

ALBERT SIROIS – RESIDENTIAL OVERBOARD DISCHARGE PERMIT RENEWAL  
DEP APPROVAL #W-003648-5A-D-R (appeal submitted by Herman Turndorf)

- Licensee Response to Appeal

102

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July 12, 2010

**VIA ELECTRONIC & U.S. MAIL**

Susan Lessard, Chair  
c/o Terry Hanson  
Board of Environmental Protection  
17 State House Station  
Augusta, Maine 04333-0017

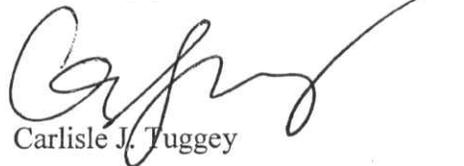
Re: Response to Appeal filed by Herman Turndoff  
in the Matter of Department Permit #W-0003648-5A-D-R  
Wastewater Discharge License.

Dear Chair Lessard:

Please find attached the Sirois response to the issues raised in the Turndorf Appeal of Department ordered Permit #W-003648-5A-D-R.

Thank you for your attention to this matter.

Very truly yours,



Carlisle J. Tuggey

CJT/jac  
Enclosure

cc: Virginia E. Davis, Esq.  
Patrick J. Mellor, Esq.  
Sue Harmon  
Albert C. Sirois

STATE OF MAINE  
BOARD OF ENVIRONMENTAL PROTECTION

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Albert C. Sirois and Sirois Associates	)	
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Department Permit #W-003648-5A-D-R	)	<b>SIRIOS RESPONSE TO APPEAL FILED</b>
Wastewater Discharge License	)	<b>BY HERMAN TURNDORF</b>
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**I. INTRODUCTION**

The Maine Department of Environmental Protection (“Department”) properly issued Mr. Albert Sirois (“Mr. Sirois”) an overboard discharge (“OBD”) license renewal. On March 4, 2010, abutting property owner, Dr. Herman Turndorf filed an appeal of Department issued Overboard Discharge License #W-003648-5A-D-R with supplemental information. Subsequently, the Board of Environmental Protection (“Board”) allowed additional information filed by Turndorf into the record in its ruling on the evidence dated June 22, 2010. The Applicant now files its response to the issues raised in the March 4, 2010 appeal.

The Appellant, Dr. Herman Turndorf, bought property from Mr. John Alley in 1981. In 1987, Mr. Sirois purchased the property in question from Mr. Alley. Since prior to that conveyance, Dr. Turndorf has owned the abutting property parcel. A year-round overboard discharge license has been in place for the property since 1981 and it has been regularly renewed.

## II. ARGUMENT

### A. The Department of Environmental Protection does not have jurisdiction to consider the appeal of the 1987 license.

The Turndorf appeal argues that the Department erred when it issued the OBD license in 1987, more than two decades ago. The assertion is that there had been no discharge in the twelve months previous to the 1987 issuance. Turndorf also asserts that there was no structure in place prior to 1989. The factual underpinning of this assertion is directly contradicted by the Appellant's Exhibit F, the deed to Mr. Sirois, which expressly includes the buildings. Regardless, however, of these factual underpinnings, the time for an appeal of the legal and factual merits of a 1987 issuance of an OBD lapsed decades ago. Dr. Turndorf's statements are factually incorrect. More importantly, Dr. Turndorf is challenging the factual basis for the 1987 license and thus the 1987 license itself and all succeeding licenses. In a letter dated May 4, 2010, from Attorney Mellor to this Board, the Appellant confirms this in his statement "[t]he items are clearly relevant and must be explored in order to determine whether or not the Applicant was properly granted an overboard discharge permit when said permit was initially provided... ."

An attempt to challenge the validity and factual underpinnings of previously issued Department permits outside the permit appeals period must fail. Accordingly, the permit was final and subsequent transfer and renewal actions were proper. The Board agreed and ruled in its June 22, 2010 letter that "All prior OBD licenses issued for the property were not appealed, are final, and cannot be reconsidered by the Board as part of the appeal of the February 3, 2010 license." This ruling is now the law of this case, and the Board must not alter that decision. Furthermore, the entire basis of certainty upon which permit holders rely would be eroded, and

any neighbor or other interested party could raise outdated challenges to previously issued permits on a whim, bringing the permit system into uncertainty.

