LEGISLATIVE COMMITTEE MINUTES

SB119

Bill as Introduced

SB 119 - AS INTRODUCED

2017 SESSION

17-0817
08/01

SENATE BILL ***119***

AN ACT relative to the length of a dock on a water body.

SPONSORS: Sen. Sanborn, Dist 9; Sen. Avard, Dist 12; Sen. French, Dist 7; Sen. Gannon, Dist 23; Sen. Giuda, Dist 2; Sen. Reagan, Dist 17; Rep. Vadney, Belk. 2

COMMITTEE: Energy and Natural Resources

ANALYSIS

This bill exempts certain temporary seasonal docks from permitting.

Explanation: Matter added to current law appears in ***bold italics.***
Matter removed from current law appears [~~in brackets and struckthrough.~~]
Matter which is either (a) all new or (b) repealed and reenacted appears in regular type.

SB 119 - AS INTRODUCED

17-0817
08/01

STATE OF NEW HAMPSHIRE

In the Year of Our Lord Two Thousand Seventeen

AN ACT relative to the length of a dock on a water body.

Be it Enacted by the Senate and House of Representatives in General Court convened:

1 Temporary Seasonal Dock; Exempt from PermitingPermitting. Amend RSA 482-A:3, IV-a(e) to read as follows:

(e) No more than 6 feet wide and no more than 40 feet long if the water body is 1,000 acres or larger, or no more than 30 feet long if the water body is less than 1,000 acres, ***unless a longer dock is required such that at the end of the dock the water level shall be at least 36 inches, based on the rolling 5-year average low water level from April 1 to October 30***;

2 Effective Date. This act shall take effect upon its passage.

Amendments

Sen. Sanborn, Dist 9
February 3, 2017
2017-0295s
08/03

Amendment to SB 119

Amend the title of the bill by replacing it with the following:

AN ACT relative to the length of docks and seasonal boat lifts and personal watercraft lifts on a water body.

Amend the bill by replacing section 1 with the following:

1 New Paragraphs; Temporary Docks, Boatlifts, and Personal Watercraft Lifts. Amend RSA 482-A:3 by inserting after paragraph IV-a the following new paragraphs:

IV-b. Any existing or grandfathered dock extension shall be exempt from permitting, provided that a notification is sent to the department by the owner of the property that includes the name and address of the property owner, the municipality, the waterbody, and tax map and lot number on which the proposed dock will be seasonally extended. To qualify for an exemption under this paragraph, a temporary seasonal dock extension shall be:

(a) Constructed to be an extension of an existing permitted or grandfathered dock;

(b) Constructed to be removed during the non-boating season;

(c) Removed from the lake bed for a minimum of 5 months a year;

(d) On bodies of water of over 1,000 acres, no more than 75 feet in length or 450 square feet, such that at the end of the dock the water level shall be 3 feet of water under the length of a vessel, based on the rolling 5 year average low water level from April 1 through October 30; nor more than 45 feet in length or 270 square feet on bodies of water under 1,000 acres; and

(e) Located at least 20 feet from an abutting property line or the imaginary extension of the property line over the water, unless previously grandfathered or permitted.

IV-c. Temporary seasonal boatlifts and personal watercraft lifts installed in any lake or pond shall be exempt from the permitting requirements of this section, provided that a notification is sent to the department by the owner of property that includes the name and address of the property owner, the municipality, the waterbody, and tax map and lot number on which the proposed lift or lifts will be located. No more than 2 lifts shall be located on any property under this paragraph. To qualify for an exemption under this paragraph, a temporary seasonal lift shall:

(a) If a seasonal boatlift, only be installed adjacent to an existing permitted or grandfathered dock in a legally existing boat slip, such that no additional boat slip or dockage is created;

(b) Be located at least 20 feet from the abutting property line or imaginary extension of

the property line over the water under this section;

(c) Be removed during the non-boating season; and

(d) Be removed from the lake bed for a minimum of 5 months each year.

2017-0295s

AMENDED ANALYSIS

This bill exempts certain temporary seasonal docks, boatlifts, and personal watercraft lifts from permitting.

Sen. Bradley, Dist 3
March 3, 2017
2017-0719s
08/10

Amendment to SB 119

Amend the title of the bill by replacing it with the following:

AN ACT relative to temporary dock extensions.

Amend the bill by replacing all after the enacting clause with the following:

1 New Paragraph; Temporary Dock Extensions. Amend RSA 482-A:3 by inserting after paragraph IV-a the following new paragraph:

IV-b. If the annual June 1 measurement of Lake Winnipesaukee taken by the department of environmental services indicates that the measured water level of the lake has fallen 2 feet or more than the 5-year average water level of the lake, then the following provisions shall apply to dock owners on all bodies of water until October 31 of that same calendar year:

(a) Any person owning a legally permitted dock under this section may extend such dock temporarily by 20 feet by sending a notification to the department of environmental services including the name and address of the property owner, the municipality, the water body, and tax map and lot number on which the extension will be located.

(b) Such extension shall be removed no later than October 31. Any dock owner who fails to do so shall be subject to the penalties of RSA 482-A:14.

(c) The installation of a temporary dock under this paragraph shall not create any new rights to the land or water on which such temporary dock is placed.

2 Effective Date. This act shall take effect upon its passage.

2017-0719s

AMENDED ANALYSIS

This bill allows persons owning legally permitted docks to extend such docks under certain conditions.

Sen. Sanborn, Dist 9
March 21, 2017
2017-0984s
08/04

Amendment to SB 119

Amend the title of the bill by replacing it with the following:

AN ACT relative to the length of docks, seasonal boat lifts, personal watercraft lifts on a water body, water body size, and notice of administrative completeness for certain shoreline projects.

Amend the bill by replacing all after the enacting clause with the following:

1 New Paragraphs; Excavating and Dredging Permits; Exemption for Temporary Docks, Boatlifts, and Personal Watercraft Lifts. Amend RSA 482-A:3 by inserting after paragraph IV-a the following new paragraphs:

IV-b. Any existing or grandfathered dock extension shall be exempt from permitting, provided that a notification is sent to the department by the owner of the property that includes the name and address of the property owner, the municipality, the waterbody, and tax map and lot number on which the proposed dock will be seasonally extended. To qualify for an exemption under this paragraph, a temporary seasonal dock extension shall be:

(a) Constructed to be an extension of an existing permitted or grandfathered dock;

(b) Constructed to be removed during the non-boating season;

(c) Removed from the lake bed for a minimum of 5 months a year;

(d) On bodies of water of over 1,000 acres, no more than 50 feet maximum length or 450 square feet, such that at the end of the dock the water level shall be 4 feet of water as measured at normal full lake level; nor more than 40 feet in length or 270 square feet on bodies of water under 1,000 acres; and

(e) Located at least 20 feet from an abutting property line or the imaginary extension of the property line over the water, unless previously grandfathered or permitted.

IV-c. Temporary seasonal boatlifts and personal watercraft lifts installed in any lake or pond shall be exempt from the permitting requirements of this section, provided that a notification is sent to the department by the owner of property that includes the name and address of the property owner, the municipality, the waterbody, and tax map and lot number on which the proposed lift or lifts will be located. No more than one boatlift and 2 personal watercraft lifts shall be located on any property under this paragraph. To qualify for an exemption under this paragraph, a temporary seasonal lift shall:

(a) Only be installed adjacent to an existing permitted or grandfathered dock in a

legally existing boat slip, such that no additional boat slip or dockage is created;

(b) Be located at least 20 feet from the abutting property line or imaginary extension of the property line over the water under this section;

(c) Be removed during the non-boating season; and

(d) Be removed from the lake bed for a minimum of 5 months each year.

2 Boat Slip; Lake Size. Amend RSA 482-A:2, VIII (a) and (b) to read as follows:

(a) On water bodies over [~~10,000~~] ***1,000*** acres, means a volume of water 25 feet long, 8 feet wide, and 3 feet deep as measured at normal high water and located adjacent to a structure to which a watercraft may be secured.

(b) On water bodies of [~~10,000~~] ***1,000*** acres or less, a volume of water 20 feet long, 6 feet wide, and 3 feet deep as measured at normal high water mark and located adjacent to a structure to which a watercraft may be secured.

3 Notice of Administrative Completeness; Requests for Additional Information RSA 482-A:3, XIV(a)(2) is repealed and reenacted to read as follows:

(2) Within 30 days of the issuance of a notice of administrative completeness for projects involving shoreline structures such as, but not limited to: docks, sea walls, breakwaters, riprap, water access ramps and stairs; or within 75 days of the issuance of a notice of administrative completeness for projects where the applicant proposes under one acre of jurisdictional impact; or 105 days for all other projects, request any additional information that the department is permitted by law to require to complete its evaluation of the application, together with any written technical comments the department deems necessary.

4 Effective Date. This act shall take effect upon its passage.

Energy and Natural Resources
March 23, 2017
2017-1099s
08/10

Amendment to SB 119

Amend the title of the bill by replacing it with the following:

AN ACT relative to the length of docks on a water body, water body size.

Amend the bill by replacing all after the enacting clause with the following:

1 New Paragraph; Excavating and Dredging Permits; Exemption for Temporary Docks, Boatlifts, and Personal Watercraft Lifts. Amend RSA 482-A:3 by inserting after paragraph IV-a the following new paragraph:

IV-b. Any existing or grandfathered dock extension shall be exempt from permitting, provided that a notification is sent to the department by the owner of the property that includes the name and address of the property owner, the municipality, the waterbody, and tax map and lot number on which the proposed dock will be seasonally extended. The installation of a temporary dock under this paragraph shall not create any new rights to the land or water on which such temporary dock is placed. To qualify for an exemption under this paragraph, a temporary seasonal dock extension shall be:

(a) Constructed to be an extension of an existing permitted or grandfathered dock;

(b) Constructed to be removed during the non-boating season;

(c) Removed from the lake bed for a minimum of 5 months a year;

(d) On bodies of water of over 1,000 acres, no more than a maximum total length of 50 feet including the existing dock or 450 square feet, such that at the end of the dock the water level shall be 4 feet of water as measured at normal full lake level; nor more than a maximum of 40 feet in length, including the existing dock, or 160 square feet on bodies of water under 1,000 acres; and

(e) Located at least 20 feet from an abutting property line or the imaginary extension of the property line over the water, unless previously grandfathered or permitted.

2 Boat Slip; Lake Size. Amend RSA 482-A:2, VIII (a) and (b) to read as follows:

(a) On water bodies over [~~10,000~~] ***1,000*** acres, [~~means~~] a volume of water 25 feet long, 8 feet wide, and 3 feet deep as measured at normal high water and located adjacent to a structure to which a watercraft may be secured.

(b) On water bodies of [~~10,000~~] ***1,000*** acres or less, a volume of water 20 feet long, 6 feet wide, and 3 feet deep as measured at normal high water mark and located adjacent to a structure to which a watercraft may be secured.

3 Effective Date. This act shall take effect upon its passage.

2017-1099s

AMENDED ANALYSIS

This bill:

I. Exempts certain temporary seasonal docks from obtaining an excavating and dredging permit.

II. Changes water body size requirements with regard to boat slip sizes.

Committee Minutes

Senate Energy and Natural Resources Committee

Griffin Roberge 271-2878

SB 119, relative to the length of a dock on a water body.

Hearing Date: February 14, 2017.

Time Opened: 9:15 a.m. **Time Closed:** 10:13 a.m.

Members of the Committee Present: Senators Avard, Bradley, Innis, Fuller Clark and Feltes.

Members of the Committee Absent: None.

Bill Analysis: This bill exempts certain temporary seasonal docks from permitting.

Sponsors:

Sen. Sanborn	Sen. Avard	Sen. French
Sen. Gannon	Sen. Giuda	Sen. Reagan
Rep. Vadney		

Who supports the bill: Senator Bob Giuda (District 2), Senator Harold French (District 7), Senator Kevin Avard (District 12), Senator John Reagan (District 17), Senator William Gannon (District 23), Senator Dan Innis (District 24), Mary Truell (NH Association of Realtors).

Who opposes the bill: Tom O'Brien (NH Lakes Association), David Ouellette (NH Department of Safety), Darlene Forst (NH Department of Environmental Services).

Who is neutral on the bill: N/A.

Summary of testimony presented in support:

Senator Andy Sanborn
Senate District 9

- Provided written testimony and an amendment, 2017-0295s.
- Presented SB 119 on behalf of dock companies – they could not attend the hearing due to them being at the New England Boat Show in Boston. One of those companies is Watermark Construction on Lake Winnipesaukee.
- When docks are contemplated what and where they should be, there is some disparity between the rules and the docking statute. There are currently three different ways a person can get a permit to put in a dock. SB 119 is meant to clear up that disparity and address an issue about a lower water table than what the statute calls for.

- Boats were damaged due to being grounded or being barged out in 2016 due to low water levels from the drought.
- Senator Sanborn presented data of the water tables from 2011 to 2016 in Lake Winnipesaukee. The data illustrated that Lake Winnipesaukee has rarely been at full reservoir and has had a consistent low water table, meaning there is small gap of space between the lake floor and the surface of the water.
- Current statutes of docking levels are predicated on full reservoir levels. A lack of proper depth can damage boats.
- Rules state that there must be three feet of water at the end of a dock. In conversations with Mr. Pelletier from NHDES, the NHDES has interpreted the statute to mean three feet under the vessel. Unfortunately, rules or statute do not say that. If there is only two feet, there is not enough volume of water to have a boat there.
- Discussion on Amendment 0295s:
    - The amendment allows someone with a currently permitted dock that does not meet the adequate water levels to extend their dock out until they do meet that water level.
    - Senator Sanborn made a note to say that on line 10, there reads "any existing or grandfathered dock extension." He was advised to alter that language to read "a legally permissible dock." This language will encompass traditional permits and traditional grandfathered docks.
    - On shorelands, the water mark can be quite low to have a vessel. The amendment will grant an individual with an already permitted dock the right to extend their dock out until they hit the high water mark.
    - The amendment would allow a 75 foot extension on a big lake and a 45 foot extension on a small lake until they hit the three foot water mark.
    - Any dock extension must be temporary and removed in the off season.
    - The amendment also installs a square foot measurement on dock extensions to allow property owners the right to enjoy sitting on their dock. For example, if a property owner extended out their dock to 62 feet and made a "T" at the end of it to lounge.
    - The amendment also discusses boatlifts. Currently, a property owner must get another permit for that boatlift. The amendment would allow a property owner who has a permitted dock to install a boatlift without getting a separate permit, as long as it fits into the same extension standards for a dock.
- Senator Sanborn addressed concerns about SB 119.
    - NHDES has concerns about how to adequately measure the depth of the water. SB 119 wants to look at depth as a five year rolling average rather than looking at any individual year. Mr. Pelletier said they had trouble keeping records for that on all of NH's lakes.
    - If applying this legislation to all lakes is a problem, Senator Sanborn said he would be open to applying SB 119 to only big lakes with a future examination on extending the legislation to smaller lakes after a few years.
    - This is a property rights issue. A property owner should be allowed to extend their dock within reason if they already have a dock permit. If that

is too much, Senator Sanborn suggested returning to a "Permit by Notification" system, which requires a permit within 10 to 21 days. Senator Sanborn expressed a desire to stay away from that as the permit process is intensive and laborious, but will leave it to the discretion of the committee.

