

DAVID E. RICE
Natural Resources Protection Act
Removal of Special Condition #5 – South Bristol

APPEAL DOCUMENTS

APPEAL OF DAVID E. RICE
IN THE
MATTER OF L-23698-4E-B-M (DENIAL)

Pursuant to the General Laws of the Department of Environmental Protection (“DEP”), 38 M.R.S. § 342-D(4), and DEP’s Rules Concerning the Processing Applications and Other Administrative Matters, 06-096 C.M.R. 2.24 (April 1, 2003), Applicant David E. Rice (“Applicant”) respectfully appeals DEP’s findings of fact and order in Department Order #L-23698-4E-B-M (“Denial”) and asks that the Board of Environmental Protection (“Board”) record be reopened on appeal.

Specifically, Applicant appeals the continued imposition of Special Condition #5 to his commercial permanent pier permit, which states, “No trap storage will be permitted on the permanent pier.” (Denial, Appendix 1.) Petition also appeals the underlying findings of fact of the Order: 1) that the proposed activity of storing lobster traps during the winter months (December through March) would unreasonably harm coastal wetland, specifically caused by shading impacts to nearby marine life and 2) that Applicant has alternative locations to store his traps within reasonable proximity to the proposed project site. Applicant asks that Condition #5 be removed from his permit.

1. Standing

Under DEP rules, an applicant must demonstrate that he or she has right, title, or interest in the proposed project site during all pending matters before the DEP and the Board of Environmental Protection (“Board”). 06-096 C.M.R. 2.10(11)(D). The existing deed for the property is enclosed (Appendix 2). Where the applicant is not the land owner, a lease agreement is sufficient to demonstrate right, title, or interest. *Id.*

Applicant has a valid license agreement with the project's landowner Elinor G. Edlund that provides Applicant "a 10 year license to use the dock and float for commercial purposes, including the right to make repairs, replacement or improvement of the dock and float. This license includes the right of access to the dock over the Premises of the Grantor." (Appendix 3.)

Furthermore, Applicant also has future rights to the property, as expressed in the "Restate First Amendment To the Elinor G. Edlund Declaration of Trust Restated in its entirety on September 25, 1997", which describes that Ms. Edlund "is desirous to further amend this trust in order to leave the Grantor's residential property in South Bristol, Maine to David E. Rice at the time of her death, in grateful recognition of all that David and his father Mervin have done for the Grantor during her lifetime." (Trust, Appendix 3.) The Trust further provides, "Upon the death of Elinor G. Edlund, the Trustee shall distribute the entire right, title and interest to the real property in Walpole, Maine being the same premises described in the deed to the Trustee recorded in Book 2277, Page 288 and attached hereto." (Appendix 3.)

As acknowledged by the DEP, "The deed for the proposed project can be seen at the Lincoln County Registry of Deeds located in Book 2277 on Page #288." (Denial, Appendix 2, pg. 2.)

Applicant is an "aggrieved person" pursuant to DEP rules. An "aggrieved person" is one "whom the Board determines may suffer particularized injury as a result of a licensing or other decision. 06-096 C.M.R. 2.24(1)(B). Special Condition #5 is personal to Applicant. DEP's decision to maintain Special Condition #5 has forced Applicant to look for other places to store his traps and also bear the burden of ensuring that any number of his traps do not stay on the pier for any substantial period of time.

Based on the foregoing, Applicant has the requisite right, title, and interest in the land to bring forth the present appeal and is by definition an “aggrieved person.”

2. Reopening the Record

Applicant respectfully asks that the Board reopen the record on the matter of Applicant’s permit and the special conditions contained therein. Pursuant to DEP Rules and Procedures, the Board may allow the record to be supplemented on appeal when it finds “relevant and material” evidence that either 1) has been introduced by a person who has shown due diligence in bringing it forth upon its discovery or 2) has been newly discovered and despite due diligence could not have been discovered previously. 06-096 C.M.R. 2.24(B)(5)(a-b).

Pursuant to DEP regulations, DEP must undergo a two-part analysis when rendering permits. DEP is charged with looking into whether an unreasonable environmental impact exists, and if so, whether there are practicable alternatives. “The activity will be considered to result in an unreasonable impact if [(1)] the activity will cause a loss in wetland area, functions, or values, and [(2)] there is a practicable alternative to the activity that would be less damaging to the environment.” 06-096 C.M.R. 310.5(A) (emphasis added). The regulation also states that even if there is no practicable alternative, “the application will be denied if the activity will have an unreasonable impact on the wetland.” 2 C.M.R. 06-096 310.5(D)(1). “Unreasonable impact” means that one or more of the standards of the Natural Resources Protection Act, 38 M.R.S.A. § 480-D, will not be met. Title 38 M.R.S., section 480-D, further provides that DEP “shall grant” a permit upon a showing that the proposed activity meets enumerated standards found in subparagraphs 1 through 9.

