

DAVID E. RICE

Natural Resources Protection Act

Removal of Special Condition #5 – South Bristol

ORDER UNDER APPEAL



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

DEPARTMENT ORDER

IN THE MATTER OF

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|---------------------------------|--------------------------------|
| DAVID E. RICE |) NATURAL RESOURCES PROTECTION |
| South Bristol, Lincoln County |) COASTAL WETLAND ALTERATION |
| REMOVAL OF SPECIAL CONDITION #5 |) WATER QUALITY CERTIFICATION |
| L-23698-4E-B-M (denial) |) MINOR REVISION |
| |) FINDINGS OF FACT AND ORDER |

Pursuant to the provisions of the Natural Resources Protection Act, 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 modification application of DAVID E. RICE 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: In Department Order #L-23698-4E-A-N, dated October 11, 2007, the Department issued a permit to David E. Rice under the Natural Resources Protection Act (NRPA) for the construction of a 12 foot wide by 110 foot long pile supported commercial pier system which included a seasonal ramp, seasonal float, combination trap chute and access stairs, platform, and equipment shed in South Bristol. The project is located adjacent to the Damariscotta River on Clarks Cove Road in the Town of South Bristol. In November 2007, CORNELIA JOHSON, DIRK BRUNNER, LINDA BRUNNER, JOHN ROUNDS, ATHAR PAVIS-ROUNDS, and PETER ROUNDS filed a petition for review of the Department's decision with superior court. While the appeal was pending, the petitioners brought to the Department's attention new information pertaining to alternative project locations, which had not been before the Department during its original review. At the request of the Department, on February 25, 2008, the court remanded the matter back to the Department for further review. The permit holder and the interested parties submitted additional information for the Department's consideration. In Department Order #L-23698-4E-A-A, dated September 10, 2008, the Department approved the construction of the pile supported commercial pier system, with conditions, after consideration of all of the evidence in the record, including the new information. That decision was appealed to the Board of Environmental Protection by the interested parties based upon title, right, or interest in the property proposed for development, soils; existing scenic, aesthetic, recreational, and navigational uses; and coastal wetland considerations. The applicant did not contest any facts, conclusions, or conditions of the permit during the appeal. On April 16, 2009, the Board affirmed the Department's approval of the project, with conditions, in Board Order #L-23968-4E-A-Z.

The commercial pier system consists of a 12-foot wide by 110-foot long pile supported pier for the purpose of operating the applicant's commercial lobster fishing business. A four-foot wide by 34-foot long seasonal wooden ramp leads from the pier to a 20-foot wide by 12-foot long seasonal wooden float. Additional aspects of the pier system included a six-foot wide by six-foot long access platform, a four-foot wide by 14-foot long combination access stairs and trap chute, and an eight-foot wide by 10-foot long by 10-foot high equipment shed to be placed at the easternmost end of the pier abutting the shoreline. The applicant designed the pier system to provide all-tide access and to fully accommodate his commercial fishing needs.

B. **Summary:** The applicant requests approval to remove Special Condition #5 from Board Order #L-23698-4E-A-Z. Special Condition #5 states "No trap storage will be permitted on the permanent pier." This condition of approval was placed on the Board Order in an effort to minimize further impacts to the coastal wetland such as shading effects and to minimize potential impacts on the scenic and aesthetic uses of the resource. The applicant requests the modification to allow him to store his 600 lobster fishing traps on the pier because the pier is in a location that is capable of providing reasonable security and protection from theft and/or malicious actions from third parties. The applicant stated that the lobster fishing traps would be stored on the pier during the off-season of lobster fishing, which is during the winter months of December through March. The applicant also stated that the location of the pier is needed as an area to prepare, service, clean, and repair fishing traps prior, during, and after the commercial lobster fishing season. The applicant contends that the existing commercial pier approved by the Department will meet his need of capacity to store fishing traps, and is a more practicable alternative to his current place of storage. During the fishing season (April through November), the applicant utilizes the existing pier to ready, stage, repair, and maintain his fishing traps along with other related fishing equipment. The applicant currently uses a family-owned pier and multiple moorings during the fishing off-season for lobster trap storage, service, and repair. The pier and moorings are located in the Town of South Bristol.

