

**Structures in Public Waters Advisory Committee Meeting
Brainerd Fire Department
Meeting Notes
April 9, 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
Molly Shodeen, DNR Waters
Sam Stern, POPULAR
Jim Strandlund, Strandlund Refrigeration
Don VanderMey, FLOE International
Henry VanOffelen, MN Center of Environmental Advocacy
Michele Walker, DNR Waters
Kenzie Phelps, MN Waters
Ed Becker, In-We-Go Resort

Staff:

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

Erika welcomed committee members. She reminded the visitors that this is a working meeting and we are not set up to take comments. Erika encouraged guests to provide their comments in writing and that there will be time for the visitors to address the committee towards the end of the meeting.

Unfinished Business

Tom Hovey went through the list of parking lot issues from the previous meetings. He noted if the issue had been dealt with by the committee and if not, how the issue would be dealt with.

Parking lot issues:

- Marina vs. large dock system – These are defined in the working draft under “marina” and “mooring facility.”

- Sand blankets –These are regulated under the Filling Into Public Waters section of the rules (6115.0190) so will not be part of the revision of structure rules (6115.0210 & .0211).
- Grandfathering – Will be deal with in draft rules and SONAR. Comments from the Question of the Week will be considered in the decision process.
- Coloration of structures – There was not enough concern expressed by the advisory committee members to warrant regulation of color as part of these rule revisions.
- Storage of docks in shore impact zone – Will not be dealt with in these rule revisions because this is above the OHW. This issue is being addressed as a shoreland rules issue, and we will attempt to match up the two rule processes.
- Different lake classes should have different rules – This issue is being dealt with, keeping in mind that the rules need to be easy to understand, communicate and enforce.
- Structures associated with planned unit developments (PUD) –We will coordinate with the shoreland rules update process on such structures.
- Compensation for a taking – We are drafting rules with this issue in mind. No rules will be proposed that will be considered a “taking.” We are aware of shoreline owners’ riparian rights, and we will respect them.
- Impact on real estate values – DNR is mindful that this is an issue. We need to consider all values: economic, recreational, and natural resource.
- Future general permit for docks – If written well, DNR believes the revised rules will remove the need for the current general permit. We cannot predict what needs will come up in the future, but the opportunity for addressing those needs will remain.
- Geothermal – We haven’t spent much time on this topic yet, but will hear more about it today.

Marinas, Mooring Facilities & Resorts

Molly Shodeen mentioned that with the 2002 rule revisions marinas are more difficult to define. DNR deregulated mooring facilities, but a marina still requires a permit. She also mentioned a concern that resorts and campgrounds have expanded seasonal rentals for non-riparian owners. Instead of a portion of the shoreline being used for the purpose of expanded use the whole shoreline is used. Some marinas are expanding into sub-par or environmentally sensitive areas.

For revisions to this part of the structure rules we need to distinguish between commercial and private marinas. Also, we will redefine what mooring facilities are and provide a better definition for commercial marinas. These issues as it relates to PUDs will be addressed in the shoreland regulations.

Julie clarified that Structures rule writing staff met with Shoreland rule writing staff to work toward better integration of the two efforts.

It was asked if PUD docking structures will be regulated by DNR or local controls. It was pointed out that LGUs have indicated that they expect DNR to regulate docking structures. Since these two efforts (Shoreland rules and Public Waters Structure rules) are related in that PUDs often include plans for water access, consistency between the two rule chapters is needed.

A concern was expressed that there are no thresholds of how big is too big. The current rules do not give capping or sidebars for issuing a permit.

Paul Radomski is also involved with the revisions to the shoreland rules. He mentioned there have been several points raised in the shoreland rules process that should move into the structure rules process that were previously under the shoreland rules. It was proposed in the shoreland rules process that everything above the ordinary high water mark be put under the shoreland rules, and everything below the OHW would be under the structure rules. There was a lot of support from citizens and members of the advisory committees for this idea.

