APPLICANT'S RESPONSE TO APPEAL

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

Re: Appeal in The Matter of: Department Permit approval #L-24420-4P-A-N for Michael E. and Diane W. Traphagen: Construction of Pier and Float System

Dear Ms. Lessard,

I am writing in response to the Appeals in the matter of Department of Environmental Protection (DEP) Permit approval #L-24420-4P-A-N for Michael E. and Diane W. Traphagen for construction of pier and float system by the two abutters: Mr. Todd P. Merolla and Mr. Christopher O. Bursaw. This letter addresses both appeals letters, starting with that of Mr. Merolla.

Mr. Merolla sent a 7-page letter of Administrative Appeal dated August 31, 2009. On the first page of this letter, he stated that the applicant had provided a "*substantial amount of misinformation*". As the agent, I signed the application which says that "I believe the information is true, accurate and complete." I take signing this oath very seriously and I have only sent statements that I believe are the truth and have never sent misinformation.

On Page 2, Mr. Merolla comments on the stream determination. The application, which was mailed on November 13, 2008, acknowledged that there is a stream regulated by DEP under the Natural Resources Protection Act (NRPA) on the property. In Attachment 9, it refers Chris Redmond and Colin Clark's Field Determinations (ID # 6119 and 6280). These determinations found that there was a NRPA regulated stream, but did not delineate the start of the stream. I requested an on-site pre-application meeting before submitting the application to confirm the start of the stream and discuss permitting issues. Lisa Vickers of DEP visited the site on June 30, 2008. She found that the north end was the drainage and not regulated. She took photos to help in the determination of the start of the stream. The photo she marked with an arrow indicating the start of the stream was attached as Photo 5 in the application. This photo was sent via an email from Lisa dated 10/7/2008. This was followed by a memo also dated 10/7/2008 with the entire series of photographs. I discussed with Beth Callahan of DEP, the project analyst for this project, the stream determination by Lisa Vickers several times. The email is copied in a letter to Beth from me dated March 30, 2009 in the second paragraph on page 2.

At the DEP meeting on April 29, 2009 at which Beth Callahan, Rich Baker, Jim Cassida, Henry Berne and Ralph Spinney from the Town of Southport and I were present, much of the conversation centered on the fact that the NRPA definition of a stream is not the same as for a tributary stream under Shoreland Zoning. It was discussed that at this site, the Town of Southport regulations were stricter than NRPA. Rich Baker, Shoreland Zoning Coordinator, did make a site visit in July of 2009 to determine the start of a 'tributary stream' under Shoreland Zoning for the Town of Southport. He wrote a letter to Ralph Spinney, Building Inspector of the Town of Southport documenting his findings. He also wrote a letter dated September 2, 2009 addressed to David Lipman of Lipman Katz and McKee that reports on his site visit of July 28, 2009. In this letter, he notes that "*tributary stream' pursuant to the Shoreland zoning rules is not the same as a 'river, stream or brook' pursuant to the National Resources Protection Act.*" This second letter was copied to Beth Callahan at DEP as well as to Michael Traphagen, me, Ralph Spinney, Henry Berne and Gerald Gamage of the Town of Southport.

In the third paragraph of page 2 of Mr. Merolla's letter, he states that the "*Site visits by Department staff does not include July 28, 2009 inspection by Rich Baker.*" I submitted the application to DEP on November 13. 2008, well before Rich Baker's site visit. My application addresses the other visits. As stated above, Beth Callahan was copied on Rich Baker's report of this visit.

In the third paragraph of page 2, he further states that "*The municipality issued an approval to the proposed project subsequent to this meeting on February 26, 2009*". The Town of Southport did issue a building permit for Mr. Traphagens's pier (dock), number 1485, dated 2-26-08, which I believe was incorrectly dated—it should have read 2-26-2009. The Wharves and Weirs hearing for the pier and float system project was held on February 18, 2009 at 4 pm.