- Senator Sanborn stated his family has owned waterfront property. Senator Sanborn made note that while he may have a conflict of interest in this case, he decided to continue participating.
- Senator Avard asked how much it costs to rescue a grounded boat. Senator Sanborn said he did have to have his boat barged off his lake for nearly $600 dollars, but could not give a wider average. Watermark Construction did provide a number of 1,000 that were damaged due to this problem.
- Senator Bradley stated a potential conflict as that he owns waterfront property. Given the issues listed by Senator Sanborn, Senator Bradley made note that nothing was mentioned about safety concerns. Currently, there is a 150 foot wake zone between the shore and where a boat can go above wake speed. That zone is there to protect kids swimming, water skiers, and other activities. While he acknowledged possible compromise on this issue, another 75 feet eating up the wake zone can undermine safety. With boats operating at 30 MPH, having an extended dock is a major safety concern. Senator Sanborn stated that safety is important. SB 119 does allow docks to be extended out 75 or until they hit three feet of water, whichever is closer to shore. Senator Sanborn said boaters would not run the risk of running aground.

Mary Truell
Managing Broker, Peabody & Smith Realty, Meredith, NH
Chair of NH Realtors Public Policy Committee

- This issue needs to be addressed due to the recent drought. Clients have had to put boats on a neighbor's dock. Other clients have gotten a tax abatement from their town because they cannot use their dock.
- The amount of time it would take to get an extension permit can be the loss of an entire boating season. This can affect property values. Having the opportunity to extend their dock to deep water can address this problem. The idea of homeowners being able to temporarily extend their dock in a drought situation, like a floating dock, is good.
- Senator Avard asked how many property owners have been affected by not being able to use their docks. Ms. Truell said that question would be better directed toward Senator Sanborn, who has been working with Watermark Construction. Ms. Truell said it is well above what Senator Sanborn reports because it is just with clients Watermark Construction deals with.
- Senator Bradley asked when the boaters used their neighbor's dock. Ms. Truell said that was in 2015.

Darlene Forst
Shoreland Section Supervisor, Land Resource Management Programs, NHDES

- Provided written testimony on behalf of the NHDES.
- Docks are not a shoreland issue. It is a wetlands issue.

- The amendment, as written, does not permit an extension of 75 feet to deep water. The bill allows a 75 foot extension from the existing dock. Something added year after year is not seasonal. Something that goes in perpetuity is permanent.
- Senator Sanborn's claim that there is no definition on a boatslip is incorrect. The definition of a boatslip was defined as three feet deep. A dock can be extended as far as it is needed to get a three foot boatslip for the applicant uless it becomes a navigational hazard. It is not something they take lightly.
- Senator Bradley sought clarification and asked if the NHDES can extend docks currently. Ms. Forst said she has permitted three docks at 90 feet long in Lake Sunapee. The NHDES looks at a three foot depth from the lake floor to the surface of the water.
- Senator Avard asked how long it took for a permit to process in those three instances. Ms. Forst said it took three months because they were waiting for information to come in from a contractor.
- Senator Avard asked how much it costs for a contractor to take a measurement. Ms. Forst said it is not a difficult job for a contractor to do and it is different for each contractor.
- Currently, a property owner having 75 feet of shorefront may choose to install a seasonal pier by obtaining a permit through three ways: the regular permit process, the expedited permit process, or the permit by notification process.
- Alternatively, an individual can choose not to obtain a permit at all and install a pier using an exemption outlined in the RSAs. SB 119 would allow shorefront owners that choose to utilize the exemption process to install a longer dock than is allowed under any of the three regular permit processes.
- The extra dock length would be solely the result of the decision to use one administrative process as opposed to another.
- In addition, the water depth data SB 119 cites for use in determining dock length does not exist.
- There is a complex history in permitting private docks in public waters. There have been four court cases on this matter. Mr. Forst provided a history:
    - The cases helped in formulating department rules on this matter.
    - In 1985, the NHDES was shut down in permitting docks. No docks permits were given away because they were easily provided.
    - After 1985 and with a review from the governor and executive council (as they both have the power to give away public lands), they provided a guidance policy in 1986. This guidance policy was amended in '87, '89, and '93.
    - Besides those amendments in those given years, NH has not taken a good long look at how to permit docks.
    - A shorefront property can have a dock, but it needs to be balanced against safety and the public trust.
- Due to the complexity of this issue, NHDES supports HB 195, which proposes to form a study committee to study temporary seasonal docks and suggests it may be more appropriate to allow that committee, if formed, to study this issue.
- Senator Avard asked, in regards to boundaries and how far docks can be extended, how boundaries get measured. Ms. Forst said it is the mean full lake

elevation. This is above sea level. There are over 1,500 lakes in NH. While data can be provided for Lake Winnipesaukee, it cannot be provided for other lakes.

- Senator Avard asked if lakes are at sea level. Ms. Forst said the datum can be adjusted based on the year it was taken.
- Senator Avard asked is sea levels are moving targets. Ms. Forst said that is recorded and tracked.
- Senator Innis asked if sea level is irrelevant since the benchmark is outdated. Ms. Forst said that is correct.
- Senator Bradley said these regulations came in the mid-1980's about 30 year sago. From his memory, 15 years ago, there was a lake wide "no wake zone" at Lake Winnipesaukee due to very high water levels. The summer of 2016 was the opposite. Senator Bradley asked if there have been any other years as bad as 2016. Ms. Forst said 2016 was the worst year she has seen since the NHDES started tracking data on sea levels. Ms. Forst said that dock extensions were allowed in times where water levels dropped for commercial situations.
- Senator Bradley said there is merit to a temporary permit in low water years for extra dock length. Senator Bradley asked if there is merit in creating a structure that becomes more expected and get a rapid permit in low water situations. Ms. Forst said in 2016, the NHDES acted in a system of mercy largely for commercial interests. There are better ways to look at it through HB 195. Such a structure needs to be organized well.
- Senator Bradley asked how many lakes are greater than 1,000 acres. Ms. Forst said there are 20.
- Senator Bradley asked where most low water levels occur. Ms. Forst said it occurs on small ponds because they lack depth. Large lakes have better depth and can hold out.
- Senator Avard asked if the NHDES has any problem with Senator Sanborn's suggestion on boatlifts. Ms. Forst said they travel a lot and tend to drift. They also have abutter problems.
- Senator Innis said it would be great to see a process in place for drought years.
- Senator Bradley said he would like to see NHDES, the NH Lakes Association, the Department of Safety, and Senator Sanborn, and others in marine construction to get together to discuss an expedited permit structure for low water level years. Senator Bradley does not want to undermine safety and property rights. He would like to see something in the next couple of weeks. There is not a fiscal note, so there is time to address this issue and the parties to bring a solution to the committee. Senator Bradley said it would be best for the NHDES to lead that effort.

Summary of testimony presented in opposition:

Tom O'Brien
President, NH Lakes Association

- Provided written testimony.
- Based on current rules by the NHDES, the department already permits longer docks when there is a demonstrated need.

- How people treat their docks affects the businesses and communities that enjoy NH's public lakes.
- Without NHDES oversight, dock owners can extend their docks at their own discretion. This can affect the space people have to enjoy public waters and exacerbate conflicts between neighbors with docks.
- Senator Innis asked what the current process is to get a dock extension. Mr. O'Brien said the NHDES would be better able to speak to that.

David Ouellette
Marine Patrol Sergeant, NH State Police, NH Department of Safety

- Provided written testimony on behalf of Captain Timothy Dunleavy.
- RSA already currently sets limits on the length of temporary seasonal docks.
- SB 119 allows for the extension of docks are owner discretion. Docks could reach in excess of 150 feet from shore before desired water depths are achieved.
- RSA statute requires all boats to travel at headway speed ("No Wake") within 150 feet from shore, boats, docks, swim lines, etc. Boaters tend to travel in excess of headway speed when 150 feet or more from shore. As a result, boaters do not expect to encounter hazards at this distance unless marked by the state with buoys, signs, and/or lights.
  SB 119 would allow docks extending significant distances to become deadly hazards to navigation. Boats vs. dock accidents are common in NH.

Neutral Information Presented: N/A.

Future Action: Pending.

GJR
Date Hearing Report completed: February 17, 2017

Speakers

Senate Energy & Natural Resources Committee

SIGN-IN SHEET

Date: 02/07/2017 **Time:** 10:15 a.m.

SB 119 AN ACT relative to the length of a dock on a water body.

Name/Representing ***(please print neatly)***

Name/Representing	Support	Oppose	Speaking? Yes	Speaking? No
Senator Bob Giuda SD#2	☑	☐	☐	☑
Senator Bill Gannon	☑	☐	☐	☑
Senator John Reagan	☑	☐	☐	☑
Senator Harold French	☑	☐	☐	☑
Sen. Kevin Avard	☒	☐	☐	☒
~~STEF~~ SOS Tom O'Brien	☐	☒	☒	☐
Darlene Forst DES	☐	☒	☒	☐
Tim Dunleavy Safety - Marine Patrol	☐	☑	☑	☐
Mary Truell	☒	☐	☑	☐
	☐	☐	☐	☐
	☐	☐	☐	☐
	☐	☐	☐	☐
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Senate Energy & Natural Resources Committee
SIGN-IN SHEET

Date: 02/14/2017 **Time:** 9:15 a.m.

SB 119 AN ACT relative to the length of a dock on a water body.

Name/Representing ***(please print neatly)***

Name/Representing	Support	Oppose	Speaking? Yes	Speaking? No
Senator Bob Giuda SD#2	☑	☐	☐	☑
Senator Gannon SD#23	☑	☐	☐	☑
Sen. Dan Innis SD#24	☑	☐	☐	☑
Tom O'Brien	☐	☑	☑	☐
Dave Ouellette Dept. of Safety	☐	☑	☑	☐
Sen Harold French - SD#7	☑	☐	☐	☒
Sen John Reagan - SD#17	☑	☐	☐	☒
Sen. Kevin Avard SD#12	☒	☐	☐	☒
Mary Truell	☒	☐	☒	☐
Darlene Forst DES	☐	☒	☒	☐
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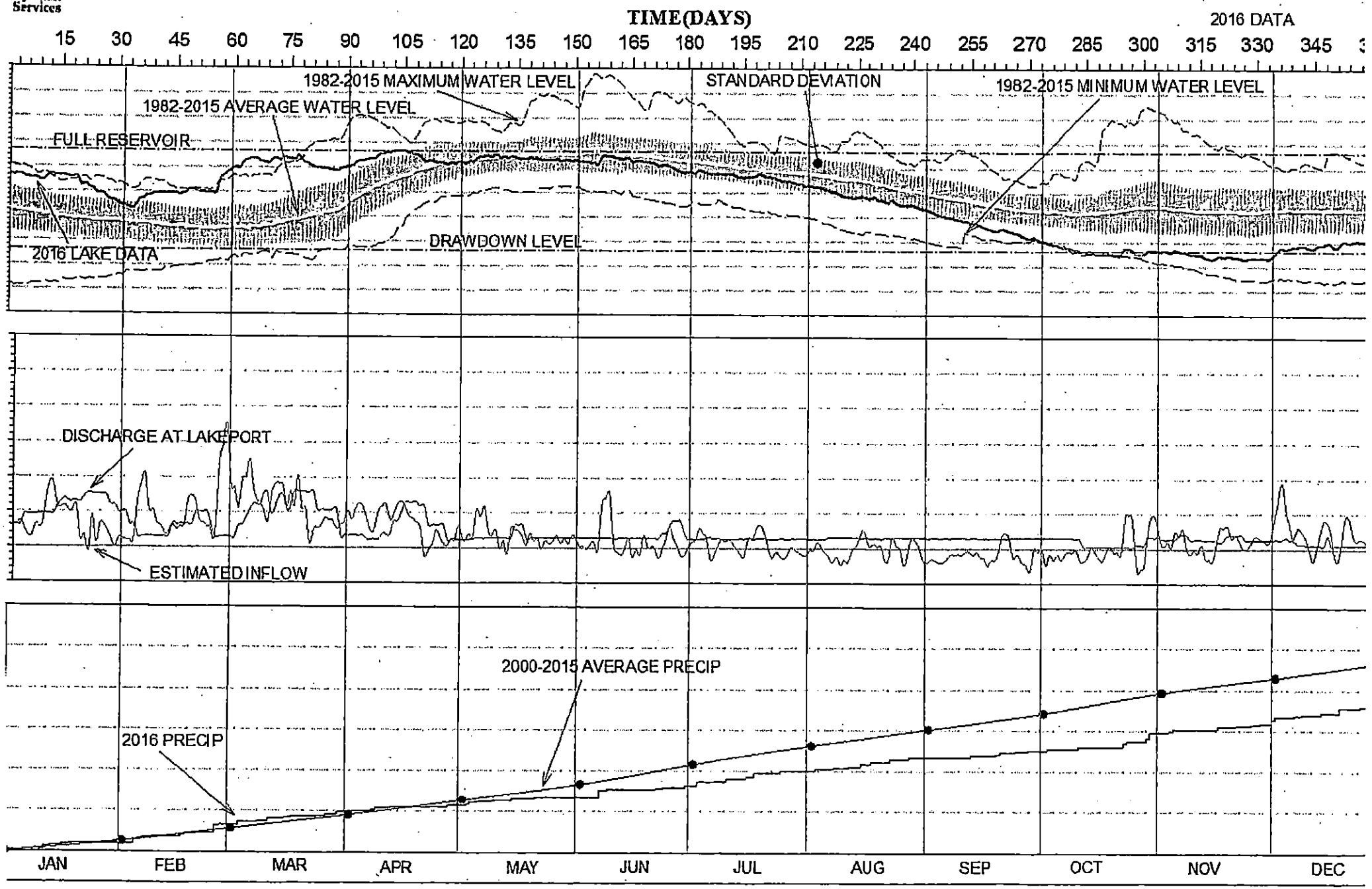
	☐	☐	☐	☐

