Before The
State Of Wisconsin
DIVISION OF HEARINGS AND APPEALS

In the Matter of the Abatement Action on Motion of the Department of Natural Resources to Remove or Reconfigure Alleged Illegal Piers Maintained by Rex Pope, Located on the Bed of Limekiln Lake, Waupaca County, Wisconsin	Case No.: IP-NE-04-0711WL

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER FOR REMOVAL

Pursuant to due notice, hearing was held at Waupaca, Wisconsin, on May 1, 2007. The parties requested an opportunity to submit written briefs, and the last was received on July 3, 2007.

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

Mr. Rex Pope
400 School Street
Waupaca, WI 54981, by

Attorney John Hart
100 South Main Street
Waupaca, WI 54981

Wisconsin Department of Natural Resources, by

Attorney Edwina Kavanaugh
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Mr. Ken Hurlbut, Chairman
Chain O'Lakes District
N2372 Tammy Trail
Waupaca, WI 54981

FINDINGS OF FACT

1. Rex Pope owns riparian property located in the NW ¼, SE ¼ of Section 33, Township 22 North, Range 11 East, Waupaca, Wisconsin. Mr. Pope inherited the property from his uncle in 2002. The previous owner operated a fee-for-use boat launch and private marina at the site for nearly 30 years.

2. Shortly after Mr. Pope acquired the property in 2002, a complaint was filed with the DNR concerning the number of boats moored on the premises.

3. Department of Natural Resources (WDNR or Department) staff, North East Region, having conducted field investigations, allege that in early 2002, WDNR staff received complaints regarding 23 piers with 45 berths (33 rented and occupied) at the site owned by Rex Pope. WDNR staff investigated, determined that the existing piers and number of berths exceeded reasonable use for the 605-609 feet of shoreline frontage, and asked Mr. Pope to apply for a commercial pier permit. WDNR staff and Mr. Pope initially discussed his applying for a permit seeking 2 multi-slip piers with a total of 42 berths. Mr. Pope decided the dredging needed to accomplish this was too costly and instead applied for a permit for 22 short piers and 42 berths in the approximate same location and configuration used by the prior owner for some years. He removed 4 piers from the existing 23 piers leaving 19 piers intact.

4. Pursuant to WDNR concerns regarding the density, Mr. Pope downsized his project and revised his application to request 14 short piers with 28 berths. A public notice for 14 piers and 28 berths was published and WDNR received substantive written objections. WDNR staff evaluated the application, the site and its historic use, the increased public access provided by a marina, the plan to revegetate and restore the shoreland area to provide habitat, and determined that a marina pier permit with 28 berths could be issued. Because the objectors did not agree, WDNR staff forwarded the file to Madison to schedule a combined contested case hearing on the permit application and an enforcement hearing seeking an order to reduce the piers and berths. The objectors and Mr. Pope negotiated to try to reach agreement on pier numbers, densities, and permit conditions acceptable to all parties. However, Mr. Pope instead decided to withdraw his pier permit application, downsize his piers somewhat, and maintain that he did not need a permit because he alleged the piers were built before 1975 and under Wis. Stat. § 30.122, were presumed in conformity with the law.

5. Based on their investigation and the legislature's enactment of an exemption from permitting for piers that meet the standards at Wis. Stat. § 30.12(1g) (f), WDNR staff asserted at hearing that 13 berths on piers that comply with the standards in § 30.12(1g)(f) is the maximum berthing density and pier size and configuration that can constitute reasonable use absent a permit with conditions to protect the public's interests.

6. At hearing the Department argued that the Division should order Mr. Pope to promptly reduce the size, number, and berthing density of these piers to 13 berths on piers that comply with the standards in Wis. Stat. § 30.12(1g)(f) by a fixed date set by the ALJ in the order for removal. The Department asserted that currently maintaining these structures in Limekiln

Lake and continuing to maintain them beyond a reasonable date for removal after the hearing decision is issued is detrimental to the rights and interest of the public in Limekiln Lake, violates Wis. Stat. §§ 30.12 and 30.13, and constitutes a public nuisance by Wis. Stat. § 30.294.