Mr. Merolla, also in the third paragraph of Page 2, refers to a meeting on May 4, 2009. I believe that he is referring to the meeting on April 29, 2009. I was at this meeting; Mr. Merolla was not. He states that "*DEP found the information submitted by the applicant and applicant's agent, Lauren Stockwell, to be repeatedly false and/or misleading and therefore deferred the application decision to the Town of Southport.*" The DEP did not make this finding, nor was the application decision deferred to the Town of Southport. What was discussed was that under Town of Southport Shoreland Zoning Ordinances, a house must be 75' from a 'tributary' stream. Therefore, the DEP Draft Order, a copy of which I had received via email from Lorraine Kelley on April 19, 2009, was going to be changed and the house site/stream relocation portion as submitted not allowed. After conveying this to Mr. Traphagen, he reviewed his options. He, the applicant, later decided to withdraw the stream relocation portion of the project. In an email dated July 28, 2009, I informed Beth that Mr. Traphagen "*has decided that he would like you to issue the NRPA permit for the pier on his property. If he gets Town approval to be within 75' of the stream, he will re-apply for that as a separate application.*"

Mr. Merolla states in the first paragraph of page 3 that "*It is questionable whether any building or septic plans for this parcel will be approved.*" When the NRPA application was filed, no application for a building permit was submitted to the Town of Southport. However, Mr. Traphagen had a septic design for the site, which was marked on the plan submitted as

Attachment 5 in the application. Mr. Traphagen intended to submit an application to the Town once DEP approval had been granted. He had no reason to believe that a building permit would not be issued.

In the second paragraph of page 3, Mr. Merolla refers to a report entitled 'The Cameron Point Excavation at Southport Island, Maine'. This is not supplemental evidence. Mr. Merolla sent a copy of this report in a letter to Beth Callahan of DEP. Prior to submittal of the NRPA application, I sent a letter to Earle G. Shettleworth, Jr. Director of Maine Historic Preservation Commission on November 12, 2008. The response from MHPC, dated December 10, 2008 by Kirk F. Mohney, Deputy State Historic Preservation Officer concludes that "*there will be no historic properties affected by the proposed undertakings as defined by Section 106.*" Letters were also sent to the five Maine Indian Tribes as required by federal law. I heard back from both the Penobscot and Passamaquoddy Tribes. The Penobscot email states: "*This project appears to have no impact on a structure or site of historic, architectural or archaeological significance to the Penobscot Nation as defined by the National Historic Preservation Act of 1966, and subsequent updates.*" The Passamaquoddy email states: "*The Passamaquoddy THPO has reviewed the following applications regarding the historic properties and significant religious and cultural properties in accordance with NHPA, NEPA, AIRFA, NAGPRA, ARPA, Executive Order 13007 Indian Sacred Sites, Executive Order 13175 Consultation and Coordination with Indian Tribal Governments, and Executive Order 12898 Environmental Justice. The proposed 2 projects listed above will not have any impact on cultural and historical concerns of the Passamaquoddy Tribe.*" In a conversation with Beth Callahan of DEP, she indicated that she had copies of these responses.

The second paragraph of page 3 of Mr. Merolla's letter says that "*The applicant stated that the shell midden is located on an abutting property.*" I did state this because that was my understanding after speaking with Mr. Christopher O. Bursaw, the other abutter who is appealing this permit, at the Wharves and Weirs hearing on February18, 2009. He stated that the pier would not impact the midden because it was further into the cove. My understanding was that it was on the abutting property. I assumed that since Mr. Bursaw owns the adjacent property and his family at one time owned Mr. Traphagen's property, that he would know the location of the midden. In my email of August 18, 2009 to Beth Callahan I state "*I don't think the shell midden is on the property at all, but further south on the Bursaw property. That is what Chris Bursaw said at the Wharves and Weirs hearing for the Town. I did not see any evidence of a shell midden (there are several near here and these ones have piles broken shells).*"

Mr. Merolla notes in the third paragraph of page 4 that "*according to Geographic Information Systems (GIS) mapping software, there are no mapped areas of significant wildlife habitats or inland fishery habitat associated with the proposed project site.*" This is a correct statement. The GIS map is available on-line and was checked prior to submittal. The Maine Department of Inland Fisheries and Wildlife has not mapped any significant habitats in this vicinity. This agency reviewed the application for this project and apparently did not have any concerns. The Maine Department of Marine Resources also reviewed this application. Their comments addressed to Beth Callahan and dated February 17, 2009 conclude that "*This project as proposed should not cause any significant adverse impacts to marine resources, traditional fishing,*

recreation, navigation or riparian access." Their other comments refer to the stream relocation, which is no longer proposed.
In the last paragraph of page 4, Mr. Merolla states that "the proposed pier, ramp and float are sited within 30 feet of an existing stream". This is incorrect. As can be seen on the plan submitted as Attachment 5, the pier is 135' from the start of the NRPA-regulated stream as determined by DEP staff (Lisa Vickers). The pier is approximately 240 feet from the outlet of the stream as measured in a straight line; longer if one follows the contour of the shore. The pier location has not changed. The pier is approximately 120' from the drainage ditch/tributary stream under Town of Southport Shoreland Zoning as determined by Rich Baker on his July 28, 2009 site visit.

