

**Vermont Agency of Natural Resources
Department of Environmental Conservation
Watershed Management Division**

Lake Encroachment Individual Permit Application Public Trust Review Procedure

Section A. Purpose

Vermont law declares that the lakes and ponds of the state and the lands lying underneath them are held in trust by the state for the benefit of all Vermonters. This basic concept is referred to as the Public Trust Doctrine, a concept which can be traced back through English common law to Roman law.

As trustee of these waters and lands, the state, through the Department of Environmental Conservation (Department), has an obligation to manage Vermont's lakes and ponds in a manner which preserves and protects a healthy environment, guarantees the right of Vermonters to hunt, fish, boat, swim, and enjoy other recreational opportunities, and provides the greatest benefit to the people of the state.

The state, as trustee, cannot sell or give away these public resources to individuals or corporations for purely private purposes. The state can, however, allow the construction of docks, marinas, retaining walls, and other structures in public waters, or the alteration of the land lying underneath the water, so long as the project involved is not in conflict with the Public Trust Doctrine and does not adversely affect the public good. While the state law governing the management of lakes and ponds provides general guidance to the Department on how to determine if a particular project is in the public good ([29 V.S.A. Chapter 11](#)), it does not provide guidance on how to determine if the project is in conflict with the Public Trust Doctrine.

Therefore, the Department has prepared the following information to explain how it will evaluate proposed projects that would encroach into the public lakes and ponds of the state under the Public Trust Doctrine. It must be noted that the following explanation is very general in nature. The Department will review each proposed encroachment on a case-by-case basis given the specific details of the project.

Section B. Exemptions

The Vermont Legislature has determined that the size and type of some encroachments are such that – although the encroachment may be for exclusively private purposes – construction of the project would neither violate the state's fiduciary duties under the Public Trust Doctrine nor adversely impact the public good under most conditions. As stated by the Legislature, these particular encroachments do not require a public trust review unless the Department determines that navigation or boating would be unreasonably impeded.

These conditionally exempt encroachments are:

1. Wooden or metal docks for non-commercial use mounted on piles or floats provided that:
 - a. the combined horizontal distance of the proposed encroachment and any existing encroachment within 100 feet owned or controlled by the applicant does not exceed 50 feet, and their aggregate surface area does not exceed 500 square feet; and
 - b. concrete, masonry, earth or rock fill, sheet piling, bulkheading, cribwork or similar construction does not form a part of the encroachment.
2. A water intake pipe not exceeding two inches inside diameter.

3. Temporary extensions of existing structures added for a period not to exceed six months, if required by low water.
4. Ordinary repairs and maintenance to existing commercial and non-commercial structures.
5. Duck blinds, floats, rafts, and buoys.
6. Filtering devices not exceeding nine square feet of disturbed area on the end of water intake pipes less than two inches in diameter for the purpose of zebra mussel control.

Section C. Public Trust Determination

To review whether a project is in keeping with the Public Trust Doctrine, there must be a public purpose, a public benefit, or both, that outweighs any adverse impact on the public resource. The state, as trustee, cannot sell or give away these public resources to individuals or corporations for purely private purposes. Under this doctrine, the state cannot approve a non-exempt encroachment that is exclusively for private purposes.

For example, if an individual wishes to construct a non-exempt encroachment, such as a marina or a lakeshore retaining wall, in a public lake or pond, there must be some public purpose, public benefit, or both, associated with the project for the state to permit its construction.

In making this public trust determination, the Department will consider:

1. The intended public purposes served by the encroachment. Examples include:
 - a. Structural or nonstructural projects to stabilize the shoreline and control erosion
 - b. Projects that provide the public new, continued, or expanded access to public waters, public trust uses, or both, such as to construct or expand marinas, public access areas, public docks, public boat ramps, public fishing piers
 - c. Projects to expand access to boat rentals, tours/cruises, and educational programs
 - d. Projects to maintain, repair, or replace existing structures, such as boathouses or docks
 - e. Dredging or excavation projects that restore or maintain an existing public trust use
 - f. Projects that maintain or construct public infrastructure, such as bridges, dry hydrants, culverts, water intake lines, utilities, and public pathways
2. The anticipated public benefits created by the proposed encroachment, which includes benefits located within or outside of public waters. Examples include:
 - a. Benefits to the public good (e.g., improving water quality, fish and wildlife habitat, aquatic and shoreline vegetation, navigation, and other recreational and public uses, including fishing and swimming, consistency with the natural surroundings, and consistency with municipal shoreland zoning ordinances or any applicable State plans)
 - b. Benefits to public trust uses (e.g., improving fishing, boating, swimming, kayaking, sea plane use, ice fishing, ice skating, navigation, boating-related recreation, commerce, environmental research, environmental preservation)
 - c. Erosion control
 - d. Preserve or restore the natural stability of the shoreline
 - e. Prevent the failure and/or deterioration of an encroachment
 - f. Fire suppression
 - g. Agricultural irrigation

3. Potential adverse impacts of the proposed encroachment and cumulative impacts of existing encroachments on the public resource. Examples include:
 - a. Adverse impacts on the public good (i.e., degrading water quality, fish and wildlife habitat, aquatic and shoreline vegetation, navigation, and other recreational and public uses, including fishing and swimming, consistency with the natural surroundings, and consistency with municipal shoreland zoning ordinances or any applicable State plans)
 - b. Adverse impacts on public trust uses (e.g., degrading fishing, boating, swimming, kayaking, sea plane use, ice fishing, ice skating, navigation, boating-related recreation, commerce, environmental research, environmental preservation)
 - c. The extent of the encroachment reserved for private use
 - d. The area occupied by the encroachment relative to the surrounding waters

The Department's determination is based upon the relative proportion of public purpose, public benefit, and adverse impact of the proposed encroachment. As the adverse impacts of a proposed encroachment increase, the applicant must increasingly demonstrate that the encroachment serves a public purpose, provides a public benefit, or both.

For example, a project to construct a stone toe slope six inches out into a lake beyond the mean water level to prevent the continued erosion of a private property may have minimal effect on the state's public resources. The applicant must demonstrate that the project would serve a public purpose, provide a public benefit, or both, is correspondingly minimal.

However, a proposal to build a private dock 500 feet into a lake could significantly impact the state's resources therefore the applicant's responsibility to demonstrate that the project would serve a public purpose, provide a public benefit, or both, is correspondingly greater.

If the applicant demonstrates that the project would serve a public purpose, provide a public benefit, or both, the applicant must then demonstrate that the public purpose and/or benefits outweigh any adverse impacts. **The Department will determine a project to be consistent with the Public Trust Doctrine if the public purpose and/or public benefit outweigh any adverse impact on the public resource. If an applicant's proposed encroachment does not have a public purpose or a public benefit, the Department will deny the application.**

Section D. Adoption and Effective Date

This procedure is hereby adopted for the review of Lake Encroachment Individual Permit applications under 29 V.S.A. Chapter 11. This procedure is effective as of the date signed below.

Bethany Sargent, Deputy Director
 Watershed Management Division
 Vermont Department of Environmental Conservation

7/15/2024

 Date