

Structures in Public Waters Advisory Committee Meeting
MN Department of Transportation, Baxter, MN
Meeting Notes
March 12, 2009

Attending:

Mike Duval, DNR Fisheries
Patty Gould-St. Aubin, Itasca Realty
Al Grabowski, Landowner
Kenneth Grob, Hubbard County COLA
John Hunt, DNR Enforcement
Terry Neff, MACPZA
Paul Radomski, DNR Ecological Resources
Sam Stern, POPULAR
Jim Strandlund, Strandlund Refrigeration
Bob Tyson, Good Ol Days Resort
Don VanderMey, FLOE International
Henry VanOffelen, MN Center of Environmental Advocacy
Michele Walker, DNR Waters
Kenzie Phelps, MN Waters

Staff:

Julie Ekman, Permit Programs Supervisor
Tom Hovey, Public Waters Hydrologist
Bruce Gerbig, Rulewriting Hydrologist
Erika Rivers, Facilitator
Felicia Barnes, Planner

Information Sharing

Erika introduced herself and mentioned to the guests that this is a working meeting. Meeting notes were being taken but they are not a transcription of the meeting. Time for comments would be provided at the end of the meeting.

Erika distributed “Question of the Week” sheets and encouraged committee members to offer suggestions for this purpose. She asked if there were any comments regarding the “Question of the Week” and one member felt that the questions are out of context.

Erika also distributed a sheet with the parking lot issues from our previous meetings. It was pointed out that the bold items would be discussed at this meeting and the red items may be addressed at another time. Two of the parking lot issues were passed around on a sheet of paper and committee members were asked to sign their name in the “yes” or “no” box. The two questions were: “Should different lake classes have different structure rules?” (5=yes and 6=no) and “Should the coloration of structures be regulated by the State?” (11=no).

Sam Stern pointed out that the form of question in the parking lot issues regarding grandfathering, referring to “illegal” structures, was misleading since there had been no request to grandfather “illegal” structures.

Timeline of Dock Rules

Tom Hovey provided a handout on dock regulation history. Tom noted that in 1978 seasonal and permanent docks were defined. Permits were required for permanent docks over 50 feet in length or to a water depth greater than 4 feet, whichever was less. In 1982, the rules were updated and provided more clarification including a definition of a dock (*a narrow platform extending waterward from the shoreline intended for ingress and egress....*). Rules for structures in public waters have been enacted since 1978. In 2002, changes were made to remove the distinction between a seasonal and permanent dock and the dock width allowed without a permit was increased to 8 feet. A suggestion was made to use the 2002 rules as a baseline for moving forward with the committee work. It was mentioned by a committee member that for several years the 2002 changes were not enforced and because of that, some didn't know about the changes.

The subject of grandfathering was mentioned and discussed. A suggestion was made to view the regulatory history for grandfathering to see what was allowed. For a dock that was built under any existing rule, will those riparian owners have to change their dock configuration to meet the new rules, or, will grandfathering-in be allowed?

Quantifying Dock Structures in Minnesota

Mike Duval presented information to the committee about docks based on data from a 2002-2003 study. The study area was the 5-county North Central Lakes area (this was the same area that was used to create the Alternative Shoreland Rules). The study included aerial photography of a random sample of 174 lakes – 51 lakes had no docks (these were Natural Environment lakes). The vast majority of docks were found on General Development lakes (83%). Responses to the study were based on the individual lot perspective. For study purposes a 50 foot buffer was built out around the docks based on aquatic plant management activities. An example shown was for Serpent Lake (9.1 miles) 95% private/5% public ownership, impacted shoreline is 4.5 miles (50.2% total). With full build-out scenario there is a 3x increase in the amount of shoreline impacted.

It was noted (by Don V.) that this study did not account for shoreline that is not able to be developed. Don also stated that a typical main walkway to a dock is 4' wide. Combining this with the 50' (25' each side) is a total of 54' wide near shore where the main walkway is. He believes the focus is in the wrong area to try to manage the ecological health of a lake by focusing on this small area, and further stated that minimizing permits for weed killers and lake bottom groomers seems like a much more logical method to reduce impact.

