

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

- Appeal submitted by André G. Duchette on behalf of John A. Gilman



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February 4, 2010

Chair, Board of Environmental Protection
17 State House Station
Augusta, ME 04333-0017

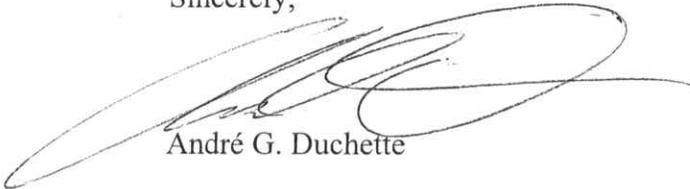
RE: **Notice of Appeal: John A. Gilman**
L-24460-2B-B-N

Dear Ms. Lessard:

Pursuant to 38 M.R.S.A. § 341-D(4) and the Department's Rules Concerning the Processing of Applications and Other Administrative Matters (Chapter 2), 06-096 CMR 2.24 (April 1, 2003), enclosed please find the applicant, John A. Gilman's Notice of Appeal and attachments thereto.

We thank you in advance for your attention to this matter. If you have any questions, please do not hesitate to contact me.

Sincerely,



André G. Duchette

Enclosures

Cc. David P. Littell, Commissioner (w/enc.)
Beth Callahan, Project Manager (w/enc.) ✓
John A. Gilman (w/enc.)

STATE OF MAINE
BOARD OF ENVIRONMENTAL PROTECTION

IN THE MATTER OF:)	
)	
JOHN A. GILMAN)	NOTICE OF APPEAL
Belgrade, Kennebec County)	
PERMANENT BOAT LIFT)	
L-24460-2B-B-N (denial))	

NOW COMES, Appellant, John A. Gilman, by and through his undersigned attorney, and appeals the Department of Environmental Protection (hereinafter "Department") Natural Resources Protection Alteration of Great Pond Water Quality Certification Findings of Fact and Order (L-24460-2B-B-N), dated January 12, 1010 (hereinafter "Order"). John A. Gilman objects to the findings, conclusions and conditions of the Departments Order as follows:

STANDING: AGGRIEVED STATUS

John A. Gilman has standing to bring this appeal as he is an aggrieved party by virtue of the Departments Order denying his application for a Natural Resources Protection Act Permit.

STATEMENT OF FACTS¹

On July 15, 2009, John A. Gilman submitted an Application for a Natural Resources Protection Act Permit to permanently maintain an aluminum boat lift in Great Pond at 87 Abena Shores Road, Belgrade, Kennebec County, Maine and submitted an Application fee of \$532.00. The justification for the permanent boat lift is based primarily on 1) Mr. Gilman is disabled from a parachute accident while serving in the United States Military Special Forces. As a result of his disability, Mr. Gilman is limited in how he can access Great Pond in order to fish, which is an activity that Mr. Gilman enjoys above all else. The boat lift allows him to get in and out of his

¹ All references are to the documents and correspondences on record with the Department Of Environmental Protection.

boat without assistance. In addition, a permanent boat lift will allow him to access the water in the offseason (spring and fall) for fishing. 2) Mr. Gilman does not have a practicable alternative to store his boat lift. Mr. Gilman shore front does not afford him the ability to bring his boat lift ashore. To do so would involve extensive removal of rocks, shrubs, trees and other native vegetation, which is essential to prevent erosion and runoff. The Department indicates in its Order that Great Pond Marina allows for boat lift storage, but offers no basis for this other to indicate that the “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.” While Mr. Gilman recognizes that there are services to remove boat lifts, these services typically store the boat lifts on the owner’s property. As previously indicated, this is not a practical solution. It is also not a practical undertaking to somehow move the boat lift to another location (i.e. the boat launch) as the boat lift does not float and it would take a great undertaking and expense to move it and take it out at the boat launch.

In his application, Mr. Gilman specifically stated that the canopy is not permanent and is removed from approximately Columbus Day until Memorial Day. In addition, Mr. Gilman specifically stated that his boat is not stored year round on the boat lift.

In support of Mr. Gilman’s justification for allowing a permanent boat lift, Mr. Gilman submitted evidence of his medical condition, which provides that Mr. Gilman suffers from spinal stenosis and arthritis and has a dropped foot on his left leg. Because of severe atrophy he must wear an AFO in order to walk and as a result has limited balance. The boat lift is necessary to allow Mr. Gilman access to his boat and access to Great Pond in order to fish and recreate as previously stated.