Paul mentioned a few items concerning structures that were discussed in the proposed shoreland rules:

- For a PUD – one slip would be allowed per unit in the first tier; slips would be part of a single continuous mooring site (flexibility could accommodate sensitive shoreline/practical business considerations through the permit process). Manufactured home parks would be considered PUDs. A slip-allowance multiplier could be considered to incentivize conservation subdivisions.
- Docking for resorts would be provided for transient lodgers only.
- A local government's conditional use permit (CUP) process would be used for a resort seeking to expand into RV sites (the resort would have to have the density for expansion).
- There is a preference to keep the resort issues in the shoreland rules chapter and not under a structure rules permit chapter. For the mixed-use operations (combined resort/RV/campground), concern was expressed about where the sideboards were and that some counties do not have the tools or funding to deal with this issue through the CUP process. Paul also stated that they are trying to address the back-lot issue through the CUP process.

The mechanics of integrating the PUD and resort docking systems proposed in the shoreland rules with the structures rules is being worked out. Both of these rule revision processes have to be tracked very closely to ensure that if one set of rules fails to be implemented that those rules are not cited in the other rules. There was concern expressed about a blanket rule for the first tier only (some resorts have transient lodging structures in the second tier, and should be able to provide docking for those guests). A question was asked about if grandfathering will be allowed for those resorts over the threshold.

Geothermal Systems

Jim Strandlund provided handouts and a short Power Point presentation on geothermal systems. All projects shown were installed in private ponds/lakes. Jim stated that they have not installed a system into a public water.

Brian Urlaub from GeoComfort Geothermal Systems provided some additional comments. He stated that they are trying to phase out the open loop system. They would like to work with DNR to develop standards for installing closed-loop systems into public waters. Four key resource concerns were identified by the industry, and discussed by the advisory group:

- 1) Thermal pollution –The industry considers this impact minimal for the size of waterbodies they have installed these systems in. A company in Indiana did a study on

thermal pollution; Jim agreed to send the report to the advisory group. Mike Duval, indicated that this issue will have to be considered in light of global climate change and its potential impacts on fish and aquatic systems.

- 2) Toxicity/contamination – The industry uses a food-grade antifreeze in the vertical loop system. The system is checked for leaks and if it does not leak in the beginning it likely will not leak at all. Some advisory group members were concerned that some toxicity and sub-lethal effects on fish and wildlife are unknown, and would need to be examined (e.g., aquatic insects, fish, mammals, birds).
- 3) Obstruction of public waters – The industry acknowledges concerns over obstructions in public waters (e.g., boating and fishing gear), but would like to work with DNR to see if there would be some kind of design to minimize problems.
- 4) Removal of systems – The industry also envisions issues with removal of systems if they are no longer desired. Brian indicated that removal is relatively easy, and would have to be up at the homeowner's expense. Minimizing damage to lake/river bottoms would be important.

Members of the committee asked questions about these systems, including:

- Q: What are other states allowing concerning these systems?
A: WI doesn't allow any permanent structures unless the water body is privately owned.
- Q: A request was made to see the difference of MSDS for humans and fish.
A: Jim indicated that it is similar to wind shield wiper fluid.
- Q: How far out into the lake are the systems placed?
A: In the 8- to 10-foot depth range.
- Q: Could the system be placed under a dock?
A: Normally docks are temporary and are taken out of the lake.
- Q: How long has the experience been with these systems to know what some of the unforeseen consequences might be?
A: Twenty years experience with pond loop systems. Industry representatives indicated that they believed in that time they would have had leaks if that was a real problem, and there really haven't been any.
- Q: What is the life expectancy of the loops?
A: The life expectancy is the same as a plastic bottle in a landfill, according to industry representatives.

