

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS
FOR THE MINNESOTA DEPARTMENT OF NATURAL RESOURCES

In the Matter of the Permit Application
No. 2004-1048 of Larry R. Jacobson,
Leech Lake, Cass County

FINDINGS OF FACT
CONCLUSIONS,
RECOMMENDATION
AND MEMORANDUM

The above-entitled matter came on for hearing before Raymond R. Krause, Administrative Law Judge, on September 22 and 23, 2004, in the Commissioner's Board Room, Cass County Courthouse Annex, 303 Minnesota Avenue, Walker, Minnesota.

Appearing on behalf of the Applicant herein, Larry R. Jacobson, was Mark A. Olson, Esq., 2605 East Cliff Road, Suite 100, Burnsville, Minnesota 55337. Appearing on behalf of the Department of Natural Resources ("DNR") was David P. Iverson, Assistant Attorney General for the State of Minnesota, Suite 900, 445 Minnesota Street, St. Paul, Minnesota 55101-2127.

The hearing in this matter lasted two days. The record closed on October 22, 2004, with the submission of post-hearing briefs.

Notice is hereby given that, pursuant to Minn. Stat. § 14.61 the final decision of the Commissioner of the Department of Natural Resources shall not be made until this Report has been made available to the parties to the proceeding for at least ten days, and an opportunity has been afforded to each party adversely affected to file exceptions and present argument to the Commissioner. Exceptions to this Report, if any, shall be filed with the Commissioner.

STATEMENT OF ISSUE

Has the Applicant met all of the conditions required for the grant of a permit to construct a breakwater on Leech Lake?

Based upon the foregoing Findings of Fact, the Administrative Law Judge makes the following:

FINDINGS OF FACT

1. Applicant Larry R. Jacobson ("Applicant") and his wife Susan are the owners and operators of Hiawatha Beach Resort, located along the shore of Leech Lake on Steamboat Bay.^[1] The resort is located approximately eight miles north of the City of Walker, Minnesota. Steamboat Bay is located in the northwestern corner of Leech Lake, separated from the main body of the lake by a large peninsula.^[2] The southeastern mouth of Steamboat Bay is restricted by Sand Point to the west and American Point to the east.^[3] Steamboat Bay is relatively shallow compared to the main body of Leech Lake and consists of mostly a muck bottom. In the immediate area of Hiawatha Beach Resort, the muck bottom is up to three feet in depth.

2. Numerous areas of emergent aquatic vegetation, such as wild rice and bulrush, are located throughout the bay.^[4]

3. Applicant has been the sole owner of Hiawatha Beach Resort since 1996. Prior to becoming sole owner, Applicant was part owner in partnership with his parents from 1980 to 1996. From 1960 to 1980, Applicant's parents and grandparents owned and operated at the resort. The resort was originally established in 1920.^[5]

4. The resort attracts a "family clientele", meaning that guest ages range from young children to elderly individuals. Some guests have been returning for many years and are of an age that they experience common physical limitations associated with age.^[6]

5. The resort currently consists of 21 cabins, along with 12 sites for recreational vehicles and four tent sites. Over the last several years, Jacobson has performed extensive remodeling of numerous cabins, and replaced some mobile home trailers with permanent cabins. Applicant estimates he has invested \$1 million in his resort over the past seven years. One such investment was the construction of a permanent dock system.^[7]

6. Prior to 1996, Hiawatha Beach Resort had a seasonal dock system for mooring resort and guest boats. The seasonal docks were put into the lake each spring and removed each fall by Applicant and resort staff. Seasonal docks had been used at the resort during the entire period the resort was owned by the Jacobson family, as well as prior to the family's ownership in 1960. For 10 years prior to the current permanent dock system, the resort had two seasonal docks, one utilizing posts driven into the lake bottom, connected by stringers and covered with a wooden walkway, and one utilizing a "pipe and disk" system with posts, attached to one another by stringers. This seasonal "post and stringer" dock system had mooring spaces available for up to 30 boats.

7. In 1996, Applicant installed a permanent dock system to provide 38 mooring slips for boats belonging to both the resort and to his guests. This permanent dock was constructed using posts and driven into the lake bottom by a pile driver brought onto the ice during the winter. The posts are attached to one another by stringers with boards attached across the stringers to act as the walkway. The dock was constructed pursuant to a DNR permit and cost \$25,000. Located within the dock system is a boat launch.

