

John A. Gilman // Natural Resources Protection Act
Permanent installation of boat lift – Belgrade

- Department Order Under Appeal



STATE OF MAINE
DEPARTMENT OF ENVIRONMENTAL PROTECTION
17 STATE HOUSE STATION
AUGUSTA, ME 04333

DEPARTMENT ORDER

IN THE MATTER OF

JOHN A. GILMAN) NATURAL RESOURCES PROTECTION
Belgrade, Kennebec County) ALTERATION OF GREAT POND
PERMANENT BOAT LIFT) WATER QUALITY CERTIFICATION
*L-24660-2B-B-N (denial) (*Corrected Order)) FINDINGS OF FACT AND ORDER

Pursuant to the provisions of 38 M.R.S.A. Sections 480-A et seq. and Section 401 of the Federal Water Pollution Control Act, the Department of Environmental Protection has considered the application of JOHN A. GILMAN with the supportive data, agency review comments, and other related materials on file and FINDS THE FOLLOWING FACTS:

1. PROJECT DESCRIPTION:

A. History of Project: On February 10, 2009, Department staff inspected the applicant's property and found that a boat lift had permanently been installed in a great pond. Department staff determined that the applicant had violated the Natural Resources Protection Act (NRPA) because the applicant constructed a permanent structure in a protected natural resource without first obtaining a permit from the Department. On February 27, 2009, Department staff required the applicant to obtain all necessary permits or utilize the boat lift on a temporary basis.

B. Summary: The applicant requests after-the-fact approval for the permanent installation of an aluminum boat lift in a great pond. The boat lift measures 10 feet wide by 25 feet long. It is constructed on four aluminum support beams and is equipped with an associated canopy. The boat lift is located within Great Pond and is adjacent to the applicant's property. Direct impacts to the freshwater aquatic habitat within the great pond total 4 square feet; indirect impacts to the habitat are approximately 250 square feet. The applicant's property is located on Abena Shores Road in the Town of Belgrade.

The applicant states that the proposed boat lift is necessary to lower and raise his boat when in operation and to store his boat when it is not in use. The applicant asserts that, due to his physical disability, the only way that he is able to access his boat is by means of an electric boat lift. Due to his physical disability, the applicant intends to utilize the boat lift by lowering the boat to the same level as an existing dock, stepping into the boat, and then lowering the boat into the resource. Currently, the applicant docks his boat at the boat lift on a seasonal basis.

C. Current Use of the Site: The applicant's property adjacent to which the proposed project is located is comprised of approximately 1,170 square feet and contains an existing residential structure on an upland portion of the property. The property is referenced in the Town of

Belgrade's tax maps as Lot #17 on Map #27. The deed for the property is in the Kennebec County Registry of Deeds located in Book #2198 on Page #175.

2. WETLANDS AND WATERBODIES PROTECTION RULES:

The NRPA defines great ponds as "any inland bodies of water which in a natural state have a surface area of in excess of 10 acres and any inland bodies of water artificially formed or increased which have a surface area in excess of 30 acres." (38 M.R.S.A. § 480-B (5)) The construction of the proposed boat lift would permanently alter a portion of the great pond and therefore requires a permit under the NRPA and the Department's Wetlands and Waterbodies Protection Rules (Chapter 310). Chapter 310 interprets and elaborates on the NRPA criteria for obtaining a permit, and guides the Department in its determination of whether a project's impacts on the functions and values of the wetland would be unreasonable.

The permanently installed boat lift directly eliminates 4 square feet of freshwater aquatic habitat within a great pond as a result of the installation of four support beams. The project alters an additional 250 square feet of aquatic habitat through shading effects. Further shading of the aquatic habitat may result from the project's orientation to the sun and the shadows that are cast on aquatic areas not directly below the boat lift.

The applicant submitted a functional assessment entitled "Shoreline Functional Assessment", prepared by Kleinschmidt Associates and dated October 2009. This assessment identified the key functions and values within the riparian and littoral zones of the proposed project site. Primary functions of the habitat within the proposed project area are Fish and Shellfish Habitat, Sediment and Shoreline Stabilization, Recreation, and Visual Quality.