With the special condition on the permit, the fishing traps may not be on the permanent pier for any substantial amount of time. As stated above, the applicant proposes to store the bulk of his lobster fishing traps on the pier during the off-season, which is during the winter months of December through March. The applicant states that the traps would remain stationary on the permanent pier for that entire duration of time pending any extenuating circumstances such as inclement weather or times when the applicant chooses to continue his fishing activities through the winter months.

C. **Current Use of Site:** The site of the proposed project is comprised of approximately 0.4 acres and contains an existing residential structure and a commercial pier system which is referenced above. The site is referenced in the Town of South Bristol's tax maps as Lot #3 on Map #28. The deed for the proposed project can be seen at the Lincoln County Registry of Deeds located in Book #2277 on Page #288.

2. DISCUSSION AND FACTUAL FINDINGS:

A. COASTAL WETLAND CONSIDERATIONS:

The applicant requests that Board Order #L-23698-4E-A-Z be modified to remove Special Condition #5, which prohibits the applicant from storing his fishing traps on the existing permanent pier. The applicant does not anticipate that the proposed project will have a direct impact to the coastal wetland. As approved in the Department's decision, the existing permitted pier currently has an indirect impact of 1,536 square feet due to shading effects on the coastal wetland. When taking the dimensions of a typical commercial lobster fishing trap and the dimensions of the existing pier into consideration, annual storage of the applicant's 600 fishing traps has the potential to have an indirect impact of 605 square feet on the coastal wetland that would be covered by the fishing traps. The amount of indirect impact from storage of the applicant's traps is dependent on such factors as percentage of light transmittal through the traps, orientation of the sun, and the configuration of the traps on the pier. The total cumulative indirect impact on the coastal wetland from the existing pier and the applicant's storage of traps would be approximately 2,141 square feet.

The NRPA defines coastal wetlands as “all tidal and subtidal lands; all areas with vegetation present that is tolerant of salt water and occurs primarily in a salt water or estuarine habitat; and any swamp, marsh, bog, beach, flat or other contiguous lowland that is subject to tidal action during the highest tide level for the year in which an activity is proposed...” (38 M.R.S.A. § 480-B [2-]). The applicant’s proposal to store his fishing traps on the existing permanent pier is not allowed under his current permit and would indirectly alter a portion of the coastal wetland and therefore requires a modification of the original permit under the NRPA and the Department’s Wetlands and Waterbodies Protection Rules (Chapter 310). Chapter 310 interprets and elaborates on the NRPA licensing criteria, and guides the Department in its determination of whether a project’s impacts on the functions and values of the wetland would be unreasonable.

Coastal wetlands such as the intertidal area of Clark Cove and the tidal waters of the Damariscotta River are considered Wetlands of Special Significance as defined in Chapter 310 (4), and thus receive heightened protection under the Department’s Rules. For projects 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 activities listed in the rule. An applicant may provide evidence that no alternative location outside of the Wetland of Special Significance exists for projects such as health and safety projects; crossings by road, rail, or utility lines; water dependent uses; expansion of a facility or construction of a related facility that cannot practicably be located elsewhere because of the relation to the existing facility, if the facility was constructed prior to September 1, 1996; mineral excavation and appurtenant facilities; walkways; or restoration or enhancement of the wetlands of special significance. Chapter 310 (3)(W) provides that a water dependent use is “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.”

The applicant’s proposal to store fishing traps on the existing commercial pier is similar to boat storage, a use specifically listed as non-water dependent Chapter 310. The permitted existing commercial pier meets the definition of a “water dependent use.” However, the Department finds that the requested modification of the permit to allow for storage of fishing traps from December through March, is for an activity that does not meet the definition of “water dependent use.” The Department further finds that trap storage cannot be categorized as any other potentially acceptable activity listed in Chapter 310(3)(W) for which a practicable alternative may not exist. Therefore, the Department finds that the impacts to the coastal wetland, a Wetland of Special Significance, would be unreasonable, specifically shading impacts to the vegetation and marine life and potential impacts to scenic and aesthetic uses of the resource, concerns that were the basis of the imposition of Special Condition #5 in the original approval of this project.