In the second paragraph of page 5, he contends that access to the proposed dock would involve cutting trees. Access to the pier will be via the existing path/right of way across the existing culvert over the drainage ditch. A footpath from this ROW to the pier will be constructed. Access ways to resources are allowed under NRPA. No tree cutting is planned.

In the third paragraph of page 5, he discussed avoidance. He says that the application states: "*The only public pier is on Southport Island and is known as the Newagen Town Landing. There is no large boat launch at this facility; the pier allows use by skiffs only.*" The Newagen Town Land IS the ONLY public pier on Southport. What is stated in Attachment 2 of the application is that at this facility: "*The pier is for skiffs only. There is a waiting list of several years for moorings in the harbor. There is no boat launch at this facility.*" At the time of submittal, Mr. Traphagen had larger vessels 22' and 39' in length. Boats of this size could not be kept on the float at this facility; they would need to be kept on moorings. For transport to these vessels, a skiff would be needed to be kept on the float.

Continuing this discussion, Mr. Merolla refers on the first paragraph of page 6 to a public launching ramp and dock less than ½ miles away on Townsend Gut. This launching ramp is actually 3.9 miles away by road as measured on the topographic map (Map Tech) and is in Boothbay Harbor. This launch ramp does not have a dock as is stated; the one nearby is a private pier on an abutting property. There are not moorings available in this vicinity. This facility was not included in the alternative analysis because it neither has moorings nor a float for a skiff, both of which would be needed to accommodate Mr. Traphagen's vessels. These vessels are too large to be trailered and launched at a boat ramp. Also, crossing the Southport bridge in the summer, which is open every half hour, adds to the difficulty of using this ramp.

Mr. Merolla notes in the first paragraph of Page 6 that Mr. Traphagen has sold his 39' boat. The record in this matter is that he owned 39' and 22' boats. Although it is not part of the record, I do not dispute that Mr. Traphagen has sold his 39' boat, but he is currently in the market for a new boat.

In the second paragraph of page 6, Mr. Merolla states that DEP recently denied another permit application for a dock at the first house on the left of Joppa Road. I was the agent for this application as well. This application for Southport Partners, LLC, on Map 4 Lot 13, was approved on August 30, 2006 and is L-23170-4E-A-N.

In the last paragraph of page 6, Mr. Merolla discusses the proposed house. As indicated in the application, there was a very serious potential buyer at that time. This sale fell through, but the permit for a pier is fundamental to the use of the property for access to the water. When built, the house will eventually be sold. It is highly likely that anyone buying the property would want water access from a waterfront lot. There are no conditions on the NRPA permit that an applicant cannot sell his property. Mr. Traphagen is currently using this pier to access his property by boat.

The following comments address Mr. Christopher O. Bursaw's appeal letter dated September 5, 2008. His first expressed concern in the second paragraph of page 1 is the proximity of Mr. Traphagen's pier to his pier and the safety implications. Mr. Traphagen owns approximately 371' of waterfront (282.03 linear feet measured between the property pins at the tie line) according to the survey submitted as Attachment 5 in the application. On this plan, the pier is shown at the northern property line, 28.8 feet from the northern property at the closest point. Mr. Bursaw owns the property to the south. I do not have an exact measurement to his pier, and could not make a measurement on the Google earth image because his pier is so new. However, his pier is more than 300 feet to the south.