On August 11, 2009, Beth Callahan, Project Manager, Division of Land Resources Regulation, Bureau of Land & Water Quality, indicated several deficiencies in Mr. Gilman's application. In addition, Ms. Callahan stated as follows: "please be aware that the Department does not generally allow permanent structures in great ponds. Further, the proposed project does not meet Shoreland Zoning guidelines; therefore, the proposed project cannot be considered by the Department.

On or about August 20, 2009, Mr. Gilman submitted his response to the deficiencies raised in Ms. Callahan's August 11th correspondence with an additional fee in the amount of \$532.00.

On September 15, 2009, Ms. Callahan provided Mr. Gilman notice that his application was acceptable for processing on September 14, 2009. Once again, Ms. Callahan indicated that "the Department is unlikely to grant a permit for a permanent structure in a great pond. Permanent structures are considered to result in unreasonable impacts to the resource because they can be avoided in virtually every case by using an alternative...**The Department does not consider safety or public health issues as factors when determining whether a proposed project represents a reasonable impact on a resource.**" *Emphasis added.* It was also requested that Mr. Gilman provide a functional assessment on the resource area completed by a qualified professional wetland scientist.

On September 30, 2009, the Maine Department of Inland Fisheries and Wildlife (MDIFW) submitted its report to Ms. Callahan. The report stated that any movement of the structure is likely to be minor and consequently, "impacts to the pond's substrate in the area of the lift will also be minor." The report further stated that "**there will be no impacts to the**

pond's fisheries." *Emphasis added.* It is evident from the report that the Maine Department of Inland Fisheries and Wildlife did not visit the site in making its findings.

On October 2, 2009, Ms. Callahan, once again, indicated that there were deficiencies in Mr. Gilman's application. Ms. Callahan's letter requested information about the canopy, which was previously submitted in Mr. Gilman's initial application; and where Mr. Gilman's boat was stored during the winter months.

On October 15, 2009, a Shoreline Functional Analysis, prepared by Kleinschmidt, was presented to the Department addressing the standards set by the Natural Resources Protection Act (NRPA). In addition, counsel for Mr. Gilman responded to the deficiencies raised in Ms. Callahan's October 2nd correspondence and provided additional arguments in support of Mr. Gilman's permit request.

On January 12, 2010, the Department entered its Order denying Mr. Gilman's permit request for the reasons stated therein.

FINDINGS, CONCLUSIONS OR CONDITIONS OBJECTED TO OR
BELIEVED TO BE IN ERROR

1. The boat lift's indirect impact to the habitat is approximately 250 square feet. *See Order at p. 1-2.*
2. The applicant failed to offer convincing evidence that no practicable alternative exists. *See Order at p. 2-3.*
3. The applicant failed to offer convincing evidence which demonstrates that impact to the protected resource would be minimized. *See Order at p. 3-4.*
4. The boat lift 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 impact on the functions and values of the habitat. *See Order at p. 4-5.*
5. The Department erred in not taking safety, disability and public health into account in making its determination.

BASIS OF THE OBJECTION AND CHALLENGE

“The [Maine Board of Environmental Protection] is not bound by the commissioner's findings of fact or conclusions of law but may adopt, modify or reverse findings of fact or conclusions of law established by the commissioner. Any changes made by the board under this paragraph must be based upon the board's review of the record, any supplemental evidence admitted by the board and any hearing held by the board.” 38 M.R.S.A. § 341-D(4)(A).

1. **The boat lift does not have an indirect impact on the habitat of approximately 250 square feet.** It appears that the Department factors in the canopy and the shading effect associated therewith in making this determination, but as stated on numerous occasions, the canopy does not stay on the boat lift year round. This is evidenced by the photos taken by the Department on February 25, 2009 and December 21, 2009, and included in the Department's record. The direct impact to the habitat is approximately 4 square feet as a result of the four support beams. *See* MDIFW report at p. 1 (“The boat lift has contact with the pond's substrate at 4 post locations for a total of 4 sq. ft. of impacts”). This impact is minimal and does not affect the freshwater habitat as indicated more fully below. Furthermore, even if the canopy is taken into effect, the area of littoral habitat impacted is approximately 90.3 square feet and not 250 square feet. *See* Shoreline Functional Analysis at § 4.0.

2. **The applicant provided convincing evidence to demonstrate that no practicable alternative exists.** The Department contends that there are practicable alternatives that would be less damaging to the environment. In determining whether a practicable alternative exists, the Department must use a reasonableness inquiry. “A balancing analysis inheres in any reasonable inquiry.” *Uliano v. Board of Environmental Protection*, 2009 ME 89, ¶ 22, 977 A.2d 400, 410 (quoting *Uliano I*, 2005 ME 50, ¶ 13, 876 A.2d 16, 19).