Great ponds, such as this one which is named Great Pond, are considered Wetlands of Special Significance as defined in Chapter 310 (4), and thus receive heightened protection under the Department's Rules. For projects proposed to be located in Wetlands of Special Significance, a practicable alternative is deemed to exist unless the project is within one of the categories of potentially acceptable projects listed in the rule. The rules allow the applicant to submit evidence to demonstrate that no practicable alternative exists.

A proposed project may be found to be unreasonable if it would cause a loss in waterbody area, functions and values and there is a practicable alternative to the project that would be less damaging to the environment. An applicant must provide an analysis of alternatives in order to demonstrate that a practicable alternative does not exist. Wetland functions are defined in Chapter 310 (3) (J) as: "The roles wetlands serve which are of value to society or the environment including, but not limited to, ...scenic and aesthetic use, ...fisheries, wetland plant habitat, aquatic habitat and wildlife habitat." Pursuant to Chapter 310, the applicant's demonstration that a practicable alternative does not exist must include evidence that the applicant has avoided wetland and waterbody impacts if possible, and has kept the amount of wetland and waterbody to be altered to the minimum amount necessary. Chapter 310 (9)(A) requires that the analysis include:

- Utilizing, managing, or expanding one or more other sites that would avoid the wetland impact;
- Reducing the size, scope, configuration, or density of the project as proposed, thereby avoiding or reducing the wetland impact;

- Developing alternative project designs, such as cluster development, that avoid or lessen the wetland impact; and
- Demonstrating the need, whether public or private, for the proposed alteration.

A. Avoidance. The applicant submitted an alternatives analysis for the proposed project dated July 15, 2009, with the latest revision being August 20, 2009. The applicant considered the following alternatives to the project:

1. The applicant considered reducing the size of the boat lift. The applicant stated that this alternative is not feasible because all boat lifts are manufactured to have the same dimensions in order to service medium-sized boats.
2. The applicant considered use of a temporary boat lift. The applicant stated that there is no upland area on the applicant's property where storage of the proposed boat lift is possible, and that undertaking the removal of a temporary system would require removal of all electrical wire. Further, the applicant states that removal of a temporary structure would damage the shoreline.

The Department reviewed the applicant's alternatives analysis and finds that the applicant failed to offer convincing evidence that the use of at least one existing facility is not feasible when cost, existing technology and logistics are considered and that its use would present an undue burden.

1. The applicant states that the purpose of the proposed project is to have direct access to the great pond by means of the boat lift on a continual basis and throughout the off-season. The applicant maintains that the use of a temporary boat lift is not an acceptable alternative because a system of this nature would require removal of all electrical wiring, removal of the system would damage the shoreline, and there is no upland area on the applicant's property to store the system. The applicant's concern over the wiring could be addressed through the use of a waterproof electrical coupling device as recommended by the Maine Department of Inland Fisheries & Wildlife (MDIFW). MDIFW also stated that removal of the structure would not cause extensive environmental impacts to the shoreline. Impacts such as erosion and damage to the littoral and riparian zones would be minor, if any. Moreover, off-season storage of the boat lift can be achieved at other locations near the project site as discussed below.
2. The applicant failed to adequately consider the use of a nearby public boat launch, which is approximately 0.7 miles from the project site. This public boat launch has adequate facilities to allow for access to the resource. In the application, the applicant states that his son launches the applicant's boat on a seasonal basis. Therefore, it is possible for the applicant to utilize the public boat launch near his property with assistance. Moreover, a public marina, known as the Great Pond Marina, is located less than one mile from the project site. This marina has at least one boat lift in an upland area of the property, provides a service of putting boats in the water, and has the capability to store boats, as observed by Department staff on December 21, 2009.

B. Minimal Alteration. According to Chapter 310 (5)(B), the amount of wetland to be altered must be kept to the minimum amount necessary for meeting the overall purpose of the project. The applicant did not submit evidence which demonstrates that impacts to the protected resource would be minimized.

According to Chapter 310 (3)(W), a water dependent use is defined as “a use which cannot occur without access to surface water. Examples of uses which are water dependent include, but are not limited to, piers, boat ramps, marine railways, lobster pounds, marinas and peat mining. Examples of uses which are not water dependent include, but are not limited to, boat storage, residential dwellings, hotels, motels, restaurants, parking lots, retail facilities, and offices.” Given that the purpose of the proposed boat lift is to lower and raise the applicant’s boat when in operation and to store the applicant’s boat at his property when not in use, the Department finds that the proposed project does not meet the definition of “water dependent use”.