8. Since construction of the permanent dock in 1996, Applicant has experienced damage to the dock as a result of winter ice formation and spring ice-out. This has included the snapping of support posts and the jacking of the dock walkway. Yearly repair to the dock has been necessary. Applicant has operated an aeration system immediately lakeward of the dock in an attempt to prevent the damage; however, it has been only partially successful. The permanent dock system is currently in a state of significant damage, including bowing and uneven dock surface, broken and tilted upright posts, as well as general instability.^[8]

9. Personal injuries have occurred to guests as a result of attempts to get into or out of their boats during heavy wave action. Personal injuries have also occurred as a result of attempts by guests to assist in preventing ice damage to the permanent dock system or in attempts to repair that damage. Property damage has occurred to the permanent dock system as a result of wind and wave action upon ice in the lake and to boats in attempts to dock during heavy wave action at the docks.^[9]

10. By application dated July 21, 2003, Applicant requested a DNR public waters permit in order to construct a breakwater around his permanent dock system in order to create a protective harbor. On the application, the stated purpose for the proposed breakwater was "for safe use by customers at resort".^[10]

11. The proposed breakwater would be 235 feet in length running parallel to the shoreline, within an 85-foot leg extending from each end of the breakwater to the shoreline. There would be a 33 foot wide opening on the lakeward side of the harbor providing a boat

entrance. The breakwater would be constructed of large boulders dumped into the lake during the winter through holes cut in the ice. The base of the breakwater would be approximately 55 feet wide, and approximately 3 feet above the waterline, depending on lake elevation. The docks constructed within the breakwater would be approximately 2 feet above the waterline. Applicant estimates the present cost of construction of the breakwater to be greater than \$80,000.^[11]

12. By letter dated November 3, 2003, the DNR staff denied Applicant's permit application for the breakwater based on a number of rule provisions.^[12]

13. Applicant demanded a contested case hearing upon the denial of the permit application pursuant to Minn. Stat. § 103G.311 (2002).

14. Mr. Kirk English, Hydrologist with the DNR, was responsible for the review and initial recommendation regarding Mr. Jacobson's permit application. In making his recommendation, Mr. English relied primarily on a computerized program that analyzes wind and wave action on a particular coordinate when supplied with accurate climatological and topographical data. This is called a "fetch" study. Neither Mr. English, nor any other DNR personnel, made any personal observations of wave height at the actual site as a check on the computerized program.^[13]

15. The DNR fetch study showed that the maximum wave height to be expected at Hiawatha Beach Resort for wind and climate conditions prevalent 95 percent of the time is 2.2 feet.

16. Mr. Pat Rivers, DNR Fisheries Manager for Leech Lake, testified that the proposed breakwater would diminish fish habitat and could contribute to littoral drift thereby causing erosion.^[14]

APPLICABLE STATUTES AND RULES

Minn. Stat. § 103G.245, subd. 1 (2002) provides, in relevant part, as follows:

. . . (T)he state, a public or private corporation, or a person must have a public waters work permit to:

(2) change or diminish the course, current, or cross section of public waters, entirely or partially within the state, by any means, including filling, excavating, or placing of materials in or on the beds of public waters.

Minn. R. 6115.0210, subp. 1, provides, in relevant part, as follows:

It is the goal of the department to limit the occupation of public waters by offshore navigational facilities, retaining walls, and other structures in order to:

- A. preserve the natural character of public waters and their shorelands;
- B. provide a balance between the protection and utilization of public waters...