Testimony

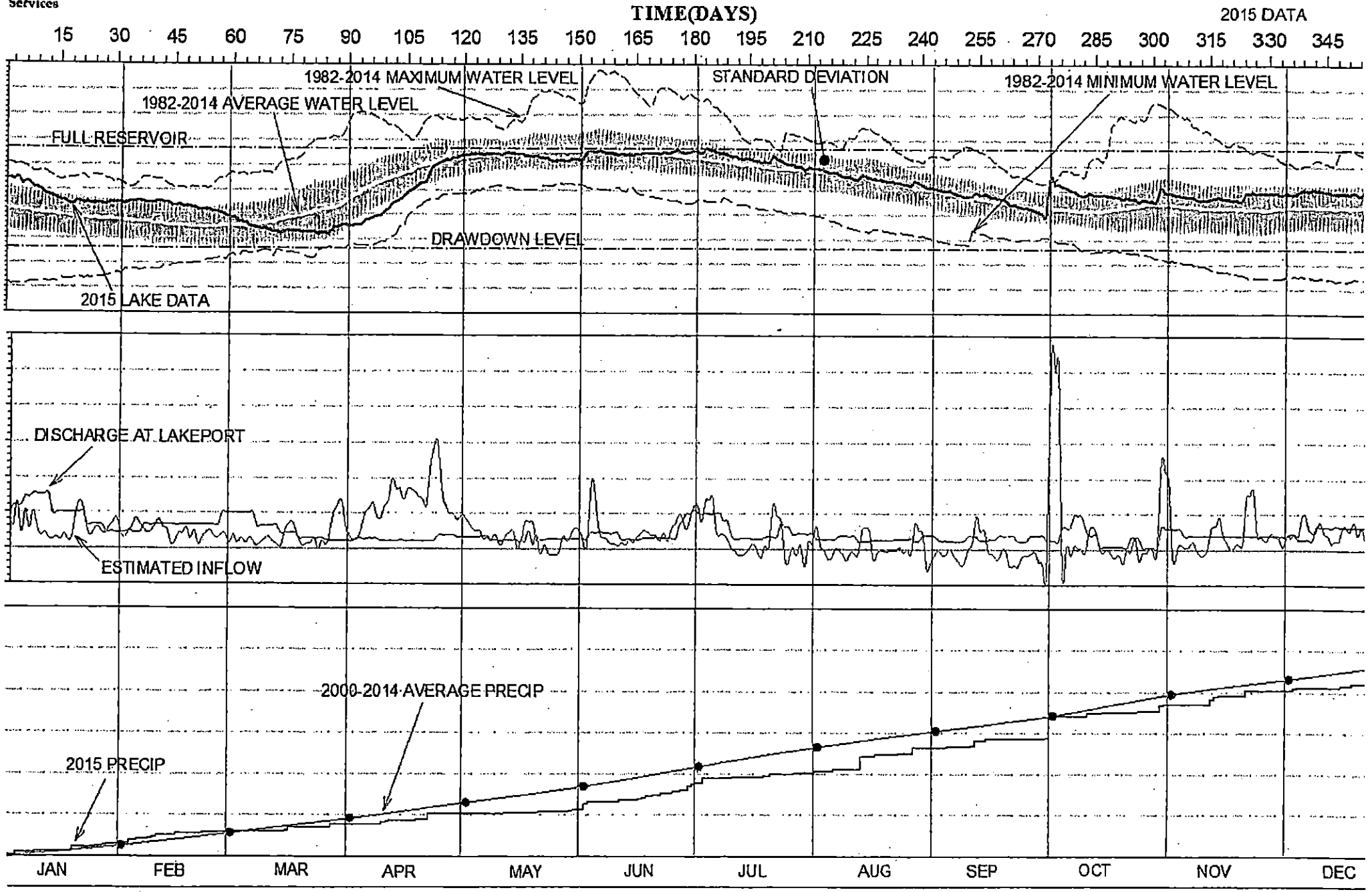
LAKE WINNIPESAUKEE LAKE LEVEL DATA



PROJECT DEVELOPMENT-JR
WINPRESENTATION.JNB

Updated 12/31/2016. LAKE LEVEL 502.64' FULL LAKE 504.

LAKE WINNIPESAUKEE LAKE LEVEL DATA

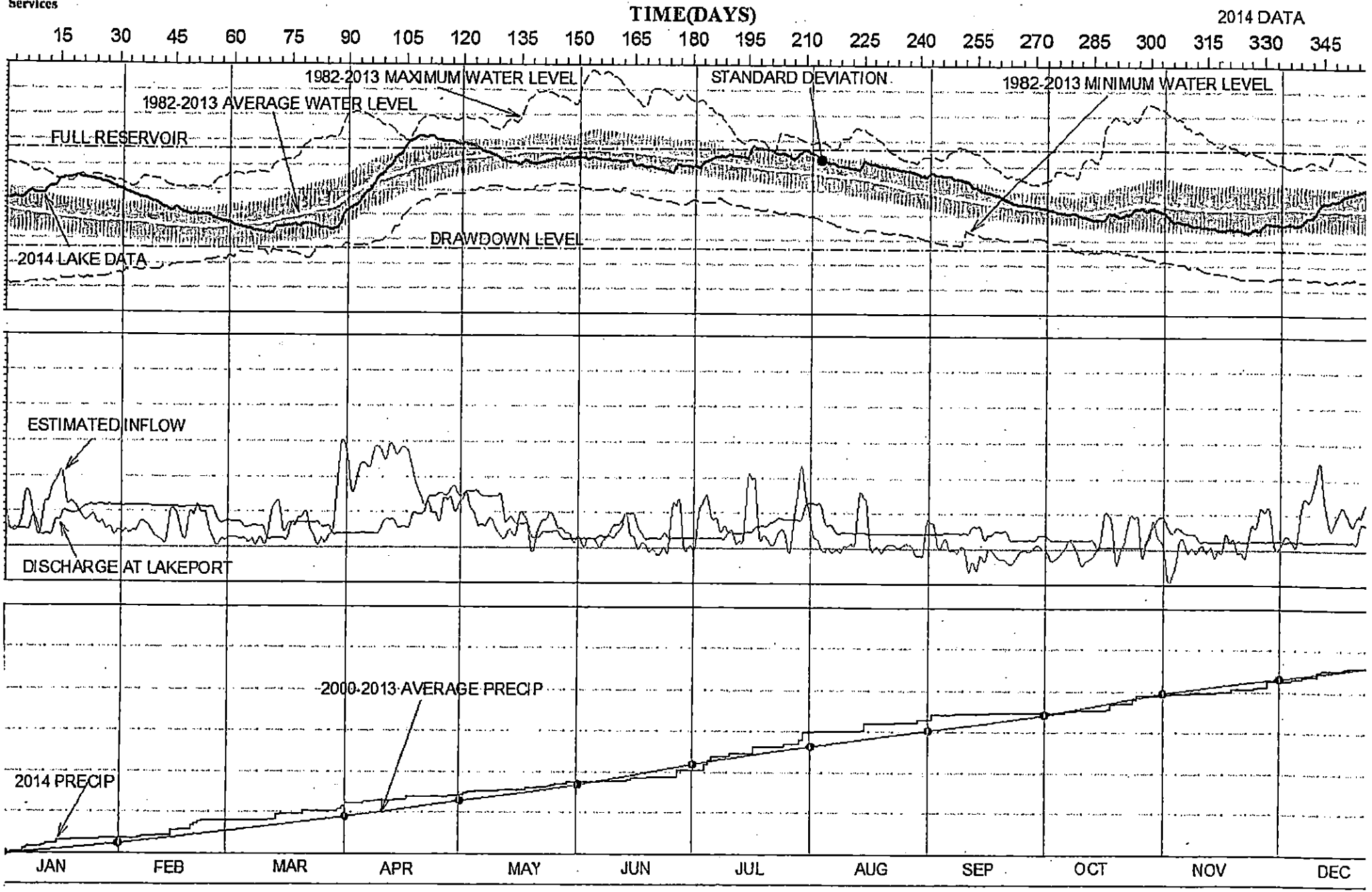


PROJECT DEVELOPMENT-JR
VINPRESENTATION.JNB

Updated 12/31/2015. LAKE LEVEL 503.84' FULL LAKE 504

nmental Services

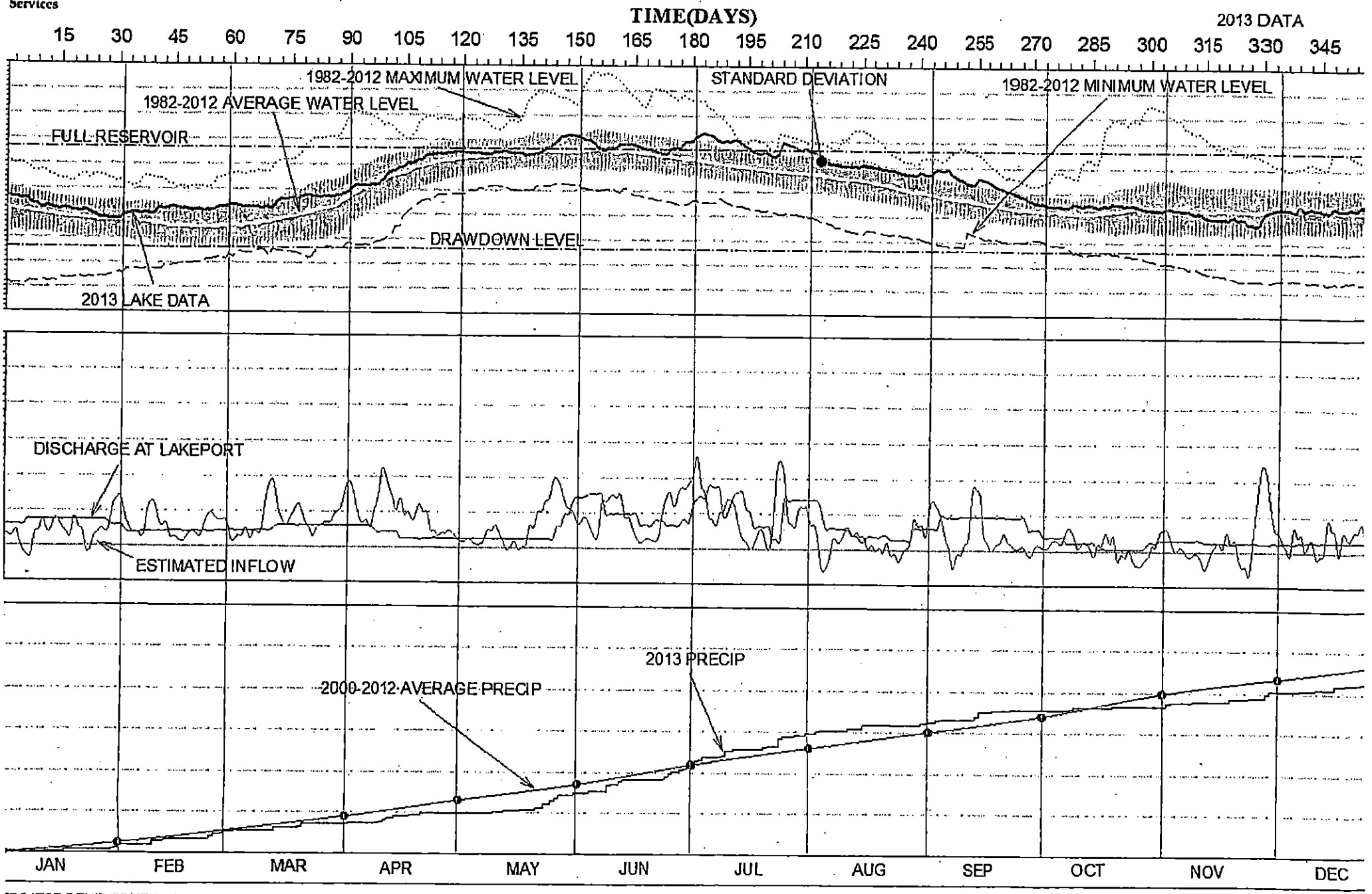
LAKE WINNIPESAUKEE LAKE LEVEL DATA



PROJECT DEVELOPMENT JR
NIMPRESENTATION.JNB

Updated 12/31/2014. LAKE LEVEL 503.74' FULL LAKE 504

LAKE WINNIPESAUKEE LAKE LEVEL DATA

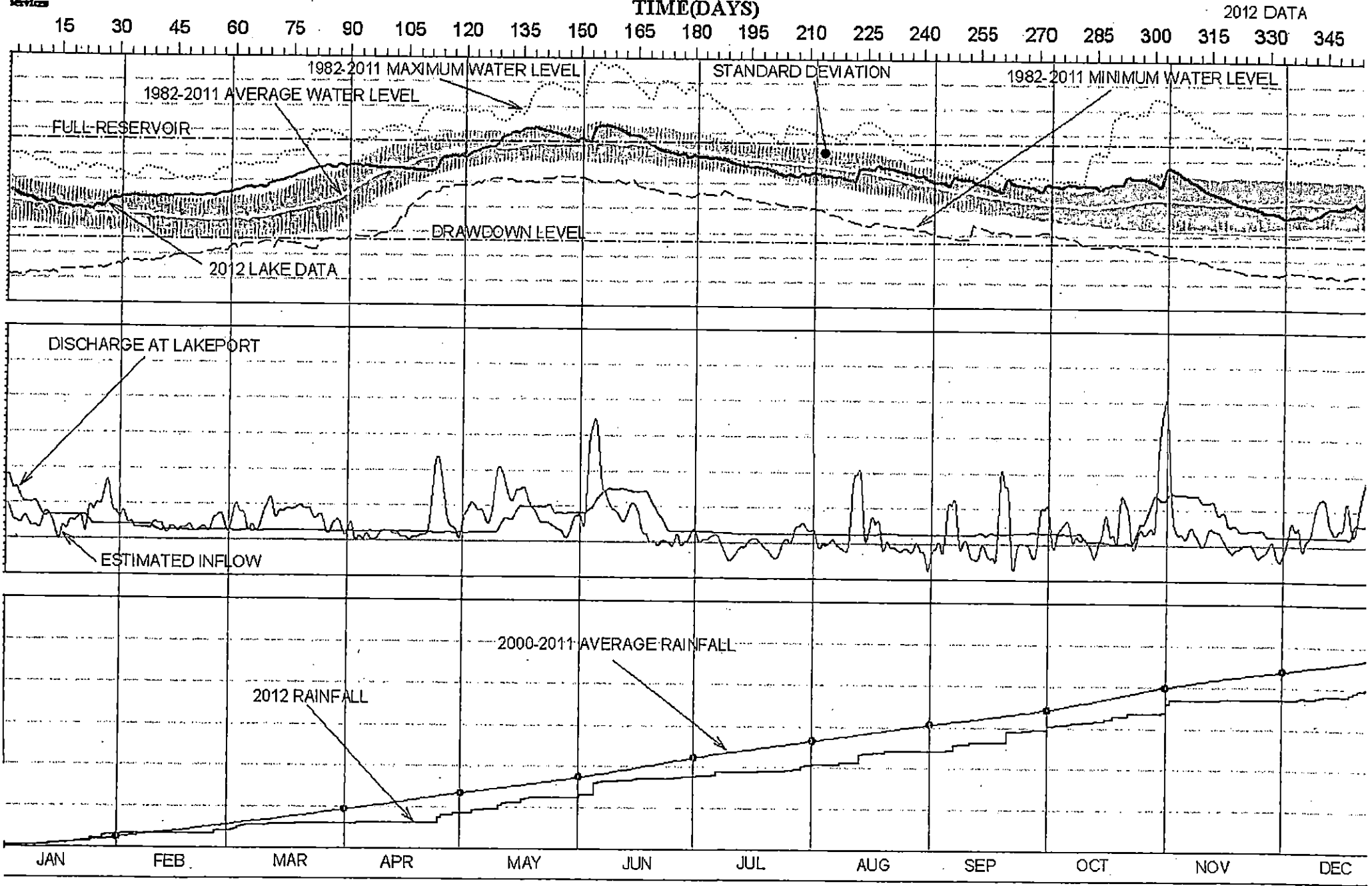


TIME (MONTHS)