Second, in the same paragraph, Mr. Bursaw mentions his mooring and proximity to Mr. Traphagen's pier. This was discussed at the Wharves and Weirs hearing (the hearings are taped) at which he was present. The marine contractor, Peter Cole, who also services Mr. Bursaw's mooring I believe, was present at this meeting. Mr. Bursaw's mooring was marked by a pot buoy and clearly visible at the time of the hearing. Mr. Cole explained that the Traphagen pier would be tucked in close to shore and not obstruct Mr. Bursaw's mooring. His explanation satisfied the Board of Selectmen, who issued the permit. It also appeared to appease Mr. Bursaw, who had no other comments at that time. Beth Callahan was not at the hearing. She however was aware that a permit was issued by the Town of Southport following the Wharves and Weirs hearing.

Mr. Bursaw's third comment in this paragraph suggests that no house will be built. The record is clear that building a house was always intended. The portion of the NRPA application to relocate a portion of the stream for the house site was withdrawn. This is because a NRPA permit from DEP is not required to build more than 75' from the stream. A new house lot, entirely outside the 75' setback from the stream, is now proposed. When the NRPA application was submitted, Mr. Traphagen had every reason to believe that he would receive a building permit from the Town once he applied. In fact, a building permit for the house has since been issued by the Town of Southport on October 15, 2009. The permit number is #1539.

In the last paragraph of page one, Mr. Bursaw suggested that the project was 'railroaded through'. The application was submitted in November 13, 2008 and accepted on December 9, 2008. The deadline for DEP's decision was April 8, 2009. When Mr. Traphagen was advised in April of 2009 that the stream relocation portion of the project was likely to be denied, he asked for an extension to review his options. Once he decided to withdrawal the stream relocation portion, the permit for the pier was issued via email on August, 27, 2009, more than 9 months later. The project was hardly railroaded through.

On page 2 of Mr. Bursaw's Appeal letter, he states that the shell midden is not located on an abutting property. As I stated above in my response to Mr. Merolla's comments, that the existence of a shell midden on the abutting property was my understanding based on a conversation with Mr. Bursaw at the Wharves and Weir's hearing. I sent letters to all five Maine Indian Tribes and to Maine Historic Preservation Commission as part of the application process. The comments received were that they did not have objections to this project. These letters are part of the record. I have not tried to hide any facts. If any artifacts were to be found, I would strongly encourage the property owner to contact MHPC and the Indian tribes.

In response to the second paragraph on page 2, Mr. Bursaw notes that two boat ramps were not considered in the alternatives analysis: one next to the Southport Bridge in Townsend Gut and one in Cozy Harbor. These were not included in the alternatives analysis because Mr. Traphagen's boats are too large to trailer and launch at boat ramps. His vessels require either a deep water pier for docking the boats or moorings with transport via skiff from a dock. Perhaps I should have included these in the written analysis, but since they were so inadequate to meet the project purpose, I did not consider them alternatives.

In the last paragraph, Mr. Bursaw questions the motives of the applicants. As the agent for Mr. Traphagen, I did, at his request, apply to DEP for relocation of the upper reaches of a low value intermittent stream to locate a particular house design on Mr. Traphagen's lot. No work was done without a permit. I answered all of DEP's questions and responded to their comments. When I became aware that a portion of the application was not going to be approved, I contacted Mr. Traphagen and advised that this portion be withdrawn. I was in email and phone contact with Beth Callahan while Mr. Traphagen decided how to proceed. In an email dated July 28, 2008, I informed Beth "*I just spoke with Michael Traphagen. He has decided that he would like you to issue the NRPA permit for the pier on his property. If he gets Town approval to be within 75' of the stream, he will re-apply for that as a separate application. Thank you very much for your patience.* "

Mr. Traphagen has spent considerable effort and money coming up with a house design that meets all the Town and State setbacks. Both of the abutters, Mr. Merolla to the north and Mr. Bursaw to the south, who are appealing the permit for Mr. Traphagen's pier and float system, have homes and piers on their waterfront lots. Mr. Traphagen only wants the same on his waterfront lot.

The Finding of Fact in the issued NRPA permit are all supported by the record. There is no basis to reverse this decision.

Sincerely,
Stockwell Environmental Consulting

Lauren T. Stockwell

Lauren T. Stockwell
Wetland Scientist/Botanist

cc: Cynthia S. Bertocci, Board of Env. Protection
Peggy Bensinger, Assistant Attorney General
Mr. Todd Merolla
Mr. Christopher O. Bursaw
Beth Callahan, Dept. of Env. Protection
Michael E. and Diane W. Traphagen