When balancing the alternatives listed by the Department against allowing for a permanent boat lift, the suggested alternatives are not reasonable. The MDIFW, made a determination, *in reviewing the photographs*, that with some planning, it would not be a difficult undertaking to remove the structure and would not cause extensive environmental impacts. *See* MDIFW report at p. 1-2. This determination, however, is not supported by the evidence. The Shoreline Functional Analysis (SFA) provided that the shoreline habitat immediately adjacent to the area of interest consists of a naturally armored bank comprised of boulders and large cobble and contains dominant species observed in the area. SFA at § 3.1. The shoreline vegetation consists mainly of shrubs with hemlock and occasionally white pine in the over-story. *Id.* Herb layer vegetation along the shoreline was limited to the occasional goldenrod, aster, and poison ivy. *Id.* *See also* SFA Plate 1. In addition the SFA stated that the shoreline contains a number of important shrubs used by a wide variety of wildlife. *Id.* at § 3.3. “This natural armoring serves an important function in preventing shoreline erosion and slumping of banks.” *Id.* at § 3.4, p. 10.

When balancing the fact that the boat lift has minimal affect on the function and values of the habitats in the impact area and vicinity versus the environmental impact to the shoreline by taking the boat lift in and out of the water each season, removal of the boat lift via the shoreline is not a reasonable practicable alternative.

The Departments second proposed alternative is offsite storage; however, the Department’s only evidence of this is an observation of a boat lift located at Great Pond Marina. While we do not object that Great Pond Marina provides a service of putting boats in the water and stores boats, it is unclear if the Marina also removes boat lifts and stores them onsite. Most boat lifts are stored on the adjacent property; however, as indicated above, this is not a practicable solution for the applicant. It is also not a practicable solution to float or dredge the

boat lift to the boat launch located approximately .7 miles away. Any dragging of the boat lift to the launch site would most certainly create a greater impact on the habitat. It is also unclear whether the boat launch could in fact be floated. Despite the applicants attempts to find such a service, most services only provide simply moving the boat lift onto the property via the shoreline. This is further evidenced by the fact that the Department references the boat launch and the Marina's boat launching capabilities, but does not offer any mechanism or services to move the boat lift; therefore, no practicable alternative exists.

3. **The applicant provided convincing evidence which demonstrates that impact to the protected resource would be minimized.** The Department stated in its Order that the applicant did not submit evidence which demonstrated that impacts to the protected resource would be minimized. This is patently false given the fact that the applicant provided a thirteen page Shoreline Functional Analysis, which concluded that "the boat lift has minimal affect on the function and values of the habitats in the impact area and vicinity." SFA at § 4.0. In fact the SFA indicated that the boat lift could potentially provide aquatic cover and habitat structure in place of naturally occurring objects since the existing shoreline lacks substantial amount of large woody debris or other cover sources. *Id.* Even the Department's evidence indicated that impact to the pond's substrate would be minor and there would be "*no impacts to the pond's fisheries.*" *Emphasis added.* MDIFW report at p. 1. In addition, the Department found that "there is relatively little purely biological issue raised by this isolated instance." *See* Lake Assessment Program at p. 1. Based on the above, the applicant objects to the Department's conclusion that the applicant did not provide convincing evidence which demonstrates that impact to the protected resource would be minimized and the applicant believes this conclusion to be in error.

4. The boat lift does not 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 does not result in a permanent loss of freshwater aquatic area and does not have additional adverse impact on the functions and values of the habitat.

The NRPA “is designed to address a legislatively identified need to ‘prevent the degradation of and encourage the enhancement of’ critical water-related state resources.” *Hannum v. Board of Environmental Protection et al.*, 2003 ME 123, ¶ 2, 832 A.2d 765 (quoting 38 M.R.S.A. § 480-A). The NRPA requires a permit for any construction, repair, or alteration of any permanent structure if located in any protected natural resource. 38 M.R.S.A. § 480-C. The NRPA establishes nine standards that must be met in order to obtain a permit. 38 M.R.S.A. § 480-D.

The standards that must be met are as follows:

1. The activity will not unreasonably interfere with existing scenic, aesthetic, recreational or navigational uses;
2. The activity will 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;
3. The activity will not unreasonably harm any significant wildlife 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;
4. The activity will not unreasonably interfere with the natural flow of any surface or subsurface waters;
5. The activity will not violate any state water quality laws;
6. The activity will not unreasonably cause or increase the flooding of the alteration area or adjacent properties;
7. The activity will not interfere with an adjacent sand dune, if applicable;
8. The activity is not interfering with an outstanding river segment; and
9. The activity does not involve dredging. 38 M.R.S.A. § 480-D.