PROJECT DEVELOPMENT-JR
WINPRESENTATION.JNB

Updated 12/31/2013. LAKE LEVEL 503.36' FULL LAKE 504

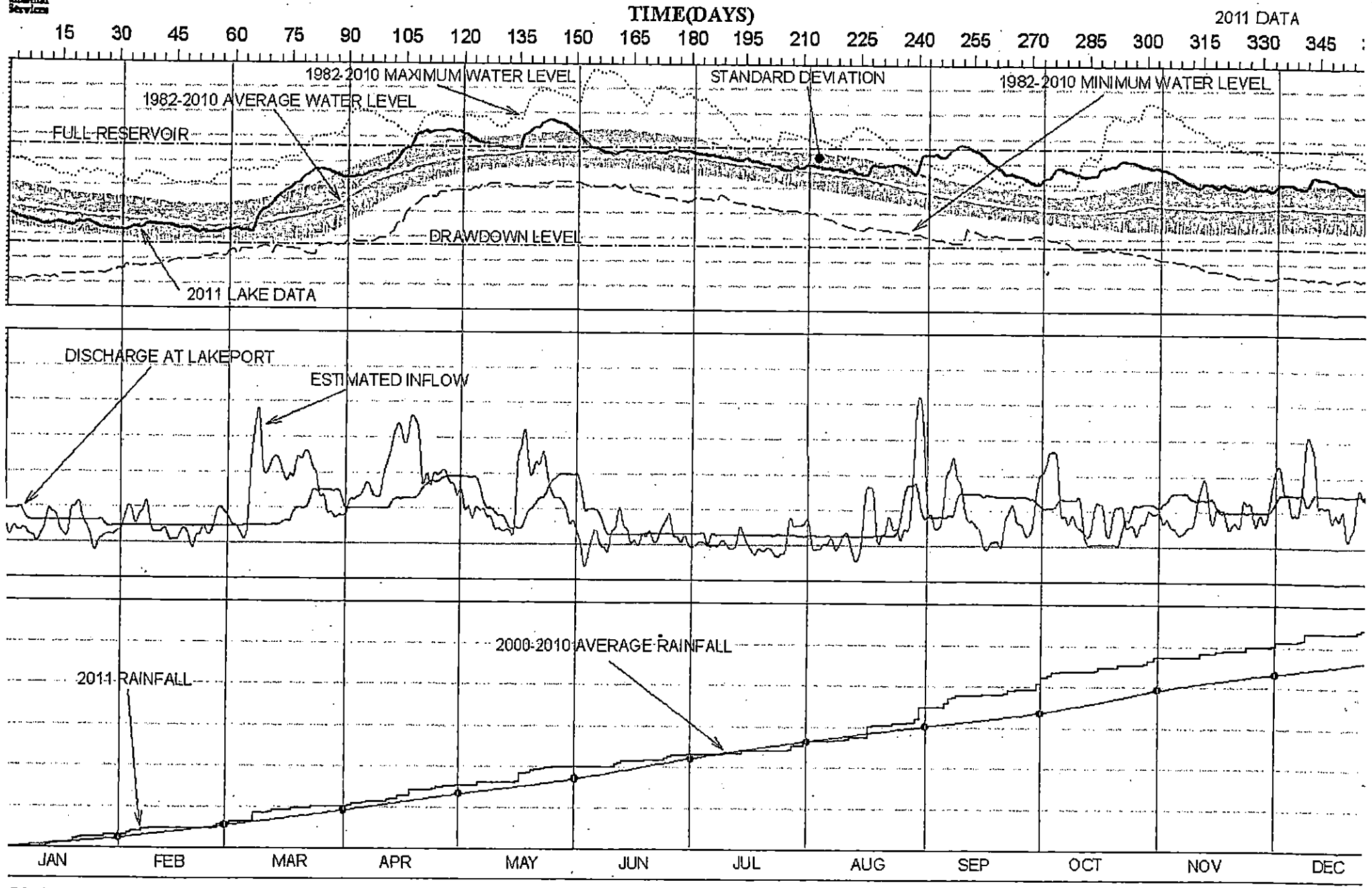
LAKE WINNIPESAUKEE LAKE LEVEL DATA



PROJECT DEVELOPMENT-JR
MINPRESENTATION.JNB

Updated 12/31/2012. LAKE LEVEL 503.32' FULL LAKE 504

LAKE WINNIPESAUKEE LAKE LEVEL DATA



TIME (MONTHS)

'ROJECT DEVELOPMENT-JR
/INPRESENTATION.JNB

Updated 12/31/2011. LAKE LEVEL 503.32' FULL LAKE 504

State of New Hampshire
DEPARTMENT OF SAFETY
JAMES H. HAYES BLDG. 33 HAZEN DR.
CONCORD, N.H. 03305
603/271-2791

JOHN J. BARTHELMES
COMMISSIONER OF SAFETY

ROBERT L. QUINN
ASSISTANT COMMISSIONER

RICHARD C. BAILEY, JR.
ASSISTANT COMMISSIONER

LEGISLATIVE POSITION
NH DEPARTMENT OF SAFETY

SB 119: Relative to the length of temporary seasonal docks.

Position: Opposed

Honorable Members of the Energy and Resources Committee:

SB 119 proposes to allow the permitting of temporary seasonal docks to extend over a body of water until the water depth at the end of the dock reaches 36 inches in depth.

Currently RSA 483-A:3 IV (e) sets limits to the length of temporary seasonal docks over the water. These restrictions are;

A dock can be no more than 6 feet wide and no more than 40 feet long if the water body is 1,000 acres or larger, or

A dock can be no more than 30 feet long if the water body is less than 1,000 acres.

SB 119 proposes to allow for the extension of these docks to a water depth of 36 inches.
There are circumstances on many of New Hampshire's public waterbodies where docks could reach in excess of 150 feet from shore before desired water depths are achieved. This becomes a serious concern to the safe navigation of vessels. Currently RSA 270-D:2, IV requires all boats to travel at headway speed ("No Wake") within 150 from shore, boats, docks, swim lines, etc. Boaters routinely travel at speeds much greater than headway when 150' or greater from shore. As a result, boaters do not expect to encounter hazards at this distance unless marked by the state with buoys, signs, and/or lights.

The Division of State Police-Marine Patrol has a serious concern that docks extending significant distances from shore will become deadly hazards to navigation. One only has to look at accident data from areas of our country known for shallow lakes, rivers, and reservoirs where boats vs. dock accidents are common. Often these collisions involve docks (even marked with lights) that extend into the travel portions of a waterway.

New Hampshire waterbodies have shorelines made up of coves, bays, narrow channels, and rocky outcroppings. Allowing docks to extend from shore without control will likely impact the public use of these waters. Neighboring properties with long docks will impact the ability for others to waterski, install moorings, place swim platforms, and even their own docks.

As currently proposed, the Department of Safety respectfully opposes SB119 and suggests establishing a safe and practical length for docks that won't negatively impact navigation.

Timothy C. Dunleavy
Captain
New Hampshire State Police
Marine Patrol
February 7, 2017

The State of New Hampshire

Department of Environmental Services

Clark B. Freise, Assistant Commissioner

February 7, 2017

The Honorable Kevin Avard
Chair, Energy and Natural Resources Committee
State House, Room 103
Concord, NH 03301

RE: SB 119 An Act relative to the length of a dock on a water body.

Dear Chair Avard and Members of the Committee:

Thank you for the opportunity to testify on SB 119. This bill would allow docks installed under the wetland permit exemption provision RSA 482-A:3, IV-a (e) to be longer than docks installed in accordance with a permit. The New Hampshire Department of Environmental Services (NHDES) opposes this bill.

NHDES understands concerns relative to providing for adequate water depth adjacent to docking structures and supports review of the rules and policies in place pertaining to all pier lengths. Currently, a property owner having 75 feet of shorefront may choose to install a seasonal pier by obtaining a permit using the process outlined in RSA 482-A:3, I, the expedited process authorized by RSA 482-A:11, VI, or the permit by notification process authorized by RSA 482-A:11, VI-A. In the alternative, they may choose not to obtain a permit at all and install a pier using the exemption outlined under RSA 482-A:3, IV-a (e). This legislation, as proposed, would allow shorefront owners that choose to utilize the exemption provision in RSA 482-A:3, IV-a (e) to install a longer dock than is allowed under any of the three permit processes. The extra dock length would be solely the result of the decision to use one administrative process as opposed to another. In addition, the water depth data this legislation cites for use in determining dock length does not exist. NHDES notes that HB 195 proposes to form a study committee to study temporary seasonal docks and suggests it may be more appropriate to allow that committee, if formed, to study this issue as well.

Thank you again for the opportunity to comment on SB 119. Should you have further questions or need additional information, please feel free to contact either Darlene Forst, Shoreland Section Supervisor, Darlene.forst@des.nh.gov (271-4067) or Collis Adams, Wetland Bureau Administrator, collis.adams@des.nh.gov (271-4054).

Sincerely,

Clark B. Freise
Assistant Commissioner

cc: Sponsors of SB 119: Senators Sanborn, Avard, French, Gannon, Giuda, Reagan, and Representative Vadney

GOVERNOR AND COUNCIL POLICY AND CRITERIA ON DOCKS

(Policies were adopted July 25, 1986, unless otherwise noted)

I. Design and Construction Criteria

Configuration - presumption of rectangular docks, perpendicular to shore. If exception is made dock structure cannot shadow adjacent property.

Width - 6' except lakes less than 1000 acres 4'.

Length out into water - 30' - standard utilized by wetlands

Frontage less than 75' - To lessen congestion, improve public safety and navigation, protect neighboring property values and provide sufficient area for construction of facilities, docks or piers on property with less than 75 feet of water frontage shall be no larger than 4 x 24 feet. *(Added May, 1989)*

Frontage over 75' - To lessen congestion, improve public safety and navigation, protect neighboring property values, provide sufficient area for construction of facilities, provide adequate area for boat maneuvering, and protect health, safety, and general welfare, there shall be a minimum of 75' of water frontage on the property for the first two slip structure, and an additional 75' of water front on the property for each additional boating slip or securing location on a structure in jurisdiction for non-commercial use. This section shall not be interpreted to prevent construction of a pier on lots with less than 75' of frontage as provided in above. *(Modified May, 1989)*

- Shoreline frontage means the average of the distances of the actual shoreline frontage and a straight line drawn between property lines. *(Modified May, 1989)*

- Property must be owned in fee not leased

- Frontage must be certified - all land disputes must be noted

- A restrictive covenant dedicating the shore frontage to docks must be filed in the respective Registry of Deeds, negating any possibility of a conveyance out.

-Frontage - all frontage considered shall be contiguous and in continuous ownership. *(Added August 7, 1987)*

- Exceptions to frontage requirement - Unique hardship must be shown by applicant.

Duration of Permits - *(provision omitted May 1989)*

Transferability - Permits are issued to land owners on whose land the project is located or

attached. Permits may be issued to party(ies) having financial or other legal interest in the property when the permitted project is proposed to be performed after transfer of title or when legal authority has been granted. For projects that have not been completed and when ownership or legal authority is to be changed, the Council may consider action to transfer the permit after receipt of a written request by the new owner or legal authority. If transfer is approved, the new permittee shall be advised of all conditions, limitations, and special considerations pertinent to the approved project. *(Modified May 1989)*

Conditional Approval - Applicant must appear before Governor and Council and verify that actual construction is consistent with approved plan.

Other Criteria - In reviewing each application, the following will also be considered:

(a) The impact of the proposal on plants, fish and wildlife including rare and endangered species. As all wetlands serve as a source of food and habitat, the extent of utilization by fish, waterfowl, and wildlife is one indication of the value of the lake and/or the wetlands.

(b) The impact of the proposed project on public commerce and recreation with special attention to those projects in or over public waters where boating is possible.

(c) The extent to which a project interferes with the aesthetic interest of the general public.

(d) The impact upon abutting property owners pursuant to RSA 482-A:11,II. *(Statutory reference changed in 1990)*

(e) The benefit of the proposed project to the interests of the general public.

(f) The impact of the proposed project on quantity or quality of water located in watersheds or waters that are public water supplies.

(g) The potential of a proposed project to cause or increase flooding, siltation or pollution.

PROPOSED GOVERNOR AND COUNCIL POLICY ON DOCKS

- In order to lessen congestion, improve public safety and navigation, protect neighboring property values, provide sufficient area for construction of facilities, provide adequate area for boat maneuvering, and protect health, safety, and general welfare, there shall be a minimum of 75' of water frontage on the property for the first two slip structure, and an additional 75' of water front on the property for each additional boating slip. Reduced structures may be permitted on frontage of less than 75', in accordance with criteria set forth in the Department of Environmental Services' (DES) administrative rules.

- Additional slips, beyond those allowed by the above policy statement, shall be permitted only where there is a clear public benefit, such as improved public access, to increasing the slip density.

- Dock configurations and boat slip size shall be determined by criteria set forth in the DES administrative rules. Size and configuration may vary dependant on the capacity and nature of the waterbody, and the physical characteristics of the frontage..

- Non-conforming structures shall not be modified unless there is a reduction in their coverage of public submerged lands, and no increase in the number of slips.

#13

Wentworth-Coolidge Mansion
Portsmouth, New Hampshire
August 7, 1987

The Governor and Executive Council convened at 10:20 A.M., all members being present.

* * *

The Governor and Executive Council, on motion of Councilor Spaulding, seconded by Councilor Streeter, voted to accept the Minutes of the meeting held on July 15, 1987.

* * *

The Governor and Executive Council, on motion of Councilor Spaulding, seconded by Councilor Griffin, confirmed the appointment of the several persons nominated for Civil Service Commissions at the July 15, 1987 meeting.

* * *

The Governor placed in nomination the several persons who applied for Civil Commissions.

* * *

The Governor and Executive Council, on motion of Councilor Rinker, seconded by Councilor Burton, accepted with regret the following resignations:

JUVENILE PAROLE BOARD

Steven Schubert, Candia — Effective: Upon confirmation of a successor

Kathleen N. Sullivan, Esq.
Manchester — Effective: Upon confirmation of a successor

The Governor and Executive Council, on motion of Councilor Rinker, seconded by Councilor Streeter, accepted with regret the following resignation:

NEW HAMPSHIRE RETIREMENT SYSTEM

Ronald A. Philibert
Manchester — Effective: Upon confirmation of a successor

* * *

TABLED

The Governor and Executive Council, on motion of Councilor Streeter, seconded by Councilor Rinker, voted to TABLE the following appointment:

JUVENILE PAROLE BOARD

William A. Varkas, Manchester — TERM: July 1, 1992

Replacing Peter C. Howatt, Hollis

#37 - #39 OFFICE OF THE GOVERNOR
The Governor and Council acted as follows:

#37 Authorized amendment to Policy and/or Criteria on Docks as follows:

POLICY AND/OR CRITERIA - DOCKS

Additional design and construction criteria:

Frontage - All frontage considered shall be contiguous and continous in ownership.

Any petition from the Wetlands Board submitted for Governor and Council approval shall henceforth include the following: (a) a complete transcription of the minutes of the Wetlands Board meeting and/or meetings considering said petition; and, (b) copies of all documents presented to the Wetlands Board regarding said petition.

POLICY AND/OR CRITERIA - DOCKS

Design and Construction Criteria:

Configuration - presumption of rectangular docks, perpendicular to shore. If exception is made dock structure cannot shadow adjacent property.

Width - 6' except lakes less than 1,000 acres 4'.

Length Out into Water - 30' - standard utilized by Wetlands.

Frontage - 75' first structure servicing 2 boats - 100' for each additional boat served.

- Frontage measured from boundary to boundary.
- Property must be owned in fee not leased.
- Frontage must be certified - all lead disputes must be noted.
- A restrictive covenant dedicating the shore frontage to the docks must be filed in the respective Registry of Deeds, negating any possibility of a conveyance out.

(CONT.)

- Exceptions to frontage requirement - Unique hardship must be shown by applicant.

Duration of Permits - Three years from date of approval.

Transferability - None.

Conditional Approval - Applicant must appear before Governor and Council and verify that actual construction is consistent with approved plan.

Other Criteria - In reviewing each application, the following will also be considered:

(a) The impact of the proposal on plants, fish and wildlife including rare and endangered species. As all wetlands serve as a source of food and habitat, the extent of utilization by fish, waterfowl, and wildlife is one indication of the value of the lake and/or the wetlands.

(b) The impact of the proposed project on public commerce and recreation with special attention to those projects in or over public waters where boating is possible.

