

11. The amended configuration DNR approved October 16, 2009, that is at issue in this hearing will extend the two larger floating piers approximately 35 feet closer to the common extended property line than the longtime breakwater being replaced (ghost image on Exs. 206-DNR to 208-DNR) and approximately 20 feet closer to the common extended property line than the configuration approved by DHA on December 17, 2008. (Exs. 203-DNR p. 2, 207-DNR)

12. As shown in Ex. 1 from the October 28, 2008, hearing, since 2005 petitioner Peninsula Shores had been authorized to place 9 mooring buoys (3 rows of 3 mooring buoys) in navigable waters adjacent to its riparian property at distances of 100, 150, and 200 ft. waterward of the ordinary high water mark (OHWM). Pursuant to Wis. Stat. §§ 30.74(2) and 30.772(1), (2)(e), and (4), the Village authorized the placement subject to any necessary DNR approval. By decision entitled DNR

Waterway Marker ID #3292 issued May 24, 2005, DNR approved placing 3 buoys 200 ft. from the OHWM. (Ex. 210-DNR)

13. By letter dated November 30, 2009, the Village notified petitioner that pursuant to Village Resolutions Nos. 2009-10 and 2009-11, it had cancelled a Mooring Agreement between it and petitioner and withdrawn its February 1, 2005, authorization to place the buoys. (Ex. 211-DNR)

14. By decision dated February 8, 2010, DNR revoked its May 24, 2005, approval that authorized petitioner to place 3 moorings buoys 200 ft. waterward of the OHWM. (Ex. 212-DNR)

15. The petitioners expressed concerns about boats moored at the marina being driven into their riparian zone in the location of the now revoked mooring area, particularly if the winds blew strongly from the south. However, wind data available for the area showed that south winds blew only a short period of time on an annualized basis, and that the water in front of Peninsula Shores was protected from a direct south wind by an upland bluff. (Ex. 113) (Testimony of Bill Brose and Captain Steve Smith) Further, the Village's consulting engineer, Bill Brose, analyzed the petitioners concerns and prepared a scaled schematic diagram which demonstrated that, even using some of the worst case scenarios provided by the petitioners, there would be at least 85.8 feet of clearance between such hypothetical moorings. Brose provided undisputed expert testimony that the navigational "fairways" met all relevant design planning criteria, including those of the American Society of Civil Engineers (ASCE). (Brose; Ex. 111-V) The fairway width in this area would be no less than 85 feet, which exceeds the 75 foot recommendations in the ASCE guidelines for small harbors. (Brose)

16. Another navigational objection raised by Peninsula Shores is that the pattern of traffic in and out of the marina area would go directly south, in front of the 400 feet of riparian property owned by Peninsula Shores, rather than exiting first to the south and then turning west as had been the pattern in the old marina. (Schaefer) This contention was refuted by Captain Steve Smith, the harbormaster for the Village, and by DNR Warden Neal. Neal was persuasive that the exiting traffic would only go south for a short distance and then turn west to get beyond the breakwater and head into the open water of the Bay. Aerial photographs show that heading directly south as Peninsula Shores contends, would lead a boat directly into the large solid Burnham Pier. This is also apparent in the composite photo of the area in front of Peninsula Shores. (Testimony of Captain Smith and Warden Neal) (Exs. 116, 117, 118 and 119)

The amended pier configuration will not be a material obstruction to navigation. (Webb; Neal; Smith) DNR Warden Patrick Michael Neal has been assigned to the Lake Michigan and Green Bay Marine Enforcement Unit since 1994. (Ex. 218) Warden Neal provided expert testimony based upon his familiarity with Egg Harbor navigational patterns and many years of patrolling the area, including almost daily trips through the project area. Neal opined that the new configuration would not materially obstruct navigation because it did not disrupt the usual navigational pattern in the area. The only concern Neal expressed about navigational problems in the area related to the opposite end of the marina—on the outside wall of the breakwater and not relevant to this hearing-- because some boaters might rely too heavily on their GPS equipment (especially at night on return trips) and crash into the outside of the breakwater. Neal testified "that's where the crashes are." He also indicated that the 20

foot adjustment of the piers did not conflict with, nor in any way obstruct, the usual, counterclockwise pattern of boat traffic in the area. (See: Ex. 213)