Minn. R. 6115.0210, subp. 5, provides in relevant part:

Permits are required for the construction, reconstruction, repair, or relocation of any structure for mooring facility upon or in public waters, except as provided under subparts 3 and 4, and a project must meet the following general criteria:

- A. The proposed project must represent the minimal impact solution to a specific need with respect to all other reasonable alternatives;
- B. The project does not exceed more than a minimum encroachment, change, or damage to the environment, particularly the ecology of the waters;

Minn. R.6115.0211, subp.4 (2003) provides in relevant part, as follows:

4. **Breakwaters.** A permit is required for the construction or reconstruction of all offshore breakwaters. These structures shall be approved if the following general conditions and the additional listed specific conditions are met:

- A. alternative dock or inland facilities are infeasible;
- B. the structure is limited to those areas where:

(1) prevalent wind, wave, or current conditions along the shoreline are of a magnitude and frequency that preclude the use and maintenance of docks to moor watercraft. Determinations of magnitude and frequency that would inhibit the use of docks shall be based on supporting facts including:

(a) the character of the water involved and its shoreline in relation to exposure to severe wind, wave, or current actions and the configuration and area of the water;

(b) the frequency of occurrence of storms producing severe winds and waves based on climatological data for the area; and

(c) the average number of days during each month of the navigational season when the shoreline is affected by severe winds, waves, or currents;

Minn. Stat. 103G.305, subp. 6(a) states:

“In permit applications, the applicant has the burden of proving that the proposed project is reasonable, practical, and will adequately protect public safety and promote the public welfare.”

Based upon the foregoing, the Administrative Law Judge makes the following:

CONCLUSIONS

1. The Administrative Law Judge and the Commissioner of Natural Resources have jurisdiction over the permit application herein.
2. All relevant procedural requirements of law and rule have been fulfilled.
3. The proposed project complies with Minn. R. 6115.0211, subp. 4B, because the evidence shows that wave conditions at the site are severe enough to cause injuries during normal use of the lake.

4. Applicant did not overcome the burden of proof as to whether the proposed project is consistent with Minn. R. 6115.0210, subp. 5 A and B, or with Minn. R. 6115.0211, subp.4A. Applicant provided insufficient evidence that the proposed project was the minimal impact solution to the problem or that docking alternatives were infeasible.

Based upon the foregoing Conclusions, the Administrative Law Judge makes the following:

RECOMMENDATION

That the Commissioner DENY a permit for the construction of a breakwater.

Dated this 8th of November, 2004.

s/Raymond R. Krause
RAYMOND R. KRAUSE
Administrative Law Judge

Reported: Tape Recorded: No Transcript Prepared

NOTICE

Pursuant to Minn. Stat. § 14.62, subd. 1, the agency is required to serve its final decision upon each party and the Administrative Law Judge by first class mail or as otherwise provided by law.

MEMORANDUM

Background

Applicant claims that wind and water action at or near the shore of his property, the Hiawatha Beach Resort, has caused numerous injuries to guests and staff at the resort. Testimony reflects that these injuries have occurred due to waves hampering the safe boarding of and egress from watercraft and by guests and staff having unstable or unsafe footing on the permanent dock. The instability and unsafe footing is in turn due to damage from ice piling up against the dock during the previous winter. In addition, injuries have occurred to staff and guests who were attempting to prevent ice damage to the permanent dock during the ice-out season.

Applicant applied for a permit to build a permanent rock breakwater enclosing his permanent dock. An opening on the lakeward side of the breakwater would allow entrance to and exit from the dock slips. The purpose of the proposed breakwater is to reduce wave action at the dock and prevent ice damage to the dock.

The DNR denied the permit based on findings that the proposed breakwater would be inconsistent with Minn. Rule 6115.0210, subp. 5 (2003) that requires that the proposed project "represent the minimal impact solution to a specific need with respect to all other alternatives" and must "not exceed more than the minimum encroachment, change or damage to the environment, particularly the ecology of the waters". The DNR also denied the permit based on findings that the proposed breakwater would be inconsistent with Minn. R. 6115.0211, subp. 4 (2003) which authorizes offshore breakwaters only where docking alternatives are infeasible and where prevalent wind, wave, or current conditions are of such a magnitude and frequency that use of alternative docking facilities are precluded.

Wind and Wave Conditions

In support of its findings with regard to wind and wave conditions, the DNR submitted the results of a fetch study that purports to calculate the maximum wave height for conditions prevailing 95 percent of the time. The results of this study show that the maximum wave height to be expected at Hiawatha Beach Resort for wind conditions prevalent 95 percent of the time would be 2.2 feet. According to Mr. Kirk English, the DNR hydrologist who conducted the study, 2.2 feet is insufficient to warrant construction of a breakwater.