Independent of the finding above that the off season storage of traps and fishing gear is not a water dependent use, and therefore the impacts of the applicant’s proposal are unreasonable, the Department also finds that the applicant has reasonable alternatives to the proposed winter storage of traps on the pier. A proposed project may be found to be unreasonable if it would cause a loss in wetland functions and values and there is a practicable alternative to the project that would be less damaging to the environment. Despite the language of Chapter 310(3)(W) above, the applicant provided 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 impacts if possible, and has kept the amount of wetland to be altered to the minimum amount necessary. Chapter 310 (9)(A) requires that the analysis includes:

- 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.

The applicant submitted an alternatives analysis for the proposed project completed by LeBlanc Associates, Inc., dated March 12, 2010. The applicant considered the following alternatives to the proposed project:

1. Use of Upland Area. The applicant considered the use of the upland area above the project site to store traps. Currently, the applicant has a ten year license agreement with the property owner for use of the property. The property is comprised of 0.4 acres and contains a residential structure and the existing permitted pier. The applicant states that due to the presence of the home, a leach field, and an entry road, there is no room to store his fishing traps. For this reason, the applicant determined that the use of the upland area is not a feasible alternative to the proposed project.
2. Use of Mooring and Float at “The Gut”. The applicant currently uses a mooring (Mooring #287) at a commercial docking facility known as “The Gut”. This docking facility is located on the Damariscotta River, north of Rutherford Island. This facility is used by numerous other fishermen. The applicant states that float associated with the mooring is not large enough to store the applicant’s 600 traps.
3. Use of Existing Pier System at Jones Point. The applicant currently owns, jointly with other family members, a parcel of property that contains an existing pier. This property is located on Will Alley Road off Jones Point in the Town of South Bristol. The pier on this property was approved by the Department on April 8, 1986 in Department Order #L-13376-03-A-N. The pier measures 10 feet wide by 120 feet long, but it does not have an associated ramp and float. The applicant also owns a mooring (Mooring #9) that is situated seaward of the pier. The applicant currently uses this site during the fishing off-season for lobster trap storage, service, and repair. Although the applicant did not provide evidence of limitations that would prohibit storage at this site, the applicant stated that if the proposed permit modification is approved, he shall abandon usage of this pier.

While the application was being reviewed, the Department received a number of comments from abutting property owners; these persons are “interested parties”, as defined in Department Rules, Chapter 2(1)(I), for the purposes of this application review. Interested parties expressed concern that the applicant has other alternative locations available to him. Specifically, interested parties stated that the applicant has the capability to use the upland area above the project site. Interested parties contend that the applicant designed the pier to facilitate an easy transfer of his fishing traps from the pier to the upland area.

The Department reviewed the applicant's analysis of alternative locations for trap storage and visited each of the alternatives. The Department finds that the applicant failed to offer convincing evidence that the use of at least one existing facility or the use of a combination of facilities is not feasible when cost, existing technology and logistics are considered.

- a. The upland area above the project site may not accommodate the storage for all of the applicant's traps due to the presence of structures on the north, south, and west side of the property. However, the east side of the property which is principally used for parking provides enough space for a limited amount of traps to be stored. The Department finds that this upland area can be used in combination with other alternative locations to store all of the applicant's traps outside of lobster fishing season.
- b. Due to the size of the float, not all of the applicant's traps can be stored on the float at the applicant's mooring in "The Gut" at any one time. However, this float can provide space for a limited number of the applicant's traps. The Department finds that this float can be used in combination with other alternative locations to store all of the applicant's traps at any given period of time.
- c. The applicant acknowledged that he currently uses the existing pier at Jones Point to store his lobster fishing traps during the fishing off-season. The applicant did not provide evidence of limitations that would prohibit further use of this site for trap storage.