7. The applicant owns approximately 6.6 acres, which includes 605 feet of riparian frontage on Limekiln Lake. (Ex.18) The property has been zoned commercial. DNR area Water Management Specialist Scott Koehnke testified that under existing regulations and earlier DNR Guidance, placement of more than 13 boat slips at this site would exceed a reasonable use and would require a permit. This would be obtained under either the previous Guidance Document or the new statutory exemptions. Further, both the Guidance and the current statute require that piers be no more than six feet in width and placed at a water depth no greater than three feet to be exempt from a permit. Scott Provost, DNR area water quality biologist, testified that even 13 slips might well have a detrimental impact on habitat values but that it would be a marked improvement over the current configuration.

8. The DNR presented unrebutted expert testimony from Scott Provost and Scott Koehnke which established that the littoral zones on either side of the Pope property shoreline have been mapped as "sensitive areas" under Wis. Admin. Code NR 107.05(3)(i)(1). However, this designation is not yet finalized. (Id.) Such littoral areas are extremely rare on the entire Waupaca chain of lakes. (Provost) The shallow area near the Pope property provides important food and habitat for ducks and other waterfowl. Further, the existing piers have a detrimental impact upon the sensitive area. Provost opined that he had "no doubt" that the aquatic plant communities would re-colonize any areas where the existing Pope property piers were removed. Boating activity and shading from piers have limited the growth of aquatic plants in this area, and have had a detrimental impact upon fishery values. (Provost)

9. Pope did not establish the exact date on which the marina began operating, and there is insufficient proof to establish that the marina was in place prior to December 9, 1977.

10. Mr. Pope testified that he has rented out 32 boat slips for the 2007 summer season. He sent out notices in March, 2007, and had rented out all of the slips as of the date of hearing. He believes it would be an unnecessary disruption to his business if he were asked to remove slips which exceed the 13 which the Department seeks for this season. Mr. Pope also indicated that his current plan is to sell the property and keep the 13 slips that the Department authorizes without a permit.

11. At hearing, Mr. Pope indicated he was getting out of the boat mooring business. He agreed to remove moorings down to the 13 at the end of the current boating season. This offer is accepted and is incorporated into the Removal Order set forth below. A total of 13 boats may be moored at the site to the three foot water depth on piers no more than six feet wide without a permit. (Ex. 28)

DISCUSSION

Mr. Pope argues that he meets the conditions in Wis. Stat. § 30.13 to place a pier without a permit. The Department argues that he does not. The DNR concedes that Mr. Pope's piers comply with Wis. Stat. § 30.13 (b) to (e) because they do not interfere with the rights of other riparian proprietors; do not extend beyond a pierhead line or violate a local pier ordinance (no pierhead line or local pier ordinance applies), do not interfere with the free movement of water under the piers, and are not constructed in a way that causes land to form upon the bed of the waterway. But the Department maintains that the existing piers and wharf do not comply with Wis. Stat. § 30.13(1) (a) because they are an unreasonable use of the riparian parcel and any unreasonable use of public waters by a riparian interferes with public rights in the lake. The Division concurs with the DNR on this point.

Mr. Pope argues that the existing 17 piers with 32 berths and 1 wharf on 607 feet of shore comprise "reasonable use" of this site after considering environmental impact, natural scenic beauty, historic use, safety, Wis. Stat. §30.122, the lack of a permit, and DNR delayed enforcement (Pope brief p. 2, last par). Mr. Pope cites *Hilton v. DNR*, 2006 WI 84, 293 Wis.2d 1, 15, 717 N.W.2d 166 (2006) to argue that the DNR must consider environmental impact, natural scenic beauty, historic use, safety, Wis. Stat. §30.122, absence of a permit, and DNR enforcement delay when determining "reasonable use" of navigable waters adjacent to a site.

Hilton was a pre-Act 118 case. Before Act 118 was enacted, the legislature provided no guidance as to how to determine common law "reasonable use" by a riparian placing a pier without a permit under Wis. Stat. § 30.13(1). The DNR prepared its own Guidance in 1991. But in Act 118, the legislature enacted its judgment as to what constitutes "reasonable use" by a riparian placing a pier <u>without</u> a permit by enacting Wis. Stat. § 30.12(1g) (f) in Act 118. That provision exempts piers that do not exceed specific size and density maximums from the need to obtain a permit. These standards are essentially the same as previous DNR Guidance requirements. (Ex. 17a) Further, the Court of Appeals expressly held that use of the Guidance Document was appropriate in aiding a determination of "reasonable use". *Sterlingworth Condominiums v. DNR*, 205 Wis. 2d 791 , at 798 (Ct. App. 1996)

The Pope piers exceed reasonable use under either regulatory scheme, as determined by DNR in 2002 using statutes, case law and its 1991 guidance and pier planner and thus would still require a permit to maintain more than 13 berths.

