

## INTERIM PROCEDURES FOR THE ISSUANCE OR DENIAL OF ENCROACHMENT PERMITS

### Section 1. Purpose

These procedures have been adopted in order to provide guidance to the Department of Environment Conservation in the permitting of encroachments in Vermont's lakes and ponds under the authority of 29 V.S.A. Chapter 11 (Management of Lakes and Ponds). The Lakes and Ponds statute recognizes that the lakes and ponds of the state and the lands lying thereunder are held in trust by the state for the benefit of the people of the state. This basic concept is referred to as the Public Trust Doctrine. As trustees of these natural resources, the state, through the Department of Environment Conservation, has an obligation to manage the lakes and ponds of the state in a manner which preserves and protects a healthy environment, which preserves and protects the rights of Vermont citizens to hunt, fish, boat, swim and enjoy other recreational opportunities, and which provides the greatest benefit to the people of the state.

The state, as trustee, cannot sell or otherwise convey these public resources to private persons for purely private purposes. It can, however, allow the construction of docks, marinas, boathouses, retaining walls, etc. in public waters 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 Lakes and Ponds statute provides general guidance to the Department on how to determine if a particular project is in the public good, it does not provide guidance on how to determine whether a project is in conflict with the public trust doctrine. Therefore, these procedures have been adopted to provide both guidance to the Department and notice to the public of how projects which encroach into the lakes and ponds of the state will be evaluated.

### Section 2. Exemptions

The Legislature has determined that the size and type of some encroachments are such that, even though the encroachment may be for exclusively private purposes, allowing the construction of the project would neither violate the state's fiduciary duties under the public trust doctrine nor adversely affect the public good under most conditions. Therefore, these particular encroachments do not require a permit unless the Department determines that navigation or boating would be unreasonably impeded.

These conditionally exempt encroachments, as described in 29 V.S.A. Section 403, are:

- (1) Wooden or metal docks for noncommercial use mounted on piles or floats provided that:

- (A) the combined horizontal distance of the proposed encroachment and any existing encroachments located within 100 feet thereof which are owned or controlled by the applicant do not exceed 50 feet and their aggregate surface areas do 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 noncommercial structures;
- (5) Duck blinds, floats, rafts and buoys.

Section 3. Invalidated by Lamoille County Superior Court, Docket No. S96-91, 9/04/92.

Section 4. Public Good Determination

- (a) The second test for determining whether a particular encroachment should be permitted involves an examination of how the proposed project will affect the public good. As all encroachments effect the waters where they are located, the question is whether the affect is adverse or not. 29 V.S.A. section 405(b) lists criteria that the Department must consider in making the public good determination. Since the determination of the potential effect of an encroachment on these criteria requires a certain degree of subjective judgment, the Department has developed the following three part test as guidance in determining whether there is an adverse effect on the public good.
- (b) First, the Department will examine the effect of the encroachment by applying the following criteria and presumptions:
  - (1) Is the extent of the proposed encroachment excessive for its stated purpose;
  - (2) Is there a feasible alternative to the proposed encroachment which is less intrusive. In examining alternatives, the Department will not consider the cost differential between various alternatives;
  - (3) Have all practical measures been taken to reduce the impacts on the public resources; and

- (4) Does the encroachment involve the placement of fill, borrow material, concrete, sand, or other similar materials beyond the mean water level of lakes and ponds. If so, the encroachment is presumed to be adverse to the public good as it may permanently eliminate the use by the public of a portion of the state's natural resources. Examples of this type of encroachment include the construction and backfill of retaining walls or rip rap, groins, jetties, dikes, and new beaches beyond the mean water level. In order to rebut the presumption of adverse effect an applicant must prove that:
- (A) the placement of a minor amount of material in state waters is the only technical solution to a severe and documented erosion problem and that no lost land is being reclaimed; or
  - (B) the land to be created through the placement of materials is a reclamation of dry land lost due to documented catastrophic damage within three years of the date the permit application is submitted; or
  - (C) the land to be created is the result of a repair to existing encroachments of similar material; or
  - (D) there are public benefits derived from the placement of the material which overwhelmingly outweigh the adverse affect of the proposed encroachment.
- (c) Second, the Department will examine the effect of the proposed encroachment on water quality, fish and wildlife habitat, aquatic and shoreline vegetation, navigation, and other recreational and public uses, including fishing and swimming. In addition, the Department will examine the proposed encroachment's consistency with the natural surroundings, any applicable municipal shoreland zoning ordinances, and any applicable state plans.
- (d) Third, the Department will determine if the potential cumulative effect of the encroachment, when considered in conjunction with other existing encroachments, is adverse. In order to make this cumulative impact assessment, the Department will be initiating the planning process mandated by 10 V.S.A. section 1423. In addition, in accordance with the provisions of Act 200, local and regional land use plans will be developed which will be used by the Department to make cumulative impact assessments. In the interim, some cumulative impact assessments can be made based on the circumstances of a particular encroachment. For example, even large lakes like Lake Champlain have individual bays that can be identified as discrete and distinct

ecological systems where cumulative impacts are more readily identifiable. The same is true for the smaller ponds and lakes in the state. Even in larger lakes outside the discrete management zones, it may be possible to identify cumulative effects on the criteria in subsection (c) above. For example, the use patterns associated with existing encroachments may clearly create a situation where additional encroachments would create serious navigational hazards.

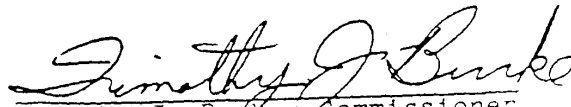
- (e) If after applying this three part test, the Department determines that the proposed encroachment does not adversely affect the public good, a permit will be issued. If the proposed encroachment fails to meet any portion of this test, the permit application will be denied.

Section 5. Duration of Encroachment Permits; Revocation

- (a) The construction of encroachments into state waters is a privilege not a right. Therefore, in order to assure the continued proper management of state resources, all encroachment permits will be issued for a definite term of years as follows:
  - (1) All encroachments involving the placement of fill, borrow material, concrete, sand, or other similar materials that are not structures may be permitted for up to a maximum of thirty (30) years; and
  - (2) All other types of encroachments may be permitted for up to a maximum of fifteen (15) years.
- (b) Permit expiration dates may be set for less than the maximum period possible on a case by case basis. In determining whether a particular permit term should be shorter than the maximum allowed, the Department shall consider the following:
  - (1) The likelihood that factors associated with the proposed encroachment's effect on the public trust or public good will change during the term of the permit; and
  - (2) The anticipated useful life of the proposed encroachment.
- (c) An encroachment permit may be revoked for cause during the term of the permit. Cause for revocation is:
  - (1) Failure by the applicant to disclose all relevant facts during the application process which were known at that time;
  - (2) Misrepresentation of any relevant fact at any time;
  - (3) Non-compliance with the terms and conditions of the permit; or

- (4) A change in the factors associated with the encroachment's effect on the public trust or public good so that on balance the Department finds that the encroachment adversely affects the public trust or public good.

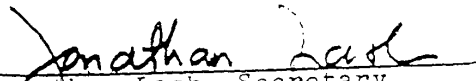
The attached Interim Procedures for the Issuance or Denial of Encroachment permits under 29 V.S.A. Chapter 11 have been duly adopted as of this date in accordance with the provisions of 3 V.S.A. section 835.



Timothy J. Burke, Commissioner  
Department of Environmental  
Conservation

10/4/89

Date



Jonathan Lash, Secretary  
Agency of Natural Resources

10/6/89

Date