After reviewing the evidence in the record including information provided by the applicant and interested parties, the Department finds that there is at least one practicable alternative to the project that would be less damaging to the environment. In particular, the applicant could use a portion of the upland area at the proposed project site, the existing mooring and float at "The Gut", the existing pier at Jones Point, or a combination of all sites. The use of these sites would represent a practicable alternative to the proposed project that is less damaging to the coastal wetland. The use of these alternatives comports with the provision in Chapter 310 (9)(A) cited above, which encourages utilizing, managing, or expanding an existing site.

B. HARM TO HABITAT:

Interested parties assert that storage of the applicant's traps would result in an increase in shading effects on the coastal wetland around the project site.

Staff from the Department of Marine Resources (DMR) visited the project site on July 16, 2007 during the Department's review of the original permit application. In its comments of that application, DMR commented that shading and subsequent loss of marine vegetation would be a likely result of construction of the commercial pier system. DMR also stated that the intertidal area is comprised of ledge/stone/cobble/gravel with approximately 75% coverage of rockweed (*Ascophyllum nodosum*).

According to a presentation on February 10, 2010 given by Dr. Tom Trott of Suffolk University at the Rockweed Research Priorities Symposium sponsored by DMR, rockweed is an important plant species that provides habitat and refuge for a number of epiphytes, invertebrates, and juvenile fish. Rockweed can also serve as a foraging area for fish, birds, and invertebrate predators.

DMR reviewed the requested permit modification and commented that the storage of traps would contribute to shading of marine vegetation. DMR stated that upland storage is

preferred and appears to be a viable option for the applicant. DMR recommends that Special Condition #5 remain in effect.

In a report entitled "Maine's Coastal Wetlands: Types, Distribution, Rankings, Functions and Values," prepared by the National Oceanographic Atmospheric Administration in conjunction with the Department's Division of Environmental Assessment, dated September 1999, a recommendation is given to consider seasonal and interannual variability when reviewing marine wetland assessment, because plant and animal species tolerant of freezing temperatures are present in the intertidal area in the wintertime. Tolerant species include rockweed and other macroalgae. The report states that freezing temperatures, lack of light, ice scour, lack of food, and other physical and biological factors affect the intertidal environment. These factors cause a die off of plants and animals, a migration by mobile species to sheltered sites, or other biological interactions.

The Department considered information provided by the applicant, interested parties, and DMR. The Department finds the presentation by Dr. Tom Trott and "Maine's Coastal Wetlands" report to be credible evidence on the assessment of biological functions and values of coastal wetlands and the associated marine species that utilize the coastal wetland. Given that a lack of light negatively affects plant and animal species according to the "Maine's Coastal Wetlands" report, the Department finds that rockweed and other marine vegetation, which are present at the proposed project site, would be negatively affected by lack of light and shading effects. Due to the shading effects from the storage of traps at the project site, a loss of the aquatic habitat due to indirect impacts would occur over time and would have additional adverse impacts on the functions and values of the coastal wetland beyond those determined to be reasonable for the pier itself, which is a water dependent use. As a result, the quality of the coastal wetland would be compromised. Given that shading from storage of traps would result in a permanent loss of habitat and given that the applicant has the capability to store his fishing traps by other means at other existing sites and facilities within reasonably close proximity to the project site, the Department finds that the applicant has not adequately demonstrated that the impacts to the coastal wetland cannot be avoided. The Department further finds that the proposed project would unnecessarily contribute to adverse effects on the coastal wetland and therefore represents an unreasonable impact on marine wetland aquatic habitat.

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

The project is located in Clark Cove on the Damariscotta River, which in general 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. However, the area surrounding the project site is developed with numerous residential structures, and the cove area is developed with commercial activities which include a shellfish aquaculture facility and an existing commercial pier that provides rental space and all-tide access to fishermen. The applicant submitted several photographs of the proposed project site.

Interested parties contend that the proposed activity to store traps on the commercial pier system adds to the commercial aspect of the resource and detracts from the scenic character of the surrounding area. Interested parties also stated that storage of traps on the pier would compromise the interested parties' view of the resource.