Mike stated that the purpose of this example was to think about what is a reasonable frontage to use and to step back from the lot and think about the lake as a whole. This exercise mirrors the discussions from the Alternative Shoreland rules in that there has to be some reasonable bounds and limited disturbance to our lakes. What if we build our current lake shore out to what is

allowed today? Erika asked for reactions to the mentioned question which coincides with one of the questions that went around – Should different lake classes have different structure rules? Committee reactions:

- Some on the committee felt that it was a good idea to regulate according to lake classes (you are allowed a certain size of dock or disturbance area based on lake class); beyond that standard, an individual permit would have to be issued (and such permits would evaluate potential impacts to that local site, with clear criteria for issuing permits outlined).
- In general, the committee liked the idea of a clear “dividing line” of responsibility between the LGU and DNR, with the LGU regulating near shore areas, and DNR regulating from the ordinary high water line out into the water.
- DNR Enforcement’s perspective – No-permit-needed criteria need to be consistent across the state; structures not meeting those parameters would need a permit.
- Several on the committee felt the need for a set of structures standards for controlled access lots on lakes greater than 10,000 acres. The point was made that such regulations could be based on lake size limit (instead of lake class).
- Could use a general permit written for platforms on lakes above a certain size, say 10,000 acres.
- Doesn’t matter what the rules are when they enter into law that the local jurisdiction is going to enforce.
- One complication with regulating structures based on lake class is that in the proposed revision to shoreland rules, a lake could have more than one class – how do you deal with that scenario?; One committee member made the observation that the current shoreland classes were not defined by biological/ecological criteria, and therefore questioned their utility for advising the structure rules decisions.
- What is reasonable without a permit?
- What is a mechanism for a permit?
 - Could mark the structure with fire numbers. (It was stated that not all counties have fire numbers.)
 - Could mark permit number on the structure.
- Permits have an expiration date.

Erika asked the committee if they could live with the approach that if a structure is bigger than X size you need a permit. One dimension without a permit and beyond that dimension would need a permit. Consensus was had by the committee.

Erika asked John Hunt if a percentage of shoreline was used for structures if that was enforceable. John stated that it would be tough.

Michele Walker (DNR area hydrologist out of Bemidji) offered information on dock permits she has received in the last year. Five applications went through the permitting process. Two of those five were issued permits. One was withdrawn after they paid the permit fee. One is in the process of being withdrawn and one is being worked on by another hydrologist. Michele also mentioned that when she receives phone calls concerning docks she does a preliminary review with the shoreland owner over the phone. Most calls result in a permit not being required because the dimensions fall within the guidelines. Many docks could be reconfigured to meet standards.

Sam Stern pointed out that he received a number of calls and letter from property owners who refused to apply for a permit because they were concerned about identifying themselves as being in non-compliance. Also, a large number of property owners who, at the suggestion of the DNR commissioner, spoke to the local hydrologists about the likelihood of getting a permit if they filed an application, were told “no” and did not file a permit application.

There was also significant concern expressed about conducting an advisory group without the benefit of a Statement of Need and Reasonableness (SONAR) to understand the scope of what is needed and reasonable. DNR staff stated that the SONAR is developed in conjunction with the rules.

Update on Dock Survey

Michele Walker is working on compiling the data from the dock survey. She has been working on data ratification. Duplicates have been removed. The list of boat registration numbers have been given to our License Center to see how many of the 25,000 that were sent the postcard to take the survey actually responded. A preliminary review of the data shows that just under 5,000 own waterfront property and about 1,400 did not have waterfront property.

Grandfathering Existing Structures

Tom Hovey provided a handout of a court case from 2006 and reported on information he received from the Attorney General’s Office on the subject of grandfathering. Riparian rights are more limited than property rights, partly because they are subject to other people’s riparian rights. Riparian rights include the right to wharf out to navigable water depths. We are not aware of a court case saying people have a right to “X” number of feet along the shoreline, or a certain size platform at the end of a reasonable dock. For the subject of grandfathering it comes down to fairness. There is no basis for grandfathering illegal structures. Amortization also comes down to fairness.

Erika asked the committee for reactions on the subject of grandfathering, and the following reactions were noted as areas of concern for committee members:

- The question was asked whether owners of grandfathered structures would be able to replace deteriorating dockage.
- Will the grandfathered structure carry through change of ownership?
- Some stated that they felt that the DNR should structure the grandfathering to minimize non-compliance thru time; possibly include a sunset on a grandfathering provision.
- The state must preserve the riparians’ right to wharf out to navigable depth
- Grandfathering should not include previously illegal structures.
- Fairness is of major concern—what is fair for riparian owners? What is fair for the public? What is fair to those who are complying with current/future standards?
- Some felt that it was reasonable, at point of selling property, to require a new property owner to reconfigure the structure into compliance with current regulations.
- When should the effective date of grandfathering be? Some suggested that anything installed before January 2010.
- Should there be a difference between grandfathering temporary vs. permanent structures?
- Individual permit for grandfathered structures.