Advisory Group Input & Highlights of Draft Rule

Tom expressed his appreciation for the help of the committee. The results of the dock survey are complete and once they are put into a better format they will be added to the structure rules web page. Tom stated that this is the end of the committee but not the end of the process, and DNR would like to keep communication with advisory group members open. He encouraged members to continue to send in their comments. He also encouraged members to attend the public hearings whether they were in full agreement with the draft rules or not. Tom stated that the work of the committee did make a difference. He reiterated some of the issues we've heard from the Advisory Group, and described how the issues were considered during the latest internal-review draft of the proposed rule changes:

- we will be talking more about grandfathering—this is clearly an issue for some in the group;

- we heard the issue of property rights loud and clear—structure rules will not interfere with riparian rights;
- safety issues are a major concern for the public, and will be in the forefront of the agency’s decision process;
- rules need to be ”NEAR” (needed, enforceable, affordable and reasonable);
- the resort piece is still being shaped and will seek to preserve Minnesota’s family-resort heritage; Tom thanked the resort representatives for participating.

Tom stated that the draft rules include housekeeping items, such as language to keep pace with revised statutes, revised definitions, and elements that were missing from the previous revision. DNR has added standards for platforms and added clarity to some other areas. It was asked when the public hearings would be held. Tom stated probably in late summer – August. The public hearings will be held around the state with a hearing in the afternoon and one in the evening at each location. A concern was stated about being mindful of the timing of the hearing held in the Metro area (e.g., not to conflict with Labor Day or MEA weekend).

Draft Rule Review

The draft rules were distributed. Julie Ekman stated that the draft has gone through internal review but those changes have not been incorporated into the draft being handed out today. Erika also stated that the document is draft and the message from the Commissioner’s Office is that the comment period is never over. This is a public draft. However, distribution is discouraged as the draft will be obsolete after today because a newer version will be drafted based on internal review and advisory group comments.

Explanation of the draft: the red type is proposed changes to the existing rules. The black type and strikeouts are the original rule language.

A question was asked about what is included in the public record. Erika stated that if anyone has comments they want entered into the public record they should send them in to Tom or Julie.

Henry VanOffelen provided some background information on linear dock dimensions.

The committee was given time to review the draft rules. We then went around the table and each committee member expressed their top three issues regarding the draft rules. Listed below are the issues that were expressed. The checkmarks indicate multiple members choosing that issue.

Definitions (Pgs. 2-9)

- Navigable depth✓✓
- PUD/Resort (across all – integrate)✓✓✓
- Dock definition
- Aquatic impact zone

Prohibited placement of structures (Pgs. 9-10)

- Setbacks – side lots
- Goals (pg. 9, 1c.)
- Caps of structures in public waters

No permit required (pgs. 10-12)

- Platform size/width√√√√√√√√

Permit required (pg. 12)

- Subd. 2a Docks and Platforms (pg. 12)√√√√√√√√
- Define “reasonable”
- Grandfathering√

Specific standards (pgs. 12-20)

- Mooring facilities√√
- Subd. 6 Constr./geothermal
- Timeline for removal (pg. 19/pg. 8)

Erika stated that the group would address the top three issues and then others if time allowed. If the group didn't have enough time to address all the issues, members were encouraged to send their comments to Julie and Tom by email.

Sam Stern expressed concern about discussing these issues without the Statement of Need and Reasonableness (SONAR). Sam indicated that he felt it would be more reasonable for the SONAR to be developed before the revised rules to direct what changes are needed. Tom and Paul reiterated that standard practice at DNR was to write the SONAR in conjunction with the rules, as advised in Minnesota rulemaking guide (chapter 4, which states that agencies must prepare the SONAR on or before the signature date on the Notice of Intent to Adopt Rules). Sam expressed his concerns about using the DNR's air-photo dock study as a justification for rulemaking.