The burden is on the applicant to prove that the standards are met. *See Hannum*, 2003 ME 123 at ¶ 12. In the Department's Order, it indicated that the applicant met his burden with respect to all of the standards above except the Department concluded that the proposed activity would be partially in violation of standard number 3 by "unreasonably harming 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. *See Order at p. 7.*

It is unclear from the record as to what proof the Department presents in determining that the activity unreasonably harms significant wildlife habitat; freshwater fisheries; and freshwater, aquatic or adjacent upland habitat. Rather, the applicant provided significant evidence and met his burden of proof establishing that the existence of a permanent boat lift would not unreasonably harm significant wildlife habitat; freshwater fisheries; and freshwater, aquatic or adjacent upland habitat. *See SFA.* As noted above, the MDIFW reviewed the proposed project and stated that there would be no resulting impact to the fisheries and the Shoreline Functional Analysis provided that there is potential that the lift may provide aquatic cover and habitat structure in place of naturally occurring object cover since the existing shoreline lacks substantial amounts of large woody debris or other cover sources. If anything, removal of the boatlift via the shoreline would have a negative effect on the adjacent upland habitat. While the MDIFW indicated that removal of the structure would not cause extensive environmental impact as asserted in the application, this is also not supported by the record in that "the shoreline of the

applicant's property contains a number of important shrubs used by a variety of wildlife." *See* Order at p.4.

The SFA and the represented pictures more than prove that in order to remove the boat lift, the shoreline would be disturbed and vegetation and natural wildlife habitat would have to be removed. The impacts of disturbing the shoreline far outweigh the 4 square feet of direct impact caused by the boat lift. Disruption to the shoreline can result in soil erosion and a decline in water quality. *See* SFA at § 3.4, p. 10.

Lastly, it appears from the Department's Order as well as the Department's Division of Environmental Assessment, Lake Assessment Program, that it is concerned about the cumulative effects of permanent structures in great ponds and the potential effects on freshwater aquatic habitat; however, the Department cannot base its findings and conclusions on mere speculation of the cumulative impacts of other permitting requests for boat lifts. *See Hannum*, 2003 ME 123 at ¶ 14 (holding that the fact-finders must rely on evidence, not mere speculation); *See also Uliano*, 2009 ME 89 at ¶6 ("the Board further erred by grounding its findings of cumulative impacts on speculation"). Ultimately, the evidence and the record establishes that there would be little to no harm to habitats and fisheries meeting the standard set by 38 M.R.S.A. § 480-D(3).

5. The Department erred in not taking safety, disability and public health into account in making its determination. The Department indicated, on September 15, 2009, that "the Department is unlikely to grant a permit for a permanent structure in a great pond...[and] *the Department does not consider safety or public health issues as factors when determining whether a proposed project represents a reasonable impact on a resource.*" *Emphasis added.* By not factoring particular safety and health concerns by the applicant in assessing whether or not other alternatives are practical, the Department is likely in violation of the Constitution of the

State of Maine by denying the applicant's due process and equal protection rights and the Americans with Disabilities Act (ADA). 42 U.S.C. § 12101 et seq. The ADA mandates that individuals with disabilities must be given an equal opportunity to access public facilities and that reasonable accommodations must be made to account for physical limitations of individuals with disabilities. Access to public facilities includes, but is not limited to, places of recreation. 28 C.F.R. § 36, App. B.). "A person [with a disability] ought to be able to enjoy the social and recreational pleasures of boating to the greatest extent consistent with his physical limitations." *See Nicholls v. Holiday Panay Marina, L.P.*, State of California Court of Appeals, Second District, Division Eight, Super. Ct. No. SC089574 (May 5, 2009).

REMEDY SOUGHT

The applicant respectfully requests that the Board reverse the Commissioner's decision and grant the applicant's Application for a Natural Resources Protection Act Permit; or, in the alternative, reverse the Commissioner's decision and grant the applicants permit to maintain a permit boat lift with certain conditions to satisfy any concerns the Board may have.

REQUEST FOR HEARING

As part of this Appeal, the applicant requests the opportunity to present oral arguments.

Dated this 4th day of February, 2010.


André G. Duchette, Esq. Bar No. 9872
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LIST OF APPENDICES

Appendix A: Shoreline Functional Analysis, prepared by Kleinschmidt, Energy & Water Resource Consultants.

Appendix B: Cases

1. *Hannum v. Board of Environmental Protection et al.*, 2003 ME 123, 832 A.2d 765.
2. *Uliano v. Board of Environmental Protection*, 2009 ME 89, 977 A.2d 400.
3. *Nicholls v. Holiday Panay Marina, L.P.*, State of California Court of Appeals, Second District, Division Eight, Super. Ct. No. SC089574 (May 5, 2009).