(c) The extent to which a project interferes wth the aesthetic interest of the general public.

(d) The impact upon abutting owners pursuant to RSA 483-A:4, III.

(e) The benefit of a project to the interests of the general public.

(f) The impact of a proposed project on quantity or quality of water located in watersheds or waters that are public water supplies.

(g) The potential of a proposed project to cause or increase flooding, siltation or pollution.

State v. Stafford & Sons, Inc.

99 N.H. 92 (1954)

STATE v. GEORGE C. STAFFORD & SONS, INC.

No. 4282.

Supreme Court of New Hampshire.

Argued March 3, 1954.

Decided May 27, 1954.

*96 Louis C. Wyman, Attorney General, George F. Nelson, Assistant Attorney General (Mr. Nelson orally), for the State.

Upton, Sanders & Upton (Mr. Richard F. Upton orally), for the town of Meredith, as an intervening plaintiff.

Tilton & Tilton (Mr. Robert P. Tilton orally), for the defendant.

KENISON, C. J.

It is a basic proposition which has become well *97 settled by usage, statute and judicial decision that lakes and great ponds in New Hampshire belong to the public and are held in trust by the State for public use. R. L., c. 182, ss. 17, 18; Concord Company v. Robertson, 66 N. H. 1; Percy Summer Club v. Welch, 66 N. H. 180; State v. Sunapee Dam Co., 70 N. H. 458; Whitcher v. State, 87 N. H. 405. Meredith Bay in Lake Winnipesaukee, which is one of the boundaries of the lands owned by the parties to this dispute, is a part of one of the public waters of the State. Musgrove v. Cicco, 96 N. H. 141; Rothrock v. Loon Island, 96 N. H. 421. While the title of the State to the bed of the lake extends to the natural high water mark (Taggart v. Jaffrey, 75 N. H. 473), the defendant and other littoral owners have rights which are more extensive than those of the public generally. Willis v. Wilkins, 92 N. H. 400. Such littoral owners have the right to erect wharves and other structures into the lake which are superior to the rights of those who have only the rights of a member of the public. Dolbeer v. Company, 72 N. H. 562. Littoral owners may use the lakes and public waters in front of the property for recreational and other similar purposes in a more

extensive manner than those who enjoy the rights to use the lake and public waters only as members of the public. Hoban v. Bucklin, 88 N. H. 73.

Although littoral owners have extensive rights in public waters, they are always subject to the paramount right of the State to control them reasonably in the interests of navigation, water storage and classification, health and other public purposes. Richardson v. Beattie, 98 N. H. 71; State v. Hutchins, 79 N. H. 132. Revised Laws, chapters 181, 182, 266, 267; Laws 1947, chapter 183 as amended. Since the State's rights in land and waters are not always enforced and protected with the same alacrity as private rights (State v. Company, 49 N. H. 240, 252), the Legislature has provided that no person can acquire title to State lands by adverse possession. R. L., c. 411, s. 6. For the same reason it has been decided that the State does not forfeit or lose its rights to public lands and waters by laches, estoppel or waiver. State v. Hutchins, supra; Trustees &c. Academy v. Exeter, 90 N. H. 472, 495; St. Regis Co. v. Board, 92 N. H. 164, 169. Nor is the State estopped to assert public rights if its officers acted without authority. Ham v. Interstate Bridge Authority, 92 N. H. 268; State v. Cote, 95 N. H. 428. "It has been expressly decided that a state is not estopped by the unauthorized acts of its officers." Smith v. Epping, 69 N. H. 558, 560.

*98 There is authority that a littoral or riparian landowner may add "made or filled land" (Watson v. Horne, 64 N. H. 416, 417) to his property assuming, of course, that it is a reasonable use of his property and not injurious to neighboring property or the public rights of the State. See Cheever v. Roberts, 82 N. H. 289. This right has sometimes been referred to as "a reasonable private right of using this public property." Dolbeer v. Company, 72 N. H. 562, 564. Even where the littoral owner limits the made or filled land to the shoreline of his own abutting property, he assumes the risk that his construction of a "wharf . . . or other thing, below the water's edge, being found to be unreasonable, and his structure being an abatable nuisance." Concord Co. v. Robertson, 66 N. H. 1, 20. It follows that the littoral owner has no right to build land or structures out from the lake frontage of his property if the same will unreasonably interfere with the paramount rights of the public to use the lake. To build them along the frontage of adjoining land, whether title to such land is privately or publicly held, would not only be clearly unreasonable but beyond the rights of the littoral owner.

The defendant's claim to title to the filled-in area stands or falls on the authority of the Highway Commissioner to grant it to him. The defendant received no conveyance to the filled-in area and, in any event, the conveyance to be binding required approval of the Governor and Council which was never obtained. R. L., c. 90, pt. 10, s. 11, as inserted by Laws 1945, c. 188. Although the Highway Commissioner had broad powers over highway matters which he exercised on behalf of the State (Id., s .7) the sale, conveyance and lease of property acquired for highway purposes required the approval of the Governor and Council. Id., s. 11. The same rule applies to surplus property which is not immediately needed for the right of way proper. Id., pt. 7, s. 2. While this land transaction was entered into honestly, openly and in good faith, it could not be legally effective to transfer property

from the plaintiff to the defendant. State v. Hutchins, 79 N. H. 132. The answer to question one is "no."

Question three is whether on the evidence in this case a littoral owner on a great pond may acquire fee simple title to additional dry land by filling up the bed of the great pond below the natural high water mark. For reasons hereinafter indicated the answer must be "no." An affirmative answer would result in serious and extensive encroachments on the public rights in public waters of the *99 state, would place a premium on trespasses against the public right and encourage one littoral owner to develop his shore frontage at the expense of others. The whole history of the development of lakes and great ponds in this state militates against the allowance of such commercial developments without legislative sanction. Dana v. Craddock, 66 N. H. 593; State v. Welch, 66 N. H. 178; State v. Sunapee Dam Co., 70 N. H. 458; R. L., c. 267, ss. 47-50; Laws 1949, c. 307. It is true that the filled-in area eliminated the building of rip-rap along a portion of the lake shore otherwise necessary to hold the bed of the highway in place. While the fill was thus connected with the highway project and improved the general appearance of the immediate vicinity, it does not follow that the land so created became the private property of the defendant. We know of no decision which allows a littoral owner to acquire fee simple title to fill deposited in a lake and thus accomplish its transfer from the public ownership to private ownership by grading and improving the filled land. 1 Powell, Real Property s. 160, pp. 624-625 (1949). If this was allowed it would be contrary to the statutory provisions punishing trespass on State lands and prohibiting private owners from acquiring title to State lands by adverse possession. R. L., c. 411, ss. 5, 6.

The answer to question two cannot be a categorical "yes" or "no." The exact point at which Cram Mill Brook ended and Lake Winnipesaukee began is difficult to ascertain. The State was not only the owner of public rights in Lake Winnipesaukee but owned certain land on the westerly side of the lake by virtue of the deed from Meredith Linen Mills and as to the defendant was an adjoining owner within the meaning of R. L., c. 269, ss. 27-29. While the defendant could not have compelled the State to determine the boundary line (Rothrock v. Loon Island, 96 N. H. 421), the State through the Governor and Council would have authority to settle a boundary dispute. The effect of this might well be to establish title in fee in the defendant to a minor portion of the filled-in area because of the uncertainty as to the location of the true boundary where the properties adjoin. Cf. Bailey v. Rolfe, 16 N. H. 247, 251, 252. It would not be possible to give the defendant title in fee to the whole of the area since the statute furnishes no authority for such procedure.

While we have answered the questions transferred there remains the further consideration whether there is any equitable solution to this case which will not deprive the defendant of its shoreline. *100 The Court has found that the defendant has expended considerable money improving the property and that this was done openly, honestly and in good faith and that the "equities weigh heavily in its favor." Possible equitable solutions which may be considered by the parties and the Court include (1) legislative action (cf. Laws 1951, c. 280); (2) settlement of the boundary dispute

by the Governor and Council and the defendant pursuant to R. L., c. 269, ss. 27-29; or (3) the one that was adopted in the somewhat analogous case of Tiffany v. Oyster Bay, 234 N.Y. 15.

As we understand the exhibits the defendant formerly had approximately one hundred feet of shore frontage while the State had two hundred twenty feet. If the defendant is to receive easement rights in the new shoreline in order to preserve the former proportions it would be entitled to ten thirty-seconds of the new two hundred sixty foot shoreline or eighty-one feet. This would involve establishment of a line from the dividing point on the new shoreline, to the defendant's southwesterly bound where the thread of the brook formerly ended and the lake began. The State would continue to hold in fee simple the area which was formerly the bed of the lake, subject to the special littoral rights of the defendant in so much thereof as lies between the portion of the new shoreline designated for the defendant's use, and the former shoreline of the land owned by it in fee. Tiffany v. Oyster Bay, supra. The rights would include the privilege to cross and recross the area for the purpose of using the frontage along the eighty-one foot section to build a wharf, boathouse or other similar structure and to exercise thereon the common privileges of littoral owners. Whitcher v. State, 87 N. H. 405, 409. This method of dealing fairly with changed conditions on public waters finds some support in Watson v. Horne, 64 N. H. 416, 417.

Remanded.

All concurred.

Heston v. Ousler

119 N.H. 58 (1979)

HERBERT N. HESTON & a. v. GEORGE W. OUSLER & a.

No. 78-128.

Supreme Court of New Hampshire.

February 14, 1979.

*59 Nighswander, Lord, Martin & KillKelley, of Laconia (Bradley F. Kidder orally), for the plaintiffs.

Wescott, Millham & Dyer, of Laconia (Peter V. Millham orally), for the defendants.

BOIS, J.

Two issues have been preserved for our review by exceptions to the report and recommendations of the Master (George W. Walker, Esq.), as approved by the Court (Dunfey, J.). The defendants except to the master's finding that the location and use of their dock on shorefront property on Lake Winnipesaukee constitutes both a private nuisance and an encroachment on the plaintiffs' littoral rights, and to the order requiring the removal of their dock and the establishment of a "buffer zone" where neither the defendants nor the plaintiffs shall be permitted to maintain dockage. We overrule this exception. The *60 defendants' further exception to the order that an equitable servitude requires them to remove two outbuildings from within twenty feet of their property boundary is sustained.

This case comes to us as the result of a dispute between owners of shorefront property on Moultonboro Neck, Lake Winnipesaukee. The parties own abutting two hundred foot lots of shorefront property in a large subdivision known as Kona estates. The plaintiffs bought their property in 1959; the defendants in 1975. The discord which subsequently arose culminated when the plaintiffs filed suit against the defendants to establish their upland boundary line, require the relocation of defendants' two outbuildings, compel the removal of debris allegedly deposited by defendants on plaintiffs' property, and force the relocation of defendants' dock from its location immediately adjacent to the plaintiffs' shorefront.

The master's rulings settling the upland boundary line and ordering the defendants to pay the plaintiffs $500 for the cost of removing debris that he found had been intentionally deposited on the plaintiffs' property have not been challenged on appeal. The defendants have excepted, however, to the master's rulings ordering the removal of their outbuildings and dock from their present locations.

The Dock

The master ordered relocation of the defendants' dock upon an explicit finding that it constituted a private nuisance. The master found that the defendants deliberately encroached upon the littoral rights of the plaintiffs and that they had the "general desire to extend their dominion and possession to the uttermost limits."

[1, 2] The master made his findings not only upon a consideration of the testimony of several witnesses, but also with the benefit of a view. We will not substitute our own judgment for that of the trier of fact if it is supported by the evidence, especially when he has been assisted in reaching his conclusions by a view. Gerrish v. Wishbone Farm, 108 N.H. 237, 239, 231 A.2d 622, 624 (1967). It is the function of the trier of fact to determine whether a nuisance exists and we will sustain his conclusions if they are warranted by the evidence. Webb v. Rye, 108 N.H. 147, 150, 230 A.2d 223, 226 (1967).

[3] The landmark case outlining the law of nuisance in our jurisdiction is Robie v. Lillis, 112 N.H. 492, 299 A.2d 155 (1972). We held that a nuisance exists when there is a substantial and unreasonable interference with a property interest. Id. We emphasized that the aesthetic or "unaesthetic quality" of an activity is "an important consideration in *61 the balancing process involved in the determination of its reasonableness under all the circumstance." Id. at 498, 299 A.2d at 160. We have departed from the traditional concept that a nuisance requires actual physical interference with another's property right. See DeGrandpre, Lex Loci: Recent New Hampshire Supreme Court Decisions, 14 N.H.B.J. 120, 123 (1973). "Property rights cannot be used as a shibboleth to cloak conduct which adversely affects ... the welfare of others." Powell, The Relationship Between Property Rights and Civil Rights, 15 HASTINGS L.J. 135, 149-50 (1963).

[4] The master's finding of a nuisance is warranted by the evidence. The defendants' dock is located at the extreme easterly side of their property, immediately adjacent to the plaintiffs' shorefront. The record indicates that the defendants have dramatically increased both the size and use of the dock since assuming ownership from their predecessors. The configuration of the shoreline is such that when the plaintiffs look out to the open lake from their home, the defendants' dock is directly in front of them and it totally obscures their view. There also was evidence that its regular use has created a safety hazard for the plaintiffs when swimming within their own water space.

The defendants are correct when they argue that the construction and appearance of their dock are not unusual for Lake Winnipesaukee. They accurately point out that their use of the dock for

boating, swimming, and bathing is not unusual for waterfront properties. Yet it is the location of the dock that the master emphasized as the essence of the nuisance and the encroachment on the plaintiffs' littoral rights. "A nuisance may be merely a right thing in the wrong place,like a pig in the parlor instead of the barnyard." Euclid v. Ambler Realty Co., 272 U.S. 365, 388 (1926). The defendants' dock has been found to be that proverbial pig in the parlor. See Catalfo v. Shenton, 102 N.H. 47, 149 A.2d 871 (1959).

The defendants argue that the master's order in the present case creating a "buffer zone" where neither party may maintain dockage "went far beyond the necessary remedy," and was incorrect as a matter of law because it utilized a simple extension of the parties' upland boundary lines to demarcate the dividing line between their respective water spaces. There is no precedent in this State concerning the issue of proper allocation of water space between abutting littoral owners. Many other States have considered the issue and established rather elaborate mechanical formulas to determine littoral boundary lines. *62 Boundary lines are determined differently under these formulas, depending upon whether the configuration of the shoreline is straight, convex, or concave. E.g., Commonwealth v. City of Roxbury, 75 Mass. 451, 522 (1857); see Annot., 65 A.L.R.2d 143 (1959).

[5] We have adopted a fixed mechanical formula for making an equitable division between abutting riparian owners of alluvion formed by the natural action of water. Watson v. Horne, 64 N.H. 416, 418, 13 A. 789, 790 (1887). Nevertheless, we refrain at this time from adopting a similar mechanical rule to determine the scope of littoral owners' rights. Rather, we adopt a rule of reasonable use as the guidepost in adjudging the permissible exercise of a shorefront owner's littoral rights. Littoral owners may erect wharves and use the waters adjacent to their shorefront property for a panoply of recreational activities. Their use is governed, however, by a rule of reasonableness, Whitcher v. State, 87 N.H. 405, 409, 181 A. 549, 553 (1935); Dolbeer v. Suncook Water-Works Co., 72 N.H. 562, 564-65, 58 A. 504, 506 (1904), and must be restricted so as not to interfere with the correlative rights of other littoral owners. Bassett v. Salisbury Mfg. Co., 43 N.H. 569, 577 (1862); see Kalinski & Forste, A Survey of New Hampshire Water Law, 13 N.H.B.J. 3, 5, 28 (1970).