17. No navigational accidents caused by collisions of two moving boats has occurred in or near the marina, although there have been mishaps in backing up and leaving the boat launch. (Testimony of Village President Nancy Fisher, Warden Neal, Captain Steve Smith)

18. A recently enacted state law also requires that slow no wake zones be maintained within 100 feet of any dock or pier on a lake. Personal watercraft must be at slow no wake speeds within 200 feet of the shoreline of any lake. (Ex. 209)

19. The pier configuration as amended will not be detrimental to the public interest in natural scenic beauty. (Webb) DNR Area Water Management Specialist Carrie Webb testified that the Department considers natural scenic beauty primarily from the perspective of a person on the public waters looking toward the shore. Further, the emphasis in protecting the public interest is on natural features not present at the highly developed and longstanding marina project site. The overall difference between the permit as previously issued and the proposed amended configuration is minor, but what changes there are seem to be more protective of natural scenic beauty rather than less. The height of the breakwater structure has been reduced, which may well make it less visible from the waters of the bay. (Webb) Further, any change in the view from the Peninsula Shores Condominium upland property is caused by boats being moored 20 feet closer to the extended property line. The marina site has been used for this purpose since 1969, prior to the construction of the Peninsula Shores condominiums. The historic use of the marina site has included placement of a large platform since the Cherry Dock was constructed there in 1907. (Finding of Fact #6 of the December 17, 2008, ALJ Permit) The condominiums were built in the aesthetic context of this longstanding historic use by its neighbor to the north.

Further, any minor diminishment of the view from the neighboring upland must be balanced against the major public benefits that the marina project provides in terms of greater public access to public waters and the improved aesthetic appearance and safety of the new marina facility compared with the crumbling and dangerous previous structure. As also found in Finding of Fact #6 of the December 17, 2008 permit, the previous structure was not structurally sound and constituted a hazard to public users of the facility.

## DISCUSSION

This is the second time that the Village of Egg Harbor marina project has come before the Division of Hearings and Appeals for a contested case proceeding. The petitioners argue that this fact means, or at least suggests, that the Village and the DNR did not give sufficient deference to the first decision, issued on, December 17, 2008. However, that is simply not the case—if it had been, a second (eight hours of) hearing would not have been necessary. Rather, the DNR granted the petitioners request for hearing and all participants re-assembled to state their views on the requested Permit Amendments. The Permit Amendment became necessary in part because the voters of the Village of Egg Harbor wanted costs reduced before they would approve financing the new facility. (Exs. 102-103) The Permit Amendment reduced costs and the financing referendum was approved by Village

voters. Clearly, some Amendment of the marina project was required to meet the financial constraints imposed by the referendum approving public financing for the marina. Further, there is no question that this constitutes a “good cause” to amend the permit within the meaning of § 30.2095(2).

Most significantly for this proceeding, the Amendment allows the placement of two large floating piers to extend 20 feet closer to the common “extended property line” in the public waters in front of the properties of petitioner condos and the Village marina parcel. The petitioners were granted a hearing on two issues: the question of whether the new configuration materially obstructs navigation and whether it will be detrimental to the public interest in natural scenic beauty. The petitioners did not come close to carrying their burden of proof on either issue.

The new configuration is 20 feet closer to the imaginary extended property line, but the closest pier, the B dock, is 172.6 feet offshore past the exclusive riparian rights zone and is placed within the extended property line. Pier A is approximately 504 feet west (into the water) below the ordinary high water mark (OHWM) and Pier B is 390 feet west. The number of slips placed at the marina is the same in the amended configuration; the piers remain behind the breakwater and in a slow no wake area that is simply not used by most boaters other than people fishing or using non-motorized small craft. Both piers are well behind the breakwater which must be passed for boaters to get into the open waters of the bay. Placement of the publically available pier slips will improve public access to these public waters and provide either seasonal or transient moorings that could provide a safe harbor for boaters in distress.