Committee members expressed the following comments/concerns about the “No permit required” element of the preliminary draft rules:

- Paul Radomski expressed concern for how many boatlifts are reasonable? Paul used the analogy of parking a motor vehicle in a public parking lot or roadway, and what is considered a reasonable expectation of a place to park. How much parking is a reasonable expectation on a public lake or river? He looked at the Wisconsin approach for what is allowed without a permit; Wisconsin allows two boatlifts for lots 100 feet and less and one additional boatlift for every additional 50 feet of shoreline owned. This could be an alternative to Subp. 4, (10).
- Mike Duval mentioned having caps and the aquatic impact zone. Thought has to be given to the habitat element as well as the social piece. Mike indicated that the Section of Fisheries would like to see the aquatic impact zone concept re-inserted into the draft rule so continuous aquatic habitat in near-shore areas can be maintained for fish and wildlife.
- Don VanderMay mentioned the handout he provided at the second meeting, and indicated that he felt that the proposed language in the current internal review draft would be too restrictive for people with small lots. The dock system on the cover of the FLOE brochure will not fit within a 50 ft. lot (where the maximum linear dimension by this rule proposal would be 25

feet), he said. The question of how projects would be handled outside of the 50 ft. lot and 2 boatlifts scenario. Don suggested that a percentage be used: For lots up to 50 ft. lot = 75% linear coverage would be allowed (allowing up to 37.5 linear feet of structures; or, 12 feet of near-shore access for the general public, fish & wildlife), 51-100 ft. lot = 65% (allowing 33-65 linear feet of structures), 101-250 ft. lot = 40% (40-100 linear feet of structures), and over 250 ft. lots = 35% (allowing 87.5 or more linear feet of structures).

- Several members of the advisory committee expressed concerns about how percentages would be enforced. Don supports the idea that the state should put the onus on the property owner, by requiring the property owner to post their shoreline and linear structure footages on the structure.
- Some suggested that another alternative would be to allow a maximum of 30 or 32 feet for narrow, 50-foot lots (rather than $\frac{1}{2}$ the lot width, which would be 25 feet). One person suggested that DNR could allow up to 40% of the linear measure, with reasonable lot-line setbacks (10 feet was suggested).
- Terry Neff suggested that local governments might appreciate having a lot line setback written into rules to alleviate access- and view shed-obstruction issues between neighbors. DNR has previously regarded this as a “good neighbor” issue and left this in the hands of local surface water ordinances.
- On the other end of the spectrum, the advisory group questioned what would be reasonable for larger lots, over 200’? Some reiterated the concern that DNR should not create rules for a few outliers, and should look to the future in writing the current rules.
- The issue of what to do with pre-existing structures that don’t meet the new rules was discussed. Sam questioned what a shoreland property would be worth if a property owner were only allowed to impact 40-feet along his/her shoreline. How does a person convert a 6 ft. dock into a 4 ft. dock? Don indicated that if the dock is modular, a solution can often be found. If it is not modular, such modifications would be difficult or impossible.
- In the end, the opinions were divided between those who thought the footage ought to be based on lot size vs. those that thought percentages were too complicated and advocated for using a fixed number.

Comments/concerns on Subd. 2a Docks and Platforms

- Bruce indicated that much of the language in this section is a recapture from previous (prior to 2002) rule language.
- Some in the group expressed concern that, as written in the current draft, an area hydrologist would have no solid guidance for what is enough. Gets to the issue of having caps. The language includes lack of clarity and lack of specificity. Dimensions are needed to lay out expectations.
- Several expressed concerns over the open-ended language in the rule, especially with the terms, “blend in,” “maintenance difficulty,” “fetch” and “public” vs. “private” users.