[6] The master found that the location and use of the defendants' dock "unreasonably and substantially infringes upon the plaintiffs' rights." The determination of reasonable use by a littoral owner is a question of fact, State v. Great Falls Mfg. Co., 76 N.H. 373, 376, 83 A. 126, 128 (1912), and we will not reverse the master's finding if it could reasonably have been reached based upon the evidence. Sargent Lake Ass'n v. Dane, 118 N.H. 720, 722, 393 A.2d 559, 561 (1978). There is evidence in the record to support the master's finding that the defendants' dock unreasonably encroached upon the correlative littoral rights of the plaintiffs. We will not disturb that finding.

[7] In applying the rule of reasonable use to determine littoral rights, however, we hold that the master incorrectly ruled that the parties have fixed littoral dominions that may be ascertained by a

simple extension of their upland boundary lines. Nevertheless, the remedy ordered by the master, creating a thirty foot "buffer zone" where neither party can build a dock, even though utilizing a line extending the upland boundaries, was within the wide ambit of relief that may be afforded in equity. "[O]nce a right to equitable relief has been established, the powers of the [master] are broad and the means flexible to shape and adjust the precise relief to the requirements of the *63 particular situation." Webb v. Rye, 108 N.H. 147, 153, 230 A.2d 223, 228 (1967).

The Outbuildings

[8] The master's report included an order that the defendants must move two outbuildings, presently located near and over their property line, to more than twenty feet away from it. The master relied upon a restrictive covenant, establishing twenty foot setback requirements, that was contained in the deed from the developer of the Kona Estates subdivision to the defendants' predecessors and to the plaintiffs. We hold that the master erred in ruling that the plaintiffs have standing to enforce the setback requirements. Therefore, the order to the defendants to move their outbuildings is vacated to the extent that it requires moving them more than twenty feet from the property line. The defendants' only obligation is to assure that their buildings do not encroach onto the plaintiffs' property.

[9] Although restrictive covenants are particularly useful devices in planning the development of lake communities, and we have rejected the traditional policy of strictly construing them, Joslin v. Pine River Dev. Corp., 116 N.H. 814, 817, 367 A.2d 599, 601 (1976), it remains fundamental that the primary tool for determining whether grantees of lots in a subdivision may enforce such covenants is the "language of the instruments." Traficante v. Pope, 115 N.H. 356, 360, 341 A.2d 782, 785 (1975). Restrictions included in restrictive covenants must have been intended by the common grantor to inure to the benefit of all purchasers of the subdivided lots or the purchasers will be powerless to enforce them. Nashua Hosp. Ass'n v. Gage, 85 N.H. 335, 339, 159 A. 137, 139 (1932). The "language of the instruments" in the present case clearly is meant to preclude purchasers of individual lots from enforcing any equitable servitudes. The enforcement right is reserved exclusively for successor developers. The deeds from the common grantor to the defendants' predecessors and to the plaintiffs read:

All rights in law and in equity for the enforcement of the conditions and restrictions contained herein shall be enforceable by the grantor's successors irrespective of the time when such rights shall accrue. The term "Successors" used herein shall mean any person, firm, or corporation succeeding the grantor as promotor and developer of this subdivision, but shall not mean grantees of individual lots or assigns of grantees. (Emphasis added.) *64 This language unequivocally forecloses the plaintiffs' right to enforce the setback requirements. Conclusion

In summary, we overrule the defendants' exception to that part of the master's report finding that the location and use of their dock constitutes a nuisance and an encroachment upon the plaintiffs'

littoral rights. We further affirm the "buffer zone" remedy that the master has ordered. We sustain, however, the defendants' exception to that part of the master's order requiring the moving of their outbuildings more than twenty feet from the plaintiffs' property line.

Exceptions sustained in part, reversed in part.

All concurred.

Donaghey v. Croteau

119 N.H. 320 (1979)

KENNETH A. DONAGHEY & a. v. WALTER S. CROTEAU & a.

No. 79-003.

Supreme Court of New Hampshire.

May 9, 1979.

*321 McSwiney, Jones & Semple, of Concord (Robert E. Bowers, Jr., orally), for the plaintiffs.

Hatfield & Henderson P.A., of Hillsboro (Leigh D. Bosse orally), for the defendants.

GRIMES, J.

The issue in this declaratory judgment action to determine the location of and rights in a right-of-way and a wharf on Lake Sunapee is whether the trial court's decree to defendants of title to the wharf and certain rights in the land of plaintiffs is supported by the evidence and the law. We hold with slight modifications that it is.

In 1925, John A. Stevens owned a large tract of land on the eastern shore of Lake Sunapee in the town of Newbury. He subdivided his shoreline property into seventeen separate lots. By deed and plan, he established a common passageway or right-of-way leading to the shore and separating lots #13 and #14 along the southern boundary of lot #14. Stevens retained title to lot #14 until his death in 1927. The plaintiffs currently own lot #14 as well as the fee under the common passageway.

Defendant Walter Croteau's father, Joseph Croteau, purchased an inland lot from Stevens in 1923. By deed dated July 21, 1925, Stevens granted Croteau a right-of-way leading to the lake. The deed reads as follows: "A right-of-way over land of said grantor [Stevens] to a certain boathouse to be erected by said grantee [Croteau] on the shore of Lake Sunapee and on the shore of Lot #14." This right-of-way and the wharf which Joseph Croteau constructed instead of a boathouse are the subjects of the present dispute. In particular what is disputed is whether the right-of-way is over the southerly sixteen feet of lot #14 or over the common passageway between lots #13 and #14.

At his death in 1927, Stevens left his realty to his only daughter, Irene, who in turn conveyed lot #14 to Herbert D. Stevens (no relation to John A. Stevens) by deed dated January 18, 1933. Herbert Stevens soon thereafter entered into, and later recorded, a written agreement with Joseph Croteau concerning the right-of-way in question. The agreement states in pertinent part:

*322 That whereas said Croteau has a certain right-of-way by the conveyance of John A. Stevens ... affecting to some extent Lot #14.... Now therefore, for the purpose of defining and establishing what right-of-way shall be over said Lot #14, the two parties hereto ... agree that [it] shall be the width of 16 feet and shall extend over said Lot #14 as follows: on the Southerly side of said Lot #14.

Joseph Croteau used the right-of-way and wharf he had constructed on the shore of lot #14 for the next twenty-nine years for recreational purposes such as boating, swimming and picnicking. Title in lot #14 changed hands several times during the period. At one point, an owner of lot #14 built a small shed on part of the southern sixteen feet of lot #14, but Croteau registered no complaint because he was able to use a part of the common right-of-way between lots #13 and #14 to get past the obstruction and thus to the wharf. In May 1962, Joseph Croteau sold his interest in his right-of-way and wharf to his son, defendant Walter Croteau. The plaintiffs purchased lot #14 in 1967.

The record indicates that for a time the plaintiffs and defendants were close friends. By agreement between them, the wharf was rebuilt and extended with their combined efforts. It is undisputed that the plaintiffs built some stone steps leading down to the water and that they improved the area generally, but as to the rest of the work, the parties are in dispute regarding who supplied what materials and did what work. Pleasant relations existed until the plaintiffs became concerned with the number of people using the wharf and with the defendants' parking their car on the sixteen-foot-wide strip between the shed and the shore in such a fashion as to block the plaintiffs' driveway.

The plaintiffs sought a declaratory judgment that defendants' right-of-way was confined to the common passageway between lots #13 and #14 and not over lot #14 and a declaration of the parties' respective interests in the way and wharf. Trial was before a Master (Robert A. Carignan, Esq.), who found the wharf to be owned wholly by the defendants. He found also that the defendants' right-of-way ran over lot #14, but that a portion of it running between the main road and the shed had been abandoned through lack of use and obstruction. The remaining portion of the way, between the shed and the shore, was found to have been retained as originally granted. The master concluded that defendants' right-of-way was an easement appurtenant to their nearby property, and that their rights in it were exclusive. The Superior Court (Johnson, J.) entered a decree in accordance with the master's findings and recommendation, and reserved and transferred plaintiffs' exceptions.

*323 [1] The decree of ownership of the wharf to the defendants raises a question previously unaddressed by this court: Consonant with the laws of riparian and littoral rights, may an owner of

property abutting a navigable body of water convey ownership of a wharf separate from ownership of the littoral property upon which the wharf is built? In our opinion, the question must be answered in the affirmative.

[2, 3] Littoral rights are incidental property rights associated with ownership of lakeshore property. 5 R. POWELL, LAW OF REAL PROPERTY § 710 (1979). In New Hampshire, the right to wharf out to navigable depth has long been recognized as a common-law littoral right. See Heston v. Ousler, 119 N.H. 58, 389 A.2d 536 (1979); Clement v. Burns, 43 N.H. 609, 617 (1862). The right to wharf out, however, like the right to appropriate riparian water or ice, Concord Manufacturing Co. v. Robertson, 66 N.H. 1, 25 A. 718 (1889), is severable from the abutting property itself. Whether the right is viewed as a "franchise," State v. Knowles-Lombard Co., 122 Conn. 263, 265, 188 A. 275, 276 (1936), or as only an incidental property interest, "[t]he reason of the law does not forbid [the littoral owner] to sever, and sell or lease, the right he may not wish to exercise." Concord Manufacturing Co. v. Robertson, 66 N.H. at 20, 25 A. at 727; 2 H. TIFFANY, REAL PROPERTY § 667, at 723 (3d ed. 1939); cf. Hoban v. Bucklin, 88 N.H. 73, 184 A. 362 (1936) (prescriptive easement in nonlittoral owner to build and maintain wharf); Hastings v. Grimshaw, 153 Mass. 497, 27 N.E. 521 (1891) (retention of title in dock after transfer of littoral property). Notwithstanding a minority of authority to the contrary, see, e.g., 6A AMERICAN LAW OF PROPERTY § 28.55, at 159 (A. Casner ed. 1954), we hold that the littoral right of wharfing out may be transferred separate rom the ownership of the littoral property, subject of course to reasonable use, nuisance, and zoning limitations. See Heston v. Ousler supra; Concord Manufacturing Co. v. Robertson supra.

[4, 5] Turning to the decree of ownership issued by the trial court, we find it supported by the evidence. Dove v. Knox Mt. Corp., 114 N.H. 278, 319 A.2d 640 (1974). The deed of July 21, 1925, from John Stevens to Joseph Croteau plainly grants to Croteau an easement of access to the lake benefiting Croteau's nearby property. The deed also grants a right to construct a boathouse. A wharf, being a structure with a similar purpose, could be found to have been substantially within the intention of the parties to the deed. Likewise, the record would support a finding that Stevens intended to pass ownership of the boathouse (or wharf) to Croteau. So far as the parties' legal rights in the wharf are *324 concerned, we are satisfied that the findings and recommendation of the master are supported by the law and the evidence.

[6] The master's location of the defendants' right-of-way also finds support in the record. Cragin v. Woollett, 104 N.H. 202, 182 A.2d 457 (1962). That the way is over lot #14 and not over the common passageway between lots #13 and #14 is, if left uncertain by the original deed, made clear by the 1933 agreement between Herbert Stevens and Joseph Croteau. The fact that the wharf was built opposite lot #14 rather than opposite the common passageway between lots #13 and #14 is further evidence of the intention of the parties. Similarly, the continued use of at least a portion of the sixteen-foot right-of-way across lot #14, both by Joseph Croteau and later by the defendants, is evidence of the intended location of the way. French v. Hayes, 43 N.H. 30 (1861). The finding of partial abandonment is supported in the record and unquestioned by the parties. The master

correctly found that the portion of the right-of-way between the shed and the shore had not been abandoned by the defendants. See 25 AM.JUR.2d Easements & Licenses § 104 (1966); cf. Lawlor v. Town of Salem, 116 N.H. 61, 352 A.2d 721 (1976) (abandonment of preexisting nonconforming use).

[7] The finding that the defendants have an exclusive right to the way is questionable, however, if it was intended to preclude use of the way by the plaintiffs or any other owner of lot #14. Nevertheless, during oral argument, the parties agreed that the owners of the underlying fee cannot be excluded from a reasonable use of the land over which the easement runs so long as that use does not interfere with the defendants' reasonable use of it. The defendants' right is exclusive only to the extent that plaintiffs and future owners of lot #14 may not grant other persons rights in the way. A reasonable construction of the 1925 deed and 1933 agreement, coupled with the parties' conduct for some fifty years, supports the conclusion that as to persons other than the owners of the servient estate (lot #14), defendants have an exclusive right in the unabandoned portion of their right-of-way. See Cragin v. Woollett, 104 N.H. 202, 182 A.2d 457 (1962); French v. Hayes, 43 N.H. 30 (1861).

[8] The defendants' use of the right-of-way and wharf must, of course, be reasonable and must take into consideration both the contemplated use and changed circumstances. See Sakansky v. Wein, 86 N.H. 337, 169 A. 1 (1933). The Croteaus may not unreasonably disturb the plaintiffs' enjoyment of lot #14; nor should they bring unreasonable numbers of persons onto the dock. They must take care not to exceed the reasonable tolerance that can be expected of the plaintiffs *325 or any owner of lot #14 regarding use of the dock by defendants' friends and acquaintances and those of their children. It was not the intention of the 1925 deed to give the Croteaus a right to funnel large numbers of persons over their right-of-way to the wharf. The law can do no more than state that the use must be reasonable. The parties must be the ones in the first instance to carry out the mandate.

Exceptions overruled.

All concurred.

Sundell v. Town of New London

119 N.H. 839 (1979)

W. A. SUNDELL & a. v. TOWN OF NEW LONDON

No. 79-059.

Supreme Court of New Hampshire.

December 12, 1979.

*843 Orr & Reno, of Concord (William L. Chapman orally), for the plaintiffs.

Ransmeier & Spellman, of Concord (John C. Ransmeier orally), for the defendant.

GRIMES, C.J.

The issues involved in this case include whether riparian and littoral owners may recover in nuisance or in inverse condemnation for injury to their rights by pollution-caused algae blooms and whether the statute of limitations and prescription defenses should have been submitted to the jury. We uphold the trial court on all issues.

All but two plaintiffs are littoral owners of property on the shore of Kezar Lake; the other two are riparian owners along Lion Brook, a tributary of Kezar Lake. The defendant operates a sewage treatment plant which discharges nutrient-laden effluent into the brook upstream from the plaintiff riparian owners. The treatment plant was constructed in 1931. From time to time, there have been changes and improvements in the plant, but effluent continued to be discharged into Lion Brook and thence into Kezar Lake.

There was evidence that in 1938 a study of the lake showed it to have a transparency of eleven feet and additional testimony described the clarity and desirability for recreational uses of the lake from the 1920's until the early 1960's. Sometime about the middle 1960's the lake began to develop intense algae blooms which caused the water to become "pea soup" in color, lose transparency, give off foul odors, leave slime on the shore and kill fish, which then wash up onto the shore. Attempts by the New Hampshire Water Supply and Pollution Control Commission to control the situation, although successful for a time, failed and were abandoned.

There was ample evidence that the condition of the lake was caused by the defendant's plant discharging into Lion Brook and this does not appear to be at issue. There was also evidence that the condition was temporary in the sense that if the discharge of effluent into the waters were stopped, the lake would clear itself in about ten years and that this clearing could be accelerated by artificial means.