1. Strict compliance with appeals periods is required.

In *Wright v. Town of Kennebunkport*, the Maine Law Court refused to revoke a property owner’s building permit where the complaining neighbor failed to file an appeal of the permit within the 30-day appeals period specified in the Kennebunk Land Use Ordinance. *Id.*, 1998 ME 184, ¶ 3, 715 A.2d 162, 163. The Town of Kennebunkport argued that the zoning board did have jurisdiction to review the appeal and because the permit was void from the beginning, it could be revoked even though the 30-day appeal period had lapsed. *Id.* at ¶ 4. The Law Court disagreed and reasoned that to allow review of the permit would render the 30-day time limit a nullity. *Id.* at ¶ 6. In reaching its decision the Law Court explained that “[s]trict compliance with the appeal procedure of an ordinance is necessary to ensure that once an individual obtains a building permit, he can rely on that permit with confidence that it will not be revoked after he has commenced construction.” *Id.* In defense of their untimely appeal in *Wright*, the abutters unsuccessfully argued that the CEO’s refusal to revoke in response to their appeal constituted a “decision” and restarted the appeals period 30-day deadline. *Id.* at 164. The Court refused to revive the appeals period based on the denial of a party’s untimely request to revoke.

The Law Court has relied upon *Wright* to require strict compliance with appeals procedures and to find lack of jurisdiction in a board or court where an appeal was brought outside the designated appeals period. *See Fryeburg Water co. v. Town of Fryeburg*, 2006 ME 31, ¶ 19, 893 A.2d 618, 623 (holding that parties may not revive an appeals period by requesting to revoke a permit or requesting a cease and desist order); *Juliano v. Town of Poland*, 1999 Me. 42, ¶ 3, 725 A.2d 545, 547 (finding that a good cause exception for failure to meet the appeals

period cannot be implied in an ordinance where the ordinance prescribes a specific appeals period).

2. The filing of an appeal is jurisdictional.

As demonstrated by the Law Court's holdings cited above, the Board has no jurisdiction to hear an appeal of a factual determination made by the Department in 1987. The applicable statute requires that appeals to the Board be filed within thirty (30) days of issuance. *See* 38 M.R.S.A. §341-D(4). The filing of an appeal is jurisdictional. Hence, if an appeal is filed after an appeal period has lapsed, the Board has no jurisdiction to hear it. *See Rice v. Amerling*, 433 A.2d 388, 391 (Me. 1981).

Since this appeal is a direct appeal of the Department's factual determinations made for the issuance of the 1987 permit, the appeal is of that permit. Therefore, the Board has no jurisdiction to hear this appeal. Furthermore, Dr. Turndorf's appeal is estopped because this appeal is an attempt to reopen past facts and licenses that have been legally established for over 20 years and relied upon by the Applicant. Sound public policy supports this conclusion as the facts are clouded by over twenty years of time, the records are not conclusive and Department staff members involved in 1987 are not available. As a result of the strict appeals period rule, and the basic premise of the Turndorf appeal being based on factual underpinnings of a previously issued permit, this Board should not reach the substance of the Appeal, as it does not have jurisdiction to do so.

3. The doctrine of laches bars the instant appeal.

Dr. Turndorf has been an abutter to the Sirois property since 1981. There has been an OBD license for the property since that time. However, Dr. Turndorf failed to comment, complain or appeal the issuance of Department's OBD license and renewals for the past 30

years. As a consequence, the current appeal is barred by the doctrine of laches. The doctrine of laches is an equitable doctrine by which courts may deny relief to a claimant who has unreasonably delayed or been negligent in asserting a claim. Laches focuses on the reasonableness of the plaintiff's delay in bringing a suit (or in this case, an appeal to the Board) and the seriousness of the prejudice to the defendant. Here, the Applicant, the Department and the Board are severely prejudiced by Dr. Turndorf's delay as it is almost impossible to reconstruct the Department's understanding of 20-year-old facts.

