

VERMONT AGENCY OF NATURAL RESOURCES
DEPARTMENT OF ENVIRONMENTAL CONSERVATION

EXPLANATION OF PUBLIC TRUST REVIEW OF
ENCROACHMENT PERMIT APPLICATIONS

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, 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, 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 under the Public Trust Doctrine proposed projects which would encroach into the lakes and ponds of the state. 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.

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.

PUBLIC TRUST DETERMINATION

To determine whether a proposed non-exempt encroachment should be permitted, the Department of Environmental Conservation must first determine whether the project meets the requirements of the Public Trust Doctrine. Under this doctrine, the state cannot approve construction of a non-exempt encroachment for exclusively private purposes.

To state this principle another way, if an individual wishes to construct a non-exempt encroachment, such as a marina, a lakeshore retaining wall, or a beach, in a public lake or pond, there must be some public purpose and/or public benefit associated with the project in order for the state to permit its construction.

In making this public trust determination, the Department will consider (1) the public purpose served by the encroachment; (2) the public benefits created by the proposed encroachment; and (3) any adverse impacts on the public resources as a result of the encroachment.

Examples of the types of public purpose and benefits that may be created to meet the public trust test include, but are not limited to: erosion control measures, public access areas, boat pump-out facilities, fuel facilities, public docks and moorings, public beach areas, or public fishing piers.

The Department's review process operates on a sliding scale: As the adverse impacts of a proposed encroachment increase, the burden on the applicant to demonstrate that the encroachment serves a public purpose and provides a public benefit also increases.

As an example, a project that involves the construction of a retaining wall four inches out into a lake beyond the mean water level in order to prevent the continued erosion of a private property may have minimal effect on the state's public resources. In this example, the burden on an applicant to demonstrate that there is a public purpose and a public benefit associated with the project is correspondingly minimal.

On the other hand, a proposal to build a private dock 500 feet into a lake could have a significant effect on the state's resources, and the burden of proving that the project would serve a public purpose and provide public benefits is correspondingly greater.

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

The Vermont Water Resources Board, in its role as the appellant body under Vermont law, will review any appeals of the Department's public trust decisions.

If you have any questions regarding the above information, please call the Department's Shoreland Encroachment Program in the Water Quality Division at 802-241-3777.