The trial court submitted the plaintiffs' claims of private nuisance and inverse condemnation to the jury but did not allow the defense of the statute of limitation, ruling instead that the condition in Kezar *844 Lake was abatable. The court also declined to submit to the jury the defense of prescriptive rights. The jury returned a verdict for the plaintiffs in the amount of $119,580 and defendant's exceptions were transferred by Brock, J.

The threshold issue is whether the court erred in not granting the defendant's motions for directed verdicts based on its claim that the plaintiffs cannot recover for damages caused by the reduced enjoyment of the waters of Kezar Lake.

[1-3] Kezar Lake is a great pond, and at common law, Concord Manufacturing Co. v. Robertson, 66 N.H. 1, 25 A. 718 (1889), and under RSA 271:20 (Supp. 1977), title to its waters vests in the State for public use. The statute provides that no individual shall have or possess any rights or privileges not common to all citizens. Our cases uniformly hold, however, that "littoral owners have rights which are more extensive than those of the public generally." State v. Stafford Company, 99 N.H. 92, 105 A.2d 569 (1954). See also Hoban v. Bucklin, 88 N.H. 73, 186 A. 8 (1936). These rights, recognized at common law, State v. Sunapee Dam, 70 N.H. 458, 50 A. 108 (1900); Concord Manufacturing Co. v. Robertson, 66 N.H. 1, 25 A. 718 (1889), constituted property which could not be taken without compensation and were not affected by RSA 271:20. These private rights of littoral owners include but are not necessarily limited to the right to use and occupy the waters adjacent to their shore for a variety of recreational purposes, the right to erect boat houses and to wharf out into the water. Hoban v. Bucklin supra; State v. Stafford Company supra; Heston v. Ousler, 119 N.H. 58, 398 A.2d 536 (1979). We have also held that these private littoral rights are incidental property rights which are severable from the shore property itself and may be conveyed separate from the littoral property. Donaghey v. Croteau, 119 N.H. 320, 401 A.2d 1081 (1979).

[4, 5] It is clear, therefore, that although waters of great ponds are public waters, littoral owners nevertheless have private property rights which are separate from, independent of, and more extensive than the public's right. Because these littoral rights are an incident of ownership of shore property, their value is reflected in the fact that shorefront property commonly is substantially more valuable than property otherwise situated. It is for interference with these private littoral rights that the plaintiffs seek damages, not for interference with rights common to the public. We hold that the trial court committed no error by declining to direct verdicts for the defendant based on this claim.

*845 [6] The defendant also argues that the trial court erred in not directing a verdict in its favor on the inverse condemnation count because there was no physical invasion of the plaintiffs' shore property. Inverse condemnation occurs when a governmental body takes property in fact but does not formally exercise the power of eminent domain. Ferguson v. Keene, 108 N.H. 409, 238 A.2d 1 (1968). It gives rise to a cause of action for compensation. The principle of inverse condemnation was developed in this State over one hundred years ago in Eaton v. B.C. & M.R.R., 51 N.H. 504 (1872), and was recognized by both the majority and the dissent in Ferguson v. Keene, 108 N.H. 409, 238 A.2d 1 (1968). The only point of difference in Ferguson related to the application of the doctrine to the alleged facts of that case. The view of the majority was that some physical invasion of the plaintiff's airspace by overflights was essential to its application. The defendant, relying on the majority opinion in Ferguson, argues that because the waters of the lake are public below the high-water line, there has been no physical invasion of plaintiffs' property and therefore no inverse condemnation.

[7, 8] One of the basic teachings of Eaton v. B.C. & M.R.R. is that under our law, "property" refers to the right to "use and enjoy" a thing, and is not limited to the thing itself. 51 N.H. at 511. Governmental action which substantially interferes with, or deprives a person of, the use of his property in whole or in part, may therefore constitute a taking, even if the land itself is not taken. Id. The dissent in Ferguson, relying heavily on Eaton, looked to the effect of the governmental action rather than to the nature of it. It recognized, of course, that the interference must be more than mere inconvenience or annoyance and must be "sufficiently direct, sufficiently peculiar, and of sufficient magnitude to cause us to conclude that fairness and justice, as between the State and the citizen, requires that the burden imposed ... be borne by the public and not by the individual alone." Batten v. United States, 306 F.2d 580, 587 (10th Cir. 1962) (Murrah, C.J., dissenting); Ferguson v. Keene, 108 N.H. at 414, 238 A.2d at 5 (dissenting opinion); see Duffield v. DeKalb County, 242 Ga. 432, 249 S.E.2d 235 (1978); Dempsey v. Boys' Club of City of St. Louis, Inc., 558 S.W.2d 262 (Mo. App. 1977).

Reliance upon concepts of physical invasion by tangible things has in other fields of the law given way to concern with the effect on individual rights. See, e.g., Katz v. United States, 389 U.S. 347 (1967) (fourth amendment protects persons, not places); accord Gordon v. City of Warren, 579 F.2d 386 (6th Cir. 1978) (compensation action *846 against municipal corporation based on fourteenth amendment).

As has already been stated, the plaintiffs, as littoral owners, have rights below the high-water line in front of their property to use the waters for "a panoply of recreational activities." Heston v. Ousler, 119 N.H. 58, 62, 398 A.2d 536, 538 (1979). In Heston this area was described as "their own water space." It is not disputed that the defendant's effluent-spawned algae invaded these water spaces causing substantial interference with plaintiffs' use of this space for bathing, swimming, boating, and other recreational purposes. There was also evidence that foul odors caused by the

algae blooms, together with dead fish cast ashore, drifted across plaintiffs' upland, diminishing their enjoyment of it.

[9] Thus the invasion of the plaintiffs' water space by effluent-caused algae blooms is a sufficient physical invasion of their property to satisfy the majority opinion in Ferguson v. Keene, 108 N.H. 409, 238 A.2d (1968). Moreover, the noxious gases and odors which invaded their shore property, containing elements not found in clear air, could also be considered sufficiently more tangible than the sound waves rejected as constituting a physical invasion in Ferguson.

[10] The right to recover for inverse condemnation, however, cannot be made to depend upon the means by which the property is taken. Foul odors invading one's property can surely interfere with an owner's use of his land as much as an invasion by more solid substances. We hold that inverse condemnation results. See Duffield v. DeKalb County, 242 Ga. 432, 433-34, 249 S.E.2d 235, 237 (1978). To the extent that Ferguson v. Keene is inconsistent with our holding in this case, it is overruled. It therefore was not error for the trial court to deny the motion for directed verdicts on the inverse condemnation count.

[11] The defendant argues further that the trial court erred in not submitting to the jury the question whether the town had acquired prescriptive rights in Lion Brook and Kezar Lake and in striking that defense as a matter of law. Rights are acquired by prescription when a use continues for a period of twenty years without significant interruption under a claim of right and is so open and notorious as to give notice of the claim. Weeks v. Morin, 85 N.H. 9, 153 A. 471 (1931). Defendant claims that because it has been discharging effluent into Lion Brook and thence into Kezar Lake since 1931, it had acquired a prescriptive right so to do long before plaintiffs' actions were begun.

The fact that the defendant was discharging effluent into Lion Brook for more than twenty years before these actions were begun in *847 1974 does not end the matter. Plaintiffs' complaint relates to the presence of algae blooms and the resulting problems. Even though effluent has been dumped into the brook and lake since 1931, there is no evidence that algae blooms began to appear until the mid-1960's. Until that time the conduct of the defendant had not interfered with the plaintiffs' use and enjoyment of their littoral rights in any substantial manner. From the mid-1960's on, however, the interference with those rights dramatically changed and the burden upon plaintiffs, negligible and unnoticed before, became substantial.

[12, 13] This new "burden or material increase" had not run the full period and therefore no prescriptive rights were acquired by the defendant. Hoban v. Bucklin, 88 N.H. 73, 88, 186 A. 8, 11 (1936). In such a case, we look to the burden placed upon the property owner, rather than the conduct of the defendant, in determining whether there has been an increase in the burden. A use which casts no burden upon the landowner cannot count in determining the prescriptive period for one which does.

[14] Thus, even if the defendant had acquired an easement by prescription to discharge effluent into Lion Brook and thence into Kezar Lake, the subsequent development of the algae condition was not within the scope of such a servitude. See Crocker v. Canaan College, 110 N.H. 384, 268 A.2d 844 (1970). Accordingly, because the defendant's activity prior to 1954 did not interfere with the property rights upon which the plaintiffs' actions are based, the court properly ruled that the defense of prescription was not available to the defendant.

The town next argues that the trial court erred in striking its statute of limitations defense. It contends that there was evidence presented at trial from which the jury might conclude that the plaintiffs' causes of action arose more than six years prior to the commencement of this suit, and thus would have been time-barred.

[15-17] We have recently reiterated that the burden of proving the bar of the statute of limitations rests with the party asserting it. See Brown v. Mary Hitchcock Memorial Hospital, 117 N.H. 739, 744, 378 A.2d 1138, 1141 (1977). The rule in this State is that a statute of limitations is a matter of procedure, see Gordon v. Gordon, 118 N.H. 356, 379 A.2d 810 (1978), "[t]he interpretation and application [of which] is traditionally within the province of the court in cases of this nature." Shillady v. Elliot Community Hospital, 114 N.H. 321, 325, 320 A.2d 637, 639 (1974); cf. Lakeman v. Lafrance, 102 N.H. 300, 156 *848 A.2d 123 (1959). Moreover, this court has observed that the applicability of the statute is a determination that "should be made ordinarily at a preliminary hearing in advance of trial...." Shillady v. Elliot Community Hospital, 114 N.H. at 325, 320 A.2d at 639; see Lepage v. L'Heureux, 119 N.H. 201, 399 A.2d 977 (1979). Thus, the trial court infringed no substantial right of the defendant in determining the applicability of the statute to the facts of this case by waiting until the evidence was in before making its ruling.

The trial court based its ruling that the statute of limitation did not bar the plaintiffs' actions on its determination that the nuisance or taking was temporary or abatable. In accordance with this view, the trial court instructed the jury that, in the event it found for the plaintiffs on either the nuisance or inverse condemnation count, it could award damages only for injuries sustained during the six years preceding the commencement of the action. Defendant, on the other hand, argues that the jury could have found that the condition of the lake was permanent, and had become so more than six years prior to plaintiffs' filing of their writs, in which event RSA 508:4 would bar their recovery.

[18] In our view, however, the trial court correctly determined that the condition complained of by the plaintiffs constitutes an abatable nuisance for which successive causes of action will lie. The fact that the damage will not stop the instant the town's offending activities cease, but may take ten years before improvement results, does not make the nuisance permanent. By continuing the discharge into the brook and lake, the town is continually causing new damage by prolonging the time before which improvement can begin.

[19, 20] In determining the nature of a plaintiff's remedy in private nuisance, the general rule is that recovery may be had only for past harm. RESTATEMENT (SECOND) OF TORTS § 930, comment a (1977). Where the injury complained of is temporary or intermittent, depending on uncertain future conditions, the nuisance is characterized as temporary or abatable and the plaintiff may not recover prospective damages. 58 AM. JUR. 2d Nuisances § 116 (1970). Instead, the injured party must bring successive actions to recover for successive injuries, as they occur. Town of Troy v. Cheshire Rail Road Company, 23 N.H. 83 (1851); RESTATEMENT (SECOND) OF TORTS § 930, Comment a. In each successive action, the plaintiff may recover for all injury sustained during the statutory period prior to the commencement of suit. 58 AM. JUR. 2d Nuisances § 132 (1971).

*849 [21-24] On the other hand, a nuisance may be characterized as permanent when it exists under circumstances that give rise to the presumption that it will continue indefinitely or affect the value of the property permanently, "being at once necessarily productive of all the damage which can ever result from it." 58 AM. JUR.2d Nuisances § 117 (1971). Where the nuisance is so characterized, the plaintiff may recover in one action for all harm sustained, whether past or prospective. Id.; see Morris v. Ciborowski, 113 N.H. 563, 311 A.2d 296 (1973). In such a case, the measure of damages becomes the total diminution in the value of the property. See, e.g., Ferguson v. Keene, 111 N.H. 222, 279 A.2d 605 (1971), RESTATEMENT (SECOND) OF TORTS § 930, comment b (1977). Prospective relief becomes appropriate because of the inadequacy to the injured party of successive suits at law. Id.; see Town of Troy v. Cheshire Rail Road Co., 23 N.H. 83 (1851). Thus, the distinction between abatable and nonabatable nuisances serves to more fully compensate the injured landowner for an interference that is tantamount to a permanent taking, and should not serve to deprive the plaintiffs of any recovery. RESTATEMENT (SECOND) OF TORTS § 930, comment a (1977). We conclude that the trial court rightly characterized the condition in Kezar Lake as an abatable nuisance.

Moreover, even if the six-year statute of limitations barred recovery by the plaintiffs on their count sounding in nuisance, the verdict could be sustained on the theory of inverse condemnation alone. The defendant asserts that actions in inverse condemnation should also be governed by the six-year limit of RSA 508:4 (Supp. 1977). We do not agree.

To begin with, the defendant's reliance on our earlier opinion in Locke v. City of Laconia, 78 N.H. 79, 97 A. 567 (1916), is misplaced. Rather than standing for the proposition that actions against municipalities for damage to land are personal actions, governed by the six-year period, the court in Locke merely assumed, arguendo, that such was the case. The real issue before the court was whether a claim for damages arising from a change in grade of a town-maintained road arose at the time of the act complained of, or lay dormant until the aggrieved landowner made a demand upon the town for compensation.

[25, 26] Whatever may be the merits of allowing such actions to be governed by RSA 508:4 (Supp. 1977), we clearly think it inappropriate to apply the six-year period in actions for inverse condemnation. The plaintiffs' right to compensation for such a taking as occurred in the instant case does not depend upon statute or case law but instead *850 derives from a constitutional imperative. Sibson v. State, 111 N.H. 305, 307, 282 A.2d 664, 665 (1971). In Ackerman v. Port of Seattle, 55 Wash. 2d 400, 348 P.2d 664 (1960), for example, it was held that an action for a constitutional taking was not barred by any statute of limitations but could be brought at any time before title to the property passed by prescription. Id. at 405, 348 P.2d at 667. See also Krambeck v. City of Gretna, 198 Neb. 608, 254 N.W.2d 691 (1977); Brazos River Authority v. City of Graham, 163 Tex. 167, 354 S.W.2d 99 (1962); State Highway Com. v. Stumbo, 222 Or. 62, 352 P.2d 478 (1960). Although there is authority to the contrary, see 27 AM. JUR. 2d, Eminent Domain, § 498 (1966), and cases cited therein, we believe the better view is to regard actions in inverse condemnation as governed by the statutory period applicable to actions for the recovery of real estate, that is, twenty years. RSA 508:2. Thus, insofar as the trial court here instructed the jury that damages could be recovered only for injury to the plaintiffs' property occurring within six years prior to the commencement of these actions, the defendant cannot complain.

Therefore, assuming that the jury returned its verdict on the nuisance count, it would have found all facts necessary to entitle the plaintiffs to a verdict on the inverse condemnation count. Thus, the general verdict will not be disturbed. State v. Railroad, 52 N.H. 528, 560 (1873). See cases collected in 89 C.J.S. Trial § 505 (1955).