Applicant made no similar computerized, climatological, or other empirical study of wave height. Instead, several witnesses who live or work at the resort testified that the frequency of waves greater than 2.2 feet is high.

The DNR study is not, in and of itself, convincing. The study is based on climatological data from areas up to 100 miles away and has too many variables not pertinent to Steamboat Bay to stand up against credible, empirical data from a study conducted at a location in question. Unfortunately, there is no such data provided by Applicant.

The DNR fetch study, however questionable, is the only empirical evidence as to wave height. The ALJ, therefore, accepts the finding that the maximum wave height under conditions prevailing at 95 percent of the time is 2.2 feet. That finding, however, does not answer the question before us. The question is: at what height does wave action warrant a breakwater in order to strike a balance between preservation and utilization of the natural resources in question? Mr. English opined that that waves under 3 feet in height do not warrant a breakwater permit. Mr. English could not provide any DNR rule, no statute, no department-wide practice or any independent, objective reason for 3 feet being sufficient and less than that being insufficient. He makes no claim of any support for 3 feet versus any other height. He claims that he picked 3 feet based on his experience.^[15] He does not, however, take us the next step and demonstrate that his experience shows significantly more property damage or risk of injury at 3 feet than at any other height. We are left to conclude that 3 feet is simply an arbitrary number used by Mr. English in any location without regard to any other factors.

Ranged against this is credible testimony of witnesses that injuries, some of which are serious, have indeed occurred due to wind and wave action at Hiawatha Beach Resort. There is also credible testimony of property damage to boats and the permanent dock system. All this has occurred whether the wave height is 2.2 feet as Mr. English claims, or higher as Applicant claims. The ALJ therefore finds that, whatever the wind conditions and wave heights at Hiawatha Beach Resort, they are sufficient, at times, to cause injuries and property damage.

The DNR raises two collateral arguments with respect to its finding that the application is not consistent with Minn. Rule 6115.0210, subp 1, or Minn. Rule 6115.0211, subp.4B. These can be dealt with in brief. First, DNR argues that the cause of the boat damage and injuries is the inexperience of the guests in handling boats in a lake with wave conditions presented at Hiawatha Beach Resort. The Applicant has shown that his is a family-type resort with guests ranging from young children to elderly people. The DNR has shown no rule which states that breakwaters are only for the protection of experienced boaters. In balancing environmental protection against utilization of a natural resource like Leech Lake, we must consider the type of people who will commonly utilize the lake. The safety of those who use Leech Lake is one of those balancing concerns. The DNR is not only concerned with the safety of boaters experienced with significant wave action and unstable dockage but also the general populace attempting to utilize the lake. That includes children, elderly, those with physical limitations and a certain percentage of inexperienced boat handlers. The fact that some of the injuries have occurred to inexperienced boat handlers does not diminish the problem for a family resort that expects such people a guests.

The second argument is that Minn. R. 6115 does not expressly provide for breakwater permits to be issued to protect from ice damage and that such damage does not occur "during the navigational season". This is also not persuasive. The safety concerns referred to in the permit application are primarily boating and dock use injuries during the navigational season. It is true that some of these injuries occur as a result of damage to the permanent dock from ice. However, the ice, in and of itself, causes little damage. It is the wind and wave action upon the ice that causes the damage and hence the danger.

Alternatives to a Breakwater

Minn. Rule 6115.0211, subp.4, authorizes breakwaters only where docking alternatives are infeasible. Minn. R. 6115.0210, subp.5, requires that the project must represent the minimal impact solution to a specific need with respect to all other alternatives.

Applicant's position is that there are no viable alternatives to a breakwater system. The DNR, however, suggests that there are several. First, they point to a harbor on an adjacent property. Applicant does not own that property.¹⁶ The property is owned by his son. The DNR argues that since the parties are related and the Applicant uses the property occasionally as a rental he should also use its harbor in lieu of a breakwater. The ALJ does not find that there is any evidence that the son is willing to allow such use of his property as a permanent solution to the identified problem. Without such permission, it is not a viable alternative. In any case, the harbor is, even if available, of insufficient size to solve the entire problem facing Hiawatha Beach Resort.

