

MEMORANDUM

TO: Board of Environmental Protection

FROM: Beth Callahan, Project Manager, Bureau of Land and Water Quality

RE: John A. Gilman Appeal of Natural Resources Protection Act Denial, #L-24660-2B-B-N, Belgrade

DATE: May 20, 2010

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**Statutory and Regulatory References:** The applicable regulatory framework for this application is the Natural Resources Protection Act (NRPA), 38 M.R.S. §480-A to 480-FF and the Wetland and Waterbodies Protection Rules, Chapter 310. Procedures for appeals before the Board are outlined in the Department's Rules Concerning the Processing of Applications, Chapter 2(24)(B).

**Location:** The project site is located off Abena Shores Road on Great Pond in the Town of Belgrade.

**Description:** On February 10, 2009, Department staff inspected the property of John A. Gilman (appellant) and found that a permanent dock had been constructed and a permanent boat lift had been installed in a great pond. Department staff determined that the appellant had violated the NRPA because the appellant constructed a permanent structure in a protected natural resource without first obtaining a permit from the Department. The Department determined that the new permanent dock was a replacement of a previously existing dock that had been in place prior to the establishment of the NRPA. On February 27, 2009, Department staff requested the appellant to utilize the boat lift on a temporary basis or obtain an NRPA permit for its use as a permanent structure.

On July 17, 2009, the appellant filed an after-the-fact NRPA permit application which requested approval for the installation of a permanent boat lift in Great Pond in the Town of Belgrade. The Department reviewed the application, and on August 11, 2009, the Department determined the application to be deficient for processing due to lack of information necessary to conduct a substantive review of the project. The application was therefore returned to the appellant.

On August 20, 2009, the appellant re-filed the after-the-fact NRPA application. With its associated canopy, the boat lift measures 10 feet wide by 25 feet long; it is supported on four aluminum beams. The appellant stated in the application that the purpose of the boat lift is to launch his boat, remove it from the water when not in use, access his boat from his existing dock and lower the boat into the water while seated. The appellant stated that a permanent boat lift would allow him to enjoy fishing in the lake. The Department denied the application in Department Order #L-24660-2B-B-N on January 21, 2010.

On February 4, 2010, the appellant filed an appeal of the Department's decision to the Board.

**Wetland and Waterbody Considerations:**

1.) The appellant argues that the boat lift structure does not have an indirect impact of 250 square feet on the freshwater, aquatic, and adjacent upland habitat and waterbody, as the Department found in its denial of the application. Rather, the appellant contends that the indirect impact of the project is 90.3 square feet.

The application included evidence indicating that the boat lift, including the associated canopy, measures 10 feet wide by 25 feet long. Based on these dimensions and its site visit, the Department calculated the total square footage of indirect impact over the project site to be approximately 250 square feet. The NRPA regulates activities in, on, or over a protected natural resource.

The Department determined that the impacts of the project are unnecessary and unreasonable, because other practicable alternatives exist that do not result in permanent loss of and land impacts to the protected resource.

2.) The appellant argues that no practicable alternative to the project exists. The appellant considered alternatives to the project which included reducing the size of the boat lift and the use of a seasonal boat lift.

The Department determined that the appellant failed to adequately consider the use of a public boat launch and a public marina which are both within close proximity of the project site. Department staff visited the boat launch and the marina. Department staff observed that the boat launch has adequate facilities to allow access to the resource, and the marina has the capability to place boats in the water and store boats and boat lifts. After considering the availability of the alternatives, the Department concluded that the appellant has a number of practicable alternatives that would meet the project purpose and would not result in permanent new construction in the protected resource.

3.) The appellant asserts that the proposed project was minimized to the greatest extent practicable. The appellant submitted a functional assessment during the Department's review process which stated that the proposed project would have minimal effect on the functions and values of the habitats at the project site. For this reason, the appellant contends that the proposed project need not be minimized.

According to Chapter 310 (5)(B), the amount of wetland or waterbody to be altered must be kept to the minimum amount necessary for meeting the overall purpose of the project. An applicant for a permit must describe how the project was designed to reduce impacts to the protected resource. Although the appellant's assessment stated that impacts from the proposed project would be minimal, the appellant did not outline any minimization strategies that were utilized to reduce impacts to the freshwater aquatic habitat and waterbody.

4.) The appellant asserts that the proposed project does not unreasonably harm significant wildlife habitat; freshwater fisheries; and freshwater, aquatic or adjacent upland habitat. The appellant states that the proposed project has the potential to provide aquatic cover and habitat structure in place of naturally occurring object cover because the existing shoreline lacks woody debris or other cover sources.

MDIFW states in its review of the project that impacts to the fisheries habitat would be minor; however, MDIFW states that structures should be limited in terms of placement in a great pond for no longer than seven months in a calendar year. The Department's Division of Environmental Assessment (DEA) commented that there is no evidence that the shoreline needs to be unduly disturbed when removing a seasonal boat lift. Based upon comments from MDIFW and DEA, the Department concluded that the impacts of the proposed project are unnecessary and unreasonable.

**Other Considerations:**

The appellant states that the Department did not consider the appellant's personal safety, disability, and health during review of the application. The appellant further asserts that by not considering particular safety and health concerns of the appellant when assessing whether alternatives are practicable, the Department is in violation of the Americans with Disabilities Act.

According to Chapter 310 Rules, the Department considers specific factors such as degree of harm or benefit to the resource; the frequency of similar impacts, the duration of the activity and ability of the resource to recover; the proximity of the activity to protected or highly developed areas; traditional uses; and other factors when considering whether a single activity is reasonable in relation to the direct and cumulative impacts on the resource. The Board may consider the appellant's need to access the resource for recreational and navigational uses in its analysis of whether there is a practicable alternative to the project and the reasonableness of the impacts of the project. The Department found that the use of the boat lift on a seasonal basis allows him access to the resource similar to that of other shorefront property owners while avoiding additional permanent structures in the resource.

**Department Recommendation:** After reviewing the appellant's arguments, the Department concludes that the appellant has not met the requirements for a NRPA permit as described above. The Department recommends that the Board affirm the Department's decision to deny the after-the-fact installation of a permanent boat lift in Great Pond as described in Department Order # L-24406-4P-A-N.

**Estimated Time of Presentation:** 1.0 hour

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