A final contention of the defendant is that the court erred in allowing plaintiffs Rolfe and Avery to recover damages. The town argues that because they purchased their property for investment purposes and had not yet sold them, they had not realized any loss. The court allowed these plaintiffs to introduce evidence of the loss in value of their properties due to the condition of the lake and to recover on the basis of applying prevailing rates of interest to this reduction for the period of the statute of limitations. Defendant argues that because the condition is abatable and that there are in fact plans to eliminate the discharge of effluent altogether, it is possible that by the time the property is sold, there will be no damage and plaintiffs will have received a windfall because they would have suffered no damage and yet they will have recovered damages.

[27, 28] We find no merit in this argument. There was evidence that these plaintiffs have held their property for a much longer time than they would have because of the diminished value. If the condition were permanent and they had sold their property at the reduced value they could have recovered their full loss. They should not be deprived of recovering the cost of holding their property until the temporary nuisance has been abated. The measure of damages allowed by the *851 court was a fair method of compensating these plaintiffs for the loss of use of their property. See Capitol Plumbing & Heating Supply Co. v. State, 116 N.H. 513, 363 A.2d 199 (1976); Sargent v. Janvrin, 109 N.H. 66, 242 A.2d 73 (1968).

Exceptions overruled.

DOUGLAS, BROCK, and KING, JJ., did not sit; LAMPRON, C.J., retired, sat pursuant to RSA 490:3; the others concurred.

NEW HAMPSHIRE LAKES

Members dedicated to protecting lakes and their watersheds

February 13, 2017

The Honorable Kevin Avard
Chair, Energy and Natural Resources Committee
State House, Room 103
Concord, NH 03301

Re. SB119, AN ACT relative to the length of a dock on a water body.

Dear Senator Avard and Committee Members:

The New Hampshire Lakes Association (NH LAKES) is opposed to SB119 and respectfully requests that the Energy and Natural Resources Committee vote the Bill, as amended, inexpedient to legislate. NH LAKES does not believe that this Bill resolves a problem in such a way that serves the public interest. The NH Department of Environmental Services (NH DES) can and does permit longer docks, "when there is a demonstrated need." Please see the accompanying NH DES Fact Sheet for the *Permitting of Freshwater Dock Structures* (top of page 2).

NH LAKES represents well over a hundred lake associations and thousands of individuals who have an interest in the quality, usability, and long-term health of our lakes. The use and enjoyment of our 1,000 lakes adds over $1.5 billion dollars to our state's economy each year. How we treat our lakes, including the docks that get built upon them, matters not only to the dock owners but also to the thousands of people, and hundreds of businesses and communities that enjoy the use of our lakes.

Because our lakes are in the public trust, we believe that a decision to nearly double the length of a dock – a structure built on public property – should be based on specific site conditions and circumstances. We believe that the agency professionals tasked with these reviews and determinations should continue to exercise that discretion. Agency oversight does not prevent anyone from extending their dock "if there is a demonstrated need." Agency oversight will, however, greatly reduce the likelihood that a navigational hazard, private property encroachment, or impact to other public uses of that resource will occur.

We respectfully request that this committee vote inexpedient to legislate on SB119.

Thank you for your consideration of this testimony.

Respectfully submitted,

Thomas W. O'Brien, President
New Hampshire Lakes Association

NH LAKES 25th ANNIVERSARY 1992 - 2017

Celebrating 25 years of protecting the lakes and ponds of New Hampshire.

14 Horseshoe Pond Lane, Concord, NH 03301 603.226.0299 info@nhlakes.org www.nhlakes.org

ENVIRONMENTAL
Fact Sheet

NEW HAMPSHIRE DEPARTMENT OF Environmental Services

29 Hazen Drive, Concord, New Hampshire 03301 • (603) 271-3503 • www.des.nh.gov

WB-19 2016

Permitting for Freshwater Docking Structures

Projects involving dredge, fill or placement of structures on, or within, the banks of surface waters requires a Wetlands Permit from the Department of Environmental Services (NHDES) Wetlands Bureau. The law authorizing NHDES to regulate these activities, RSA 482-A, took effect in 1967 and initially only regulated construction of permanent structures in tidal waters. In 1969, the law was expanded to include permanent and commercial structures in fresh water and, in 1978, the law was amended again to include all seasonal docking structures.

Dock Size Limitations

A wetlands permit is required for all new docking structures, including seasonal and permanent docking structures, and all boat and jet-ski lifts. The use of seasonal (removable) structures is preferred because they pose the least impact to public waters. Permanent docking structures are only permissible on waterbodies greater than 1,000 acres in size and only when applicants can demonstrate that conditions exist that inhibit maintaining a seasonal docking structure. The allowable size of a dock is based on several criteria. These criteria include the number of boat slips that will be provided, the amount of shoreline frontage on the parcel, the size of the lake on which the docking structure will be located and whether the dock will be seasonal or permanent. **Table 1** below provides a summary of these criteria.

STANDARD DIMENSIONS OF A DOCK		
Freshwater Waterbodies	**Shoreline Frontage 75 feet or Greater**	**Shoreline Frontage Less Than 75 ft.**
Lakes less than 1,000 acres	6 feet x 30 feet (seasonal)	4 ft. x 24 ft.
Lakes 1,000 acres or greater	6 feet x 40 feet (seasonal) 6 feet x 30 feet (permanent)	
Navigable rivers	6 ft. x 30 feet parallel to shore	

Table 1- Standard dimension of docks

New docks or additions to existing docks must be located at least 20 feet from abutting property boundaries, including the imaginary extensions of those property boundaries over the water. If an applicant proposes to place docking structures within 20 feet of an abutter's property line or the imaginary extension of the property line over the water, the applicant must provide a signed, notarized letter from the adjacent property owner granting permission for the new docking structure to be placed within 20 feet of the adjacent property line. See **Figure 1** below.

Exceptions to the standard size and configuration criteria (site specific constraints) are permitted when there is a demonstrated need. For instance, a longer dock may be permissible if the applicant can demonstrate the water depth, at standard dock length, is too shallow to safely dock a boat.

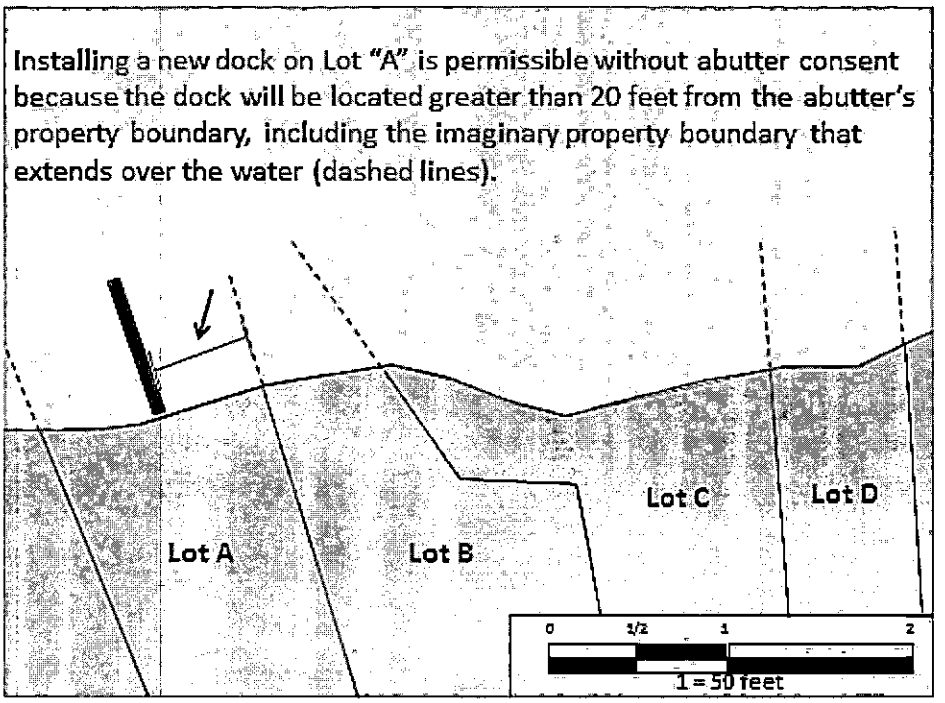


Figure 1 – Dock setback from property lines and the imaginary extension of property lines over the water.

Boat Slip Limitations

The quantity of boat slips permissible on an applicant's shorefront property is based on the total length of shoreline frontage on the subject waterfront lot. Shoreline frontage is determined by taking the average of the distances of the actual natural navigable shoreline footage and the straight line distance drawn between the property lines. Each is measured at the normal high water line. See **Table 2** below:

LIMITS ON BOAT SLIPS	
Shoreline Frontage	**Boat Slip Maximum**
Less than 75 feet	A single 4 foot x 24 foot dock. Must have abutter's consent if the dock will be placed closer than 20 feet to abutter's property line.
75 feet to 149 feet	2 Slips
150 feet to 224 feet	3 Slips
225 feet to 299 feet	4 Slips
300 feet to 374 feet	5 slips

Table 2 – Limits on Boat Slips

A boat slip is the volume of water in which a boat is secured and boat slip size is a predetermined, waterbody dependent, volume of water. For waterbodies 10,000 acres or less, a boat slip is a volume of water 20 feet long, 6 feet wide, and 3 feet deep. For waterbodies greater than 10,000 acres, a boat slip is a volume of water 25 feet long, 8 feet wide and 3 feet deep. Water depth is measured at the normal high water mark. At no time can a new docking structure be permitted when the applicant's proposed boat slip area would extend over the imaginary property line extending over the waterbody. See **Figure 2** below:

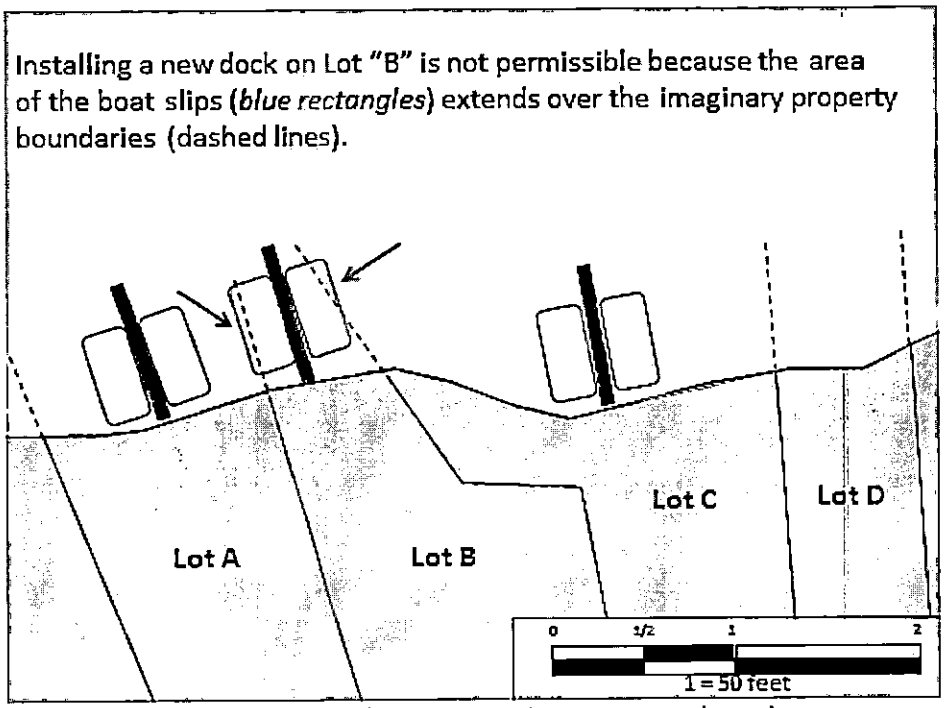


Figure 2 – Boat slip area extending over imaginary property boundary

Permitting

Seasonal docks are the preferred design because they pose the least environmental impact on public waters. "Seasonal Docks" are defined as being designed and constructed such that the structure and all associated supports can be completely removed from the surface water and its bed during the non-boating season, including, but not limited to: pipe docks, floating docks and watercraft lifts.

A seasonal dock on a lake or pond may be permitted by submitting a Seasonal Dock Notification Form to the NHDES Wetlands Bureau if all of the criteria listed below are met:

- The proposed dock will be the only docking structure on the frontage.
- Constructed to be removed for a minimum of 5 months during the non-boating season.
- Configured to be narrow, rectangular, and perpendicular to the shoreline.
- No more than 6 feet wide by 40 feet long if the water body is 1,000 acres or more; no more than 6 feet wide by 30 feet long (or less) if the water body is under 1,000 acres.
- Located on a parcel that has at least 75 feet of shoreline frontage.
- Located at least 20 feet from an abutting property line or imaginary extension of the property line over the surface water.
- Constructed in an area that results in no impact to wetlands along the shoreline.
- Installed in a manner which requires no modification, regrading, or recontouring of the shoreline.
- Installed in a manner which complies with the Shoreland Water Quality Protection Act (RSA 483-B).
- Not installed within or adjacent to NH Prime Wetlands.

If a property has less than 75 feet of shoreline frontage, a single, seasonal dock, measuring 4 feet x 24 feet may be permitted with a Standard Wetlands Permit Application Form. This is classified as a minimum impact project type and may receive an expedited review time. Docks constructed on freshwater rivers may be permitted by submitting a Standard Wetlands Permit Application Form.

Stairs to the dock can be constructed without a permit provided they are no wider than 6 feet and they are constructed over the bank in a manner that does not require regrading or recontouring of the land. Alternative dock access designs are permissible with a wetlands permit.

Permanent docking structures are defined as all docks, including its supports, or both and are designed to remain within the bank or surface water bottom throughout the non-boating season. Permanent docks can be supported by piles or cribs within the water or can be cantilevered from the bank. Permanent docks are only permissible on waterbodies that exceed 1,000 acres in size and when applicants can demonstrate that conditions exist that inhibit the safe maintenance of a seasonal docking structure. Conditions that may inhibit safe dockage include, but are not limited to: wave height at the area of the proposed docking structure. Permanent docking structures may be permitted by submitting a Standard Wetlands Permit Application Form.

Repairing Existing Docks

If the existing, legal dock is repaired in such a way that results in **no** change to the pre-existing footprint (size, location and configuration) and the work is conducted in "**the dry**", a wetland permit is not required. It is permissible to repair those portions of permanent docks below full lake level that are exposed and in the dry during **draw down** without a wetlands permit provided there is no excavation of the lake bed. Projects that propose impacts to legal, permanent docking structures below the normal water line, including repairs to cribs, piles and all other underwater support structures, requires a Wetlands Permit. These projects may be permitted with a Standard Wetlands Permit Application Form.

More Information

For more information on docks, please use the online interactive tool, "Determine if a Permit is Required to Repair or Install a New Dock" or contact the NHDES Wetlands Bureau, 29 Hazen Drive, PO Box 95, Concord, NH 03302-0095, (603) 271-2147; or visit the NHDES Wetlands Bureau's home page: http://www.des.nh.gov/wetlands.

Committee Report

STATE OF NEW HAMPSHIRE

SENATE

REPORT OF THE COMMITTEE

Thursday, March 23, 2017

THE COMMITTEE ON Energy and Natural Resources

to which was referred **SB 119**

AN ACT relative to the length of a dock on a water body.

Having considered the same, the committee recommends that the Bill

OUGHT TO PASS WITH AMENDMENT

BY A VOTE OF: 4-1

AMENDMENT # 1099s

Senator Jeb Bradley
For the Committee

Griffin Roberge 271-2878

ENERGY AND NATURAL RESOURCES

SB 119, relative to the length of a dock on a water body.
Ought to Pass with Amendment, Vote 4-1.
Senator Jeb Bradley for the committee.