- For (4) D., many on the committee felt that the four feet language for “navigable depth” needs some adjustment. Julie mentioned that if people wharf out too far waterward, they will run into the county sheriff’s jurisdiction.
- Sam asked what the relationship is between the state rules and local rules, like the Lake Minnetonka Conservation District (LMCD). Julie replied that if the state rules change, LMCD has to comply with the new rules. Currently LMCD is more restrictive than the state rules.
- Several on the advisory group advocated for adding a definition for navigable depth, and making that depth four feet. Then, in this section, the rules should state that if a riparian owner demonstrates a reasonable need for more than four ft. for navigation, a permit could be issued.
- Concern was raised about how DNR would deal with shoreland properties with quick drop offs. It was suggested that language be added to allow for dock lengths for reasonable and secure mooring. Further discussion pointed out that current rule language states that dock length is limited to that necessary to accomplish its intended purpose and that this would address the concern where there are quick drop-offs—the dock can be longer than reaching navigable depth so as to accommodate mooring watercraft, for example, which is an intended purpose.
- Concern was raised about the ambiguity in the references to “reasonable justification” and “minimal impact” solutions.

Platform Size

- Julie indicated that Subp. 4 (9) uses the same size platform as currently allowed under the general permit.
- Terry Neff pointed out that in Aitkin County, water accessory structures with a footprint the size of the proposed platform are not allowed within 50 ft. of the shore impact zone. He indicated concern that DNR would allow platform structures in public waters that exceed the footprint of those allowed on private property within the shore impact zone.
- Mike Duval pointed out that the platform size proposed in this version of the rules takes the 64 sq. ft. standard platform size envisioned by the older rule and effectively doubles it and allows it statewide in all lake types. He cautioned the group to think about the implications of this, and consider whether such platforms should be in the unpermitted or permitted section of this rule.
- The suggestion was made to add rule language that would allow public and semi-public service docks (e.g., public fishing piers) that meet standards outlined by the Trails & Waterways Division. Paul indicated that in the proposed shoreland rules, some public activities are exempt from permits.

PUD/Resorts

- Use the definition in the proposed shoreland rules
- For Subp. 3 (pg. 9), insert some cap language.
- For Subp. 4, A, exempt resorts.

Paul stated that the language he was bringing forth as suggestions to the structure advisory committee was developed after discussions at 10 resort meetings across the state and at the shoreland advisory committee meetings.

- Concern was raised about tracking both sets of rules to watch for language that may be removed from one set of rules that may apply to the other set of rules. It was suggested that some language should be in both set of rules to ensure that problems don't arise if one set of rules is held up.
- The question was asked if all, new and existing, PUDs and conservation subdivisions would require a permit for mooring facilities. Julie indicated that this version of the rules proposes seven or more spots as a trigger for the need for a permit.
- Ed Becker expressed concern for enough transient docking facilities allowed for resorts. There is an expectation for those who visit resorts that they would have dock access. There has to be some reasonableness. As such, resorts should be allowed to have necessary transient docking.
- Patty Gould-St Aubin expressed concern about how docking would be handled for fractional ownership scenarios? Paul suggested that this could be covered in the proposed shoreland rules.

Erika encouraged those who have additional comments on the preliminary rules to send them to Julie and Tom soon (within the week).

Next steps, timeline & communication

Julie mentioned that there has been some interest expressed to meet again once the final draft is complete. Several members expressed this same interest.

She also stated that a meeting is scheduled on the 20th to meet with the commissioner on the preliminary rules. Once approval is received from the commissioner, the preliminary rules would then go to the Governor's Office for approval to post the Notice of Intent for public hearings. If all goes smoothly with agency and governor's approvals, the notice could be published in late July; the hearings could then be held in August. Following the hearings, the administrative law judge develops a report to the DNR. Once approval is given then the rules are promulgated. More information on the state rulemaking process can be found in the Minnesota Rulemaking Manual: A Reference Book For The Practitioner (www.health.state.mn.us/rules/manual/manual08.pdf)

Erika thanked everyone for their time and commitment to the advisory group process. Julie reminded the group to stay informed about the process by subscribing to the listserv on the DNR Web site.

The meeting adjourned at 2:00 pm.

Submitted by: Felicia Barnes, Planner