DNR practice has been to consistently seek permitting of or enforcement against existing piers only in specific situations, including upon receiving a complaint as in the instant case. (Koehnke, Ex. 10) Currently the Governor's Executive Order # 148 issued May 15, 2006, restricts DNR from taking enforcement against many existing piers, but not against piers that do not meet existing pier slip density standards or were the subject of DNR enforcement before February 6, 2004 (the effective date of Act 118). (Ex. 30)

The DNR summarizes succinctly in its brief: "*Because (1) DNR received a complaint about the piers; (2) the piers do not meet existing boat slip density standards; and (3) the piers*

were the subject of DNR enforcement before February 5, 2004, Wis. Stat. § 30.13 does not exempt Mr. Pope from the need for a permit, and neither DNR practice nor the Governor's Executive Order preclude DNR from asking the ALJ to abate the public nuisance they represent under Wis. Stat. § 30.294 by ordering the piers reduced to a size and configuration exempt from permitting under Wis. Stat. § 30.12(1g)(f)." The Division concurs with this reasoning.

Placement of more than 13 slips constitutes an unreasonable riparian use of the waterway because the number of piers and berths consume an excessive amount of public waters for private riparian use and are therefore detrimental individually and cumulatively to the littoral zone habitat, water quality, and the public's use of such waters. The DNR, accordingly, has established that the piers above are in violation and require a permit.

After hearing the DNR's case, Mr. Pope agreed to remove all piers that exceed the 13 allowable under reasonable use at the end of this boating season when his current contracts expire. The DNR refused to accept this offer, but sought an immediate removal of said piers. However, given that the end of the boating season is fast approaching, the Division accepts Mr. Pope's sworn intention to remove the piers prior to October 6, 2007. The disruption of this year's rental contracts is not worth the minimal environmental gain of removing the piers prior to the end of the season.

CONCLUSIONS OF LAW

1. The Division of Hearings and Appeals has authority under Wis. Stat. §§ 30.03, 30.12, 30.14 and 227.43(1)(b), and in accordance with the foregoing Findings of Fact, to issue an order for removal of unlawful structures on the beds of navigable waters.

2. Pope is a "riparian owner" within the meaning of Wis. Stat. § 30.12. He has voluntarily agreed to remove all structures at the location described above by the end of this boating season.

3. If the DNR learns of a possible violation of statutes relating to navigable waters or possible infringement of the public rights relating to navigable waters, and the DNR determines that public rights may not be adequately served by imposition of a penalty or forfeiture, the DNR can seek an order directing the responsible parties to perform or refrain from performing acts in order to fully protect the interest of the public in navigable waters. Wis. Stat. § 30.03(4)(a) The Order set forth below is necessary to fully protect the interest of the public in the navigable waters of the state.

4. The Pope piers are not exempt from Chapter 30 permitting requirements. 2003 Wis. Act 118, effective February 6, 2004, created exemptions for piers that meet the standards at Wis. Stat. § 30.12(1g)(f). The piers do not meet the requirements of Wis. Stat. § 30.12 or 30.13 to place a pier without a permit. Further, Pope did not establish that the piers were permanent structures in place before December 9, 1977, within the meaning of § 30.122.

5. The Pope piers that exceed reasonable use (13 moorings) do not meet the exemption standards and do not meet the standard for piers in Wis. Admin. Code ch. NR 326, especially the standards for marina piers at § NR 326.04(8), and thus require a permit.

6. Placement of more than 13 boat moorings at the site constitutes a violation of Wis. Stat. Ch. 30, relating to navigable waters and infringe on the public's rights relating to navigable waters, and thus constitute a public nuisance under Wis. Stat. § 30.294, that must be abated under Wis. Stat. § 30.03(4)(a).

ORDER

WHEREFORE, IT IS HEREBY ORDERED, that Rex Pope reduce the piers described above down to no more than 13 moorings extending to the three foot water depth on piers no more than six feet in width in a configuration acceptable to the DNR within 60 days of the date of this Order. Failure to comply with this Order could result in sanctions pursuant to Wis. Stat. § 30.03.

Dated at Madison, Wisconsin on August 6, 2007.

STATE OF WISCONSIN
DIVISION OF HEARINGS AND APPEALS
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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 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.