- Concept of fairness:
 - Sale of dock sections with property
 - Purchase price for “extra” frontage with belief that extra = more access
 - Purchase price of lot – impact by docks w/property (not real property/but bill of sale).
 - Affects the quality of the lake experience (an owner cannot do what they want).
- Public fairness
 - Is everyone treated consistently?
 - Fair if they go through a permit process
 - What’s fair to future generations?
 - Criteria for “entitlement” of non-conforming structures
 - Access is preserved

Erika asked for a show of hands of who would like to see some type of permitted grandfathering in of existing legal structures provided in rule? 10 members raised their hand. Most members on the committee would like to see a grandfathering provision in the new rules, provided that 1) those grandfathered structures are regulated by individual permit, 2) the structures were legal when they were installed, and 3) they meet the criteria of “lowest impact alternative” to a well-described need.

Economic Impacts

Erika led the committee in a discussion on the economic impacts of structure regulation.

Jim Strandlund was asked to comment on the economic impacts to the geothermal heat pump business:

- Economic Stimulus - Rebate for geothermal heat pump install 30% tax credit (loops in lakes).
- Jim felt that companies would need more than one foot depth into bed, 6 ft. needed to be below frost line (otherwise anti-freeze is needed, which leads to other concerns).

Other reactions to geothermal from committee members:

- There may be a public safety issue from structures on the lakebed.
- Directional boring is used for many installs.
- Special considerations will be needed for trout/cisco/coldwater resources.
- If we don’t allow geothermal on other public lands, why should we allow them in our public waters?
- This discussion illustrates the need for a system/framework to address new technology(ies), so Minnesota isn’t always in a reactive mode.

Don VanderMey was asked to comment on the economic impacts to the dock manufacturers:

- Much of the docks industry is MN-based companies (30 manufacturers)
- \$70-\$80 million of revenue generated annually in MN
- Sales tax generated is in \$5 million range
- Numbers don’t include service revenues and associated income from those services.
- MN has a competitive edge in this market
 - 60-70% of the MN dock industry is sales outside MN

- Service revenue could be a large factor. DNR should consider impacts of regulations:
 - layoffs?
 - labor
 - taxes (payroll)
- Some argued that boat sellers might be impacted (cascade impact)
- The question was raised about what's "known" about economic impacts vs. "anticipated"/"estimated".
- Modular nature of docks makes analysis of "average square footage sold / invoice" difficult.

There was also some discussion of the economic downside of declining habitat/water quality as a result of aquatic habitat disturbance:

- Economic impacts of fish populations (decrease)
- Decreases in water quality have been shown to decrease property values (BSU research).
- Service industry – tourism goes down due to eroding aesthetics, according to another study.
- Should there be a compensation for taking a public resource?
- If lakes are overdeveloped, will property tax revenues decline due to declining real estate values?
- One committee member estimated that there are likely about 280,000 lakeshore owners (claim for taking).
- UW study shows that increased restrictions = increased property value.

There was discussion about the potential decline in property values if accessibility is reduced as a result of a rule revision. It was noted that clients might want to sell their lake homes if their access was reduced, and a growing number of sellers in response to new regulations will depress prices as a matter of basic economics. It was further noted that studies have shown that reasonable regulations sometimes support or increase a local tax base because lakeshore owners know that public action has been taken to protect the environmental amenity that they have invested in.

Exercise on Regulatory Approaches

Bruce Gerbig provided some history on structure regulation. He was involved with the rule process back in 2002. Cities and counties have had the authority to regulate structures in the water long before State rules were in place. Local governments have chosen not to regulate these structures. How do we get at what is included for a structure with no permit and criteria for structures that will require a permit?

A handout was provided to the committee that listed three different approaches under consideration for the structure rules. Illustrations of the Point concept and the Spatial concept were presented.

The Point concept:

Certain sizes and configurations of structures wouldn't need a permit. (dock and beach sand). When a permit is required, criteria considers shore length owned and land use.

The Spatial concept:

Define an area/space/slice within which we concentrate the riparian rights to access the public water.

The area coincides with other impacts (aquatic plant removal, sand blanket placement, boat ramp).

Placement within this area would not need a permit.

A permit would be needed to place structures outside this area.

Combination concept:

Suggest other concepts or suggest how a combination of both the point and spatial concept would work.

Members were asked to write down their individual ideas for these approaches. Erika and Felicia will compile the input and it will be sent out as the question of the week.

Closing Comments/Suggestions

Question was asked what is allowed in Wisconsin for docks. They allow a 6 ft. wide dock with an L or T. They do have some type of general permit.

What are parameters for a no permit needed, parameters for marinas, as listed in the shoreland rules as controlled access?

Henry asked if the numbers from the width exercise from the question of the week could be put into a table. Erika will create a summary and provide it to the committee.

Send examples of the three concepts – spatial, point and combination to be used as a question of the week. Paul will send his idea for a combination example.

Next Meeting

April 9, 2009, 9:30am-2:00pm, Brainerd Fire Hall (23 Laurel St.)

Submitted by: Felicia Barnes, Planner