With regard to the interested parties' concern, scenic quality is generally measured on a broad geographic scale and is focused on public views; therefore, visual impairments to abutting

properties are not the primary factor. However, the Department considered the interested parties' concerns for potential adverse impacts to the scenic character of the resource.

Department staff visited the project site on June 22, 2007, July 2, 2007, September 5, 2007, December 31, 2008, May 19, 2009, July 2, 2009, and March 2, 2010. The proposed project was evaluated using the Department's Visual Impact Assessment Matrix and was found to have an acceptable potential visual impact rating. Based on the information submitted in the application, the visual impact rating, the site visits, and comments provided by interested parties, 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. For this reason, the Department finds that the proposed activity would not unreasonably interfere with existing scenic, aesthetic, recreational or navigational uses of the protected natural resource.

Based upon its review of the modification application, DMR's comments, information provided by the applicant, and all other information in the record, the Department finds that the requested minor revision is not in accordance with Departmental standards. The winter storage of the applicant's commercial fishing traps is not a water dependent use under the Wetland Protection Rules, Chapter 310, and therefore its impacts on this Wetland of Special Significance would be unreasonable. Moreover, the applicant has not demonstrated that storage of his commercial fishing traps on the existing permanent pier between December 1 and March 31 is necessary, as there are in fact practicable alternatives available to him, including the arrangement he currently utilizes. Board Order #L-23698-4E-A-Z will not be modified to remove Special Condition #5. Other commercial fishing activities including readying, servicing, maintaining, and repairing lobster fishing traps, as described in the modification application, during the active fishing season (approximately April 1 through November 30), are allowable uses of the existing permitted pier. The findings of fact, conclusions and conditions remain as approved in Board Order #L-23698-4E-A-Z.

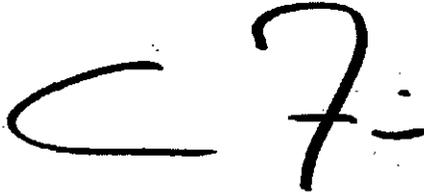
BASED on the above findings of fact, and subject to the conditions listed below, the Department makes the following conclusions pursuant to 38 M.R.S.A. Sections 480-A et seq. and Section 401 of the Federal Water Pollution Control Act:

- A. The proposed activity would not unreasonably interfere with existing scenic, aesthetic, recreational, or navigational uses of the resource.
- 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 unreasonably harm significant wildlife habitat, marine wetland plant habitat, freshwater wetland plant habitat, threatened or endangered plant habitat, aquatic or adjacent upland habitat, travel corridor, freshwater, estuarine, or marine fisheries or other aquatic life in that shading effects from the storage of lobster fishing traps would have additional adverse indirect impacts on the functions and values of the coastal wetland that would accumulate over time, and the applicant has alternative locations to store his traps within reasonable proximity to the proposed project site.
- E. The proposed activity would not unreasonably interfere with the natural flow of any surface or subsurface waters.

- F. The proposed activity would not violate any state water quality law including those governing the classifications of the State's waters.
- G. The proposed activity would not unreasonably cause or increase the flooding of the alteration area or adjacent properties.
- H. The proposed activity would not be on or adjacent to a sand dune.
- I. The proposed activity would not be on an outstanding river segment as noted in 38 M.R.S.A. Section 480-P.

THEREFORE, the Department DENIES the application of DAVID E. RICE which requests the modification of Board Order #L-23698-4E-A-Z to remove Special Condition #5. All other Findings of Fact, Conclusions and Conditions remain as approved in Department Order #L-23698-4E-A-N, and subsequent orders, and are incorporated herein.

DEPARTMENT OF ENVIRONMENTAL PROTECTION



This permit has been digitally signed by Andrew C. Fisk on behalf of Commissioner David P. Littell. It is digitally signed pursuant to authority under 10 M.R.S.A. § 9418. It has been filed with the Board of Environmental Protection as of the signature date. 2010.07.15 13:08:31 -04'00'

PLEASE NOTE THE ATTACHED SHEET FOR GUIDANCE ON APPEAL PROCEDURES...

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