Warden Neal, Mr. Brose, and Village Harbormaster Smith were all specific and persuasive in demonstrating that the 20 foot reconfiguration would not materially obstruct navigation nor disrupt the usual pattern of boating in the area. Even the worst case scenarios envisioned by the petitioners—which then included the boat mooring area that is no longer relevant to the facts before the Division--could not be seen to materially obstruct navigation or interfere with the rights of Peninsula Shores Condominium owners. Nor does the new configuration pose any danger to boats, boaters or other users of the public waters. (Neal)

Further, DNR Area Water Management Specialist Carrie Webb indicated that there was little or no impact on *natural* scenic beauty from the reconfigured pier layout. The petitioners make the point that Ms. Webb overstated the effect of the developed shoreline on remaining remnants of natural scenic beauty in the harbor. “We are disturbed by the DNR’s assertion that some additional piers inserted into that field of view do not diminish natural scenic beauty. The DNR took a completely opposite position in *Sterlingworth Condominium Association, Inc v. DNR*, 205 Wis. 2d 710, 727, 556 N.W. 2d 791 (Ct. App 1996) We grant that circumstances may differ, but to assert that piers have no impact on natural scenic beauty is patently false.” (Pet. Reply, p.7)

We agree with the petitioners that Ms. Webb’s statement was overly-broad as it relates to the status of the case law on natural scenic beauty. Developed or partially developed areas can and do retain some elements of natural scenic beauty, particularly as observed from the water looking toward shore. Further, the proliferation of an unreasonable number of new piers or slips cluttering even a partially developed near shore area historically developed as a resort was found to be detrimental to the public interest in natural scenic beauty. (See: *Sterlingworth*, at p.718 and 727) However, this is not the situation with respect to the present permit amendment.

First, as noted, the number of pier slips is the same. (Ex. 202) Secondly, the most significant impact of the project on natural scenic beauty was caused by the breakwater and the breakwater height has been reduced from + 10 LWD to + 7.5 LWD in the latest configuration. (Id.) This will improve view corridors for natural scenic beauty. (Webb) Thirdly, as Mr. Brose testified, the piers are located behind the breakwater and will not cause any obstruction or diminishment of the view that is not already caused by the breakwater structure (which petitioners did not object to in either contested case). Finally, the historic use of the marina site has included placement of a large platform since the Cherry Dock was constructed there in 1907. The Village marina has been at this site for many years. The condominiums were built in the aesthetic context of this longstanding historic use by its neighbor to the north. The new marina will improve public access as well as aesthetics and will not be detrimental to the public interest in natural scenic beauty.

The petitioners have not carried their burden of proof on either issue.

The Village argues that the objections of the petitioners should be found to be frivolous within the meaning of Wis. Stat. § 227.483. That statute provides in pertinent part as follows:

*(1) If a hearing examiner finds, at any time during the proceeding, that an administrative hearing commenced or continued by a petitioner or a claim or defense used by a party is frivolous, the hearing examiner shall award the successful party the costs and reasonable attorney fees that are directly attributable to responding to the frivolous petition, claim, or defense...*

*3) To find a petition for a hearing or a claim or defense to be frivolous under sub. (1), the hearing examiner must find at least one of the following:*

*(a) That the petition, claim, or defense was commenced, used, or continued in bad faith, solely for purposes of harassing or maliciously injuring another.*

*(b) That the party or the party's attorney knew, or should have known, that the petition, claim, or defense was without any reasonable basis in law or equity and could not be supported by a good faith argument for an extension, modification, or reversal of existing law.*

The Wisconsin Supreme Court has held that a "claim is not frivolous merely because there was a failure of proof or because a claim was later shown to be incorrect." **Jandrt v. Jerome Foods, Inc.**, 227 Wis. 2d 531, 548, 597 N.W.2d 744 (1999). "Nor are sanctions appropriate merely because the allegations were disproved at some point during the course of litigation." *Id.* For example, a plaintiff's failure to raise a genuine issue of material fact in opposition to a motion for summary judgment was not frivolous where the court found that some evidence supported the plaintiff's claim. *See Id.* "The test for frivolousness is extremely stringent." Frivolousness exists only when no reasonable basis exists for a claim. *Id.* Further, all doubts about frivolousness must be resolved in favor of the party filing the action. **Id.** § 55