Second, the DNR suggests that a floating dock system, individual boatlifts, or a temporary seasonal dock system be used instead of a breakwater. Any of these options can be removed in winter to avoid the ice-out damage. Some of them may also reduce the risk of injuries from boat accidents. Applicant provided no substantive evidence that a seasonal dock of some kind, either a floating dock, boatlifts, or a "post and stringer" dock system, cannot alleviate the safety concerns associated with the current system without a breakwater. Applicant suggests that installation and removal of seasonal docks would be costly. He does not, however, provide evidence that it is more costly than the estimates of \$80,000 to \$100,000 for installation of a breakwater and repair to the existing permanent dock.

Applicant also argues that having many boatlifts is less attractive than a breakwater. While this may be true, the rule requires a balancing of preservation versus utilization. Boatlifts, however unsightly, are by their nature temporary dislocations from the natural state of the lakeshore. The breakwater is a permanent change to that environment. It should only be allowed when less permanent solutions are unavailable or infeasible. Applicant claims that the physical capacity of some of his guests limits their ability to utilize the manual boat raising mechanism of the boatlift. Applicant has offered no evidence that this is more than a hypothetical issue for his guests or why electrical assisted lifts could not solve that problem. Applicant has, in short, not demonstrated that the alternatives are unavailable or infeasible.

Applicant's arguments against the use of seasonal docking systems are conclusory and not supported by any substantive evidence. Because applicant has the burden of proving a permit is warranted, there must be an affirmative showing, supported by evidence, of why alternatives are unavailable or infeasible. The ALJ finds that the Applicant has not met the burden in this respect.

Environmental Impact

Similarly, Applicant takes issue with the findings of Mr. Rivers, the DNR Fisheries Manager for Leech Lake, who testified that a breakwater would disrupt fisheries and fish habitat. He also testified that the proposed breakwater would contribute to littoral drift and erosion. Applicant raises several criticisms of Mr. Rivers' methodology and conclusions. Again, Applicant bears the burden of proving that no disruption will occur or that this is the solution that will minimize ecological disruption. Applicant does not dispute that temporary docks will have less negative impact. Without a positive showing by Applicant that a breakwater is the minimal solution to the problem, simply attacking DNR's evidence is not sufficient. Applicant provided insufficient expert testimony or other evidence to overcome the testimony on this point by Mr. Rivers. The ALJ finds, therefore, that the burden has not been met with respect to this issue.

Summary

In sum, Applicant has demonstrated that there is sufficient wind and wave action at Hiawatha Beach Resort to cause injuries to guests and staff while using their boats at the existing permanent docking system. In addition, wind and wave action in the winter cause ice pileups that cause property damage to the permanent dock. This in turn creates the potential for injuries while repairing or attempting to prevent that damage.

The rule requires a balancing between protection and utilization of natural resources. In this case, Applicant has demonstrated that utilization is hampered by wind and wave action severe enough to cause injury during the course of normal activity on the lake. Applicant has not, however, shown that a breakwater is the minimal impact solution to the problem with respect to all other alternatives. Applicant has also not provided evidence that the project does not exceed a minimum encroachment, change or damage to the environment, particularly the ecology of the waters. Applicant's conclusory statements in this regard may be well founded but they are not supported by evidence on the record. The ALJ therefore recommends that the permit be denied.

R.R.K.

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- [\[1\]](#) DNR EX.9-11
 - [\[2\]](#) DNR Ex. 7
 - [\[3\]](#) DNR Ex.8
 - [\[4\]](#) DNR Ex. 8
 - [\[5\]](#) Testimony of Applicant, Tape 1
 - [\[6\]](#) Id.
 - [\[7\]](#) Id.
 - [\[8\]](#) Id
 - [\[9\]](#) Testimony of Applicant and Dennis Smith, Tape 2 and 6
 - [\[10\]](#) DNR Ex. 5
 - [\[11\]](#) DNR Ex.5and 6
 - [\[12\]](#) DNR Ex. 6
 - [\[13\]](#) Testimony of Mr. Kirk English, Tape 4
 - [\[14\]](#) Testimony of Mr. Pat Rivers, Tape 5
 - [\[15\]](#) Testimony of Kirk English, Tape 4
 - [\[16\]](#) Testimony of Applicant, Tape 2