The Department finds that storage for boats does not have to be located on an individual development site or property for it to be practicable. The construction and use of the proposed boat lift at this location would result in a permanent loss of freshwater aquatic habitat and would have additional adverse impacts on the functions and values of the great pond. As a result, the quality of the water would be compromised. Given that the construction of the proposed boat lift would result in a permanent loss of habitat from the direct impacts, as well as additional indirect impacts to the habitat of the great pond; and given that the applicant has access to the water an capability to store his boat by means of the use of a temporary system and existing facilities within very close proximity to the project site, the Department finds that the applicant has not adequately demonstrated that the impacts to the great pond cannot be avoided.

In determining whether the project would result in an unreasonable impact to the waterbody, the Department must consider whether the impact is necessary. If there are alternatives, the Department may weigh the impacts to the waterbody and the availability of the alternative and find an unnecessary impact to the waterbody to be unreasonable. In this case, the Department finds that the applicant has practicable alternatives that would meet the project purpose and would not result in permanent new construction in the great pond.

3. HARM TO HABITAT:

The functional assessment submitted by the applicant included a qualitative survey for evidence of aquatic and terrestrial wildlife surrounding the project site. A number of freshwater mussel shells and a terrestrial beetle were collected and identified. Mussel species indentified include eastern floater and eastern elliptio, both of which are common to the state of Maine. A species of water penny, the aquatic form of a terrestrial beetle, was observed at the project site. No terrestrial wildlife was observed during the survey; however, the shoreline of the applicant’s property contains a number of important shrubs used by a variety of wildlife. The applicant’s assessment concludes that the existence of these species indicates that habitat is present.

The Maine Department of Inland Fisheries and Wildlife (MDIFW) reviewed the proposed project and stated that resulting impacts to the great pond’s fisheries would be minor. However, MDIFW is not supportive of the placement of permanent structures in the state’s great ponds. MDIFW stated that structures should be limited in terms of placement in a great pond for a duration no longer than seven months in a calendar year. In response to the applicant’s alternatives analysis, MDIFW commented that temporary installation and removal of the structure, if planned for,

would not cause extensive environmental impacts as asserted in the application. Moreover, the applicant's concern over removal of electrical wiring could be addressed by installing a waterproof electrical coupling device.

The Department's Division of Environmental Assessment (DEA), Lake Assessment Program reviewed the proposed project and stated that the negative effects of permanent structures placed in lake littoral or riparian zones, coupled with the detrimental effects on biological and human values of accumulating artificial structures along shorelines and the cumulative effects over time of minor initial alterations, makes the prohibition of permanent structures an important lake safeguard. DEA commented that the applicant has adequate access to remove the proposed structure, as other shoreline owners with similar equipment do so every year, and there is no evidence that the shoreline needs to be unduly disturbed to achieve removal.

As presented in Finding 2, the applicant has not met the burden of proof required to demonstrate that a less environmentally damaging alternative is not practicable. Although the applicant argues that to achieve the project purpose a permanent boat lift must be on his immediate property, a temporary structure can be installed, and a public boat marina capable of providing boat lift storage and a public boat launch both exist within close proximity to the applicant's property. The Department finds that the applicant's need to access his boat on a year-round basis does not have to be located solely on the applicant's property for it to be practicable. Given that the permanent installation of the boat lift would result in a permanent loss of habitat functions and value, and that the applicant has boating access to the water by means of other alternatives, the Department finds that the applicant has not adequately demonstrated avoidance of impacts to the freshwater aquatic habitat within the great pond.

In determining whether the proposed project would result in an unreasonable impact to habitat, the Department must consider whether the impact is necessary. The Department may find an unnecessary impact to habitat to be unreasonable. In this case, the Department finds that the applicant has practicable and less environmentally damaging alternatives that would meet the project purpose to lower and raise the applicant's boat when in operation and to store the applicant's boat when not in use, and not result in permanent loss of freshwater aquatic habitat within the great pond. Therefore, the impacts of the proposed project are unnecessary and unreasonable. The Department finds that the proposed project would result in an unreasonable adverse impact to freshwater aquatic habitat within the great pond.