In the instant matter, the claims of the petitioners were not proven but there was a reasonable basis to the two claims for which the DNR granted the contested case. The material obstruction to navigation claim made more sense prior to the removal of boats moored in front of the petitioner condos, because there was less area to maneuver in the near shore area. Further, as the petitioners argue, it is true that the prior ALJ Permit tried to strike a balance between public and private rights by choosing the option which would have kept the piers farther away from the petitioners extended property line. However, that option is no longer before the ALJ. The question for this hearing was whether the marina project as Amended meets the standards for issuance of this permit. There is no question that it does, and the Village and the DNR provided largely un-rebutted expert testimony that the Amended configuration did not materially obstruct navigation.

The natural scenic beauty claim also had a reasonable basis in law as discussed above in connection with the *Sterlingworth Condos* case. While no detrimental impact upon natural scenic beauty was demonstrated at hearing, resolving all doubts about frivolousness in favor of the party filing the action, the claim was not frivolous with the meaning of Wis. Stat. § 227.483.

The permit as Amended by the DNR on October 16, 2009 shall remain in full force and effect, and the petition for review will be dismissed, without costs to any party.

#### CONCLUSIONS OF LAW

1. The Division of Hearings and Appeals has authority under Wis. Stat. §§ 30.12, 30.208, 30.209 and 227.43(1)(b) and in accordance with the foregoing Findings of Fact, to review issuance of a permit for the construction and maintenance of structures placed upon the beds of navigable waters.

2. The proposed facility described in the Findings of Fact constitutes a structure within the meaning of Wis. Stat. § 30.12.

3. Wis. Stat. § 30.12(3m) provides that:

The department shall issue an individual permit to a riparian owner for a structure or a deposit pursuant to an application under par. (a) if the department finds that all of the following apply:

1. The structure or deposit will not materially obstruct navigation; 2. The structure or deposit will not be detrimental to the public interest; 3. The structure or deposit will not materially reduce the flood flow capacity of a stream.

The Village of Egg Harbor has met the standards for issuance of the permit, with the conditions described herein.

4. Wisconsin Stat. § 30.208(3)(d) provides that the DNR may issue a permit, subject to the stay provision of Wis. Stat. § 30.209 in ruling on a contested permit application. Accordingly, the review of the permit is no longer a *de novo* review as had been the case under the earlier version of Wis. Stat. § 30.12. The Petitioners have the burden of proof to demonstrate that the DNR issuance of the permit was not reasonable.

5. The marina pier project is a type III action under Wis. Admin. Code § NR 150.03(8)(f)(1). Type III actions normally do not have the potential to cause significant environmental effects. The Department met its procedural obligations pursuant to NR 150 and § 1. (First hearing: Ex. 219)

6. The project meets all applicable solid pier standards set forth in Wis. Admin. Code § NR 326.04. The structure does not totally enclose the bay, and allows the public access for fishing, sight-seeing, boat launching and numerous other public rights on Green Bay. The structures have openings that allow for the free flow of water to prevent littoral drift depositories. The piers do not obstruct navigation.

7. The requirements of the referendum for public financing constitutes a “good cause” to amend the permit within the meaning of § 30.2095(2) and the amended permit meets all requirements for issuance as described above.

8. The two objections for which hearing was granted in this matter were not frivolous within the meaning of Wis. Stat. § 227.483.

#### ORDER

WHEREFORE, IT IS HEREBY ORDERED, that the permit as amended by the DNR October 16, 2009 shall remain in full force and effect, and;

IT IS FURTHER ORDERED, the petition for review be DISMISSED, with prejudice but without costs to any party.

Dated at Madison, Wisconsin on May 10, 2010.

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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.