**B. If the Board Deems it Appropriate to Hear this Appeal, the Turndorf Appeal Fails on its Merits**

1. The property was used year-round throughout the 1980s and 1990s.

The Department's factual determinations supporting the 1987 license are the legally established facts and are correct. There has been a structure on the property since long before Mr. Sirois bought it. Mr. Alley, the previous owner and licensee, used the structure as a shop for his fishing gear and as a camp. The documentation is not clear as to when the system was installed; however, it appears that the discharge pipe was extended in 1986/1987 and other actions were taken consistent with the Department's direction. Mr. Alley used the structure year round. Once Mr. Sirois bought the property, it continued to be used year round. His son lived there for several years beginning in the summer of 1987. His daughter lived there year round starting in 1996, again for several years. The structure acquired from Mr. Alley burned and was replaced in 1997. In addition, the property has been rented to winter tenants.

2. Mr. Sirois has owned the property in question since 1987.

Dr. Turndorf is alleging that Mr. Sirois has not owned the property since 1987. Mr. Sirois created Sirois Associates for family successional and ownership purposes. Then and now,

Mr. Sirois is the majority shareholder, controlling owner of Sirois Associates, and authorized representative and clerk. The current Annual Report filed with the State of Maine is attached.

Note: ←

(Exhibit 1). If the Board sees fit, the Applicant will simply amend the application to specify a renewal and transfer from the name Albert Sirois to Sirois Associates. The Board must not

Exhibit 1 was not admitted into the record.

overturn the Department's decision on this issue. The appropriate remedy would be to allow the suggested amendment to the application via remand to the Department.

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3. There is no feasible alternative for the discharge on the property.

The Appellant, Dr. Turndorf, mistakenly argues that the renewal license should not have been issued because "there is no indication that a less damaging alternative" has been explored. The property in question is approximately .5 acres. The Department's letter to Mr. Sirois dated December 14, 2009 states: "Department records contain sufficient information to conclude that there is no technologically-proven alternative system to this OBD system at this time." It is the Department's standard practice to confirm the availability of feasible alternatives, and where none exist, renew an OBD license. To confirm whether a feasible alternative exists, Sirois hired licensed site evaluator, Matthew Page, to determine whether a feasible alternative exists.

Note: Exhibit 2 was not admitted into the record. CBertocci

(Exhibit 2). Mr. Page completed a Department Suitability Report for 33 Tecumseh Trail, East Boothbay, Maine which confirms the Department's conclusion in the December 14, 2009 letter that there is no less damaging alternative.

For all the reasons cited above regarding the history of the property's use, Dr. Turndorf's appeal is not properly before the Board and must be rejected and the Department properly issued the OBD license.

4. Procedural error committed by the Department must not penalize the property owner and was remedied by the Department

The final basis for Dr. Turndorf's appeal is procedural. The Department mistakenly issued the Sirois OBD license prior to the end of the comment period on the application. The Department remedied its inadvertent procedural error by allowing the Appellant to supplement the record with Exhibits I, K, L, and M. See Board Letter to Parties, June 22, 2010. Importantly, the existence of a procedural error committed on the part of the Department, should not be considered an Applicant error. The Applicant, Mr. Sirois, used the public notice form provided by the Department and fully complied with the Department's regulations. The Department's form provides:

A request for a public hearing or request that the Board of Environmental Protection assume jurisdiction over this application must be received by the DEP, in writing, no later than 20 days after the application is found acceptable for processing, or 30 days from the date of this notice, whichever is longer. Requests shall state the nature of the issues(s) to be raised. Unless otherwise provided by law, a hearing is discretionary and may be held if the Commissioner or the Board finds significant public interest or there is conflicting technical information.

Public comment will be accepted until a final administrative action is taken to approve, approve with conditions or deny this application. Written public comments or requests for information may be made to the address below.

The Department complied with the notice provisions for public comment. This Board must not penalize the Applicant for an inadvertent error made by the Department, an error which did not deprive Appellants of rights and which has since been admitted and remedied by the Department.

110

### III. CONCLUSION

The Board must reject this appeal as it is an appeal of factual determinations made when licenses were issued in 1981, 1982, 1987 and 2004. The Department properly issued the renewal of the OBD license in question, as it routinely does for grandfathered properties such as this. The Board has no legal authority to hear an appeal of those findings. Legal and equitable principles bar Dr. Turndorf, an abutter for almost thirty years, from waiting until 2010 to challenge the Department's findings of fact made in 1987 and 2004. If there is a procedural error, the remedy is a remand to the Department, not a repeal or modification of the license. Repeal or modification is fundamentally unfair as the Applicant has committed no error. Therefore, the Applicant requests that the Board dismiss Dr. Turndorf's appeal.