4. EXISTING SCENIC, AESTHETIC, RECREATIONAL OR NAVIGATIONAL USES:

In accordance with Chapter 315, Assessing and Mitigating Impacts to Scenic and Aesthetic Uses, the applicant submitted a copy of the Department's Visual Evaluation Field Survey Checklist as Appendix A to the application along with a description of the property and the proposed project. The applicant also submitted photographs of the proposed project site. Department staff visited the project site on December 21, 2009.

The proposed project is located in Great Pond, which is a scenic resource visited by the general public, in part, for the use, observation, enjoyment and appreciation of its natural and cultural visual qualities. The surrounding area is developed with residential structures. Many of these residences have associated temporary dock systems. A public boat landing is located within 0.7 miles of the proposed project site and a public marina is located approximately 1 mile from the project site.

The Department evaluated the proposed project using the Department's Visual Impact Assessment Matrix. Although visual quality would be impacted by the year round presence of the boat lift, the proposed project was found to have an acceptable potential visual impact rating. Based on the information submitted in the application, the visual impact rating, and the site visit, the Department determined that the location and scale of the proposed activity is compatible with the existing visual quality and landscape characteristics found within the viewshed of the scenic resource in the project area.

The Department did not identify any issues involving existing recreational and navigational uses.

The Department finds that the proposed activity would not unreasonably interfere with existing scenic, aesthetic, recreational or navigational uses of the protected natural resource.

5. SOIL EROSION:

The Department finds that the activity would not cause unreasonable erosion of soil or sediment nor unreasonably inhibit the natural transfer of soil from the terrestrial to the marine or freshwater environment.

6. WATER QUALITY CONSIDERATIONS:

The proposed project is composed of welded aluminum.

The Department does not anticipate that the proposed project would violate any state water quality law, including those governing the classification of the State's waters.

7. OTHER CONSIDERATIONS:

The Department did not identify any other issues involving existing scenic, aesthetic, or navigational uses, soil erosion, habitat or fisheries, the natural transfer of soil, natural flow of water, water quality, or flooding.

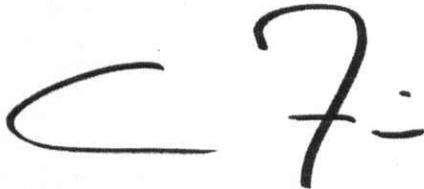
BASED on the above findings of fact, and subject to the conditions listed below, the Department makes the following conclusions pursuant to 38 M.R.S.A. Sections 480-A et seq. and Section 401 of the Federal Water Pollution Control Act:

- A. The proposed activity would not unreasonably interfere with existing scenic, aesthetic, recreational, or navigational uses.
- B. The proposed activity would not cause unreasonable erosion of soil or sediment.
- C. The proposed activity would not unreasonably inhibit the natural transfer of soil from the terrestrial to the marine or freshwater environment.
- D. The proposed activity would not unreasonably harm , freshwater wetland plant habitat, threatened or endangered plant habitat, travel corridor, estuarine, or marine fisheries or other aquatic life.

- E. The proposed activity would unreasonably harm significant wildlife habitat; freshwater fisheries; and freshwater, aquatic or adjacent upland habitat in that the construction and use of the proposed boat lift would result in a permanent loss of freshwater aquatic area and would have additional adverse impacts on the functions and values of the habitat, and that the applicant has access to the water by means of use of a temporary system and other existing facilities within close proximity to the project site.
- F. The proposed activity would not unreasonably interfere with the natural flow of any surface or subsurface waters.
- G. The proposed activity would not violate any state water quality law including those governing the classifications of the State's waters.
- H. The proposed activity would not unreasonably cause or increase the flooding of the alteration area or adjacent properties.
- I. The proposed activity would not be on or adjacent to a sand dune.
- J. The proposed activity would not be on an outstanding river segment as noted in Title 38 M.R.S.A. Section 480-P.

THEREFORE, the Department DENIES the above noted after-the-fact application of JOHN A. GILMAN for the permanent installation of a boat lift in a great pond.:

DEPARTMENT OF ENVIRONMENTAL PROTECTION
CORRECTING THE ORDER DATED 01/12/10. The effective date and expiration date remain the same as in the original.



This permit is digitally signed by Andrew C. Fisk on behalf of Commissioner David P. Littell. It is digitally signed pursuant to 10 M.R.S.A. § 9418. It has been filed with the Board of Environmental Protection as of the signature date.
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PLEASE NOTE THE ATTACHED SHEET FOR GUIDANCE ON APPEAL PROCEDURES...