Based on an erroneous Department of Marine Resources (“DMR”) finding and subsequent faulty DEP finding, DEP concluded that Applicant failed to meet one of the nine

statutory standards. DEP then analyzed potential alternative sites for Petition to store 600 traps.

Applicant appeals all findings leading to DEP's conclusion that

[t]he 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.

(Denial, Appendix 1, page 7.) *See* 38 M.R.S. §480-D(3).

The original finding by the DMR that storage of lobster traps atop the pier would result in an environmental impact has proven to be erroneous. In a letter from DMR Deputy Commissioner David Etnier to DEP Director Andrew Fisk dated 07/27/10 (Appendix 4) ("DMR Letter"), DMR attested that "[DMR] erred in the comments it sent Beth Callahan of [DEP's] staff in [DMR's] memo dated August 31, 2009 (Appendix 5), regarding the request for seasonal trap storage on the recently constructed permanent pier." (DMR Letter, Appendix 4, page 1.)

Importantly, DMR further states,

At this time we are unaware of any criteria from our perspective that would justify the continued imposition of the ban on trap storage as contemplated by Special Condition #5. Should there be means for DEP to reopen consideration of the request by the applicant to eliminate Special Condition #5 we would respectfully request that that occur as soon as feasible. It is [DMR's] sincere hope that the applicant not be compelled to file an appeal to the Board of Environmental Protection or Maine's Superior Court given the considerable expense such an appeal would involve and given that DEP's July 2010 denial was partially based on insufficient technical review provided by DMR regarding the issue of trap storage.

(DMR Letter, Appendix 4, page 2.)

Unfortunately, an appeal is the only way the agencies' can rectify their mistakes. By reopening the record, DMR and the Applicant will be able to bring forth additional information in further support of the DMR Letter. Thus the Board would allow all new information to come

forward and allow the Applicant, state agencies, and interested parties to correctly apply the law and regulations to accurate facts.

DMR outlined two specific errors that resulted in DEP's denial of Applicant's request for removal of Special Condition #5. Applicant asks that the record be opened for the Board and DEP to consider the following new evidence:

A. NEW INFORMATION: Any Additional Shading Caused by Trap Storage During Winter Months Will Not Cause an Adverse Impact

DMR originally had commented that shading and subsequent loss of marine vegetation would be a likely result of construction of the commercial pier system. (Denial, Appendix 1, page 5.) DMR also commented that storage of traps would contribute to shading of marine vegetation, specifically rockweed (*Asophyllum nodosum*). (Denial, Appendix 1, page 5-6.) Based on DMR's erroneous conclusions about shading effects on rockweed, DEP incorrectly found that "[d]ue to the shading effects from the storage of traps at the project site, a loss of 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 reasonable for the pier itself, which is a water dependent use." (Denial, Appendix 1, page 5.)

New information from DMR since has clarified that trap storage of 600 lobster traps will cause no such impact. The DMR Letter states,

1) DMR was not fully aware and therefore did not properly evaluate the seasonal time frame that was being proposed for trap storage. It is now apparent in the text of DEP's July denial that the primary time during which the traps will be stored on the pier will be December through March. *DMR does not believe this will pose a consequential impact due to shading of nearby marine vegetation.* In addition, and in a larger context, this agency [(DMR)] feels that the entire issue of shading caused by the short or long term storage of lobster traps on piers needs a thorough evaluation. Toward that end we believe it is important that we meet with you and your staff directly to discuss what short term or cumulative impacts would occur from lobster traps shading at various times of year.

(DMR Letter, Appendix 4, page 1 *emphasis added*.) Because of this error, Applicant asks that the record be reopened for further correct fact finding to bring his permit in line with applicable law and available new information.

Furthermore, other indicia of DMR's erroneous findings have come forth since the modification denial. First, the Applicant obtained available portions of technical report information from DEP files (Appendix 6.).

Here are pertinent quotes from this report: ... "The marine environment, like terrestrial habitats, fluctuates annually and seasonally."... "In winter, 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 of mobile species to sheltered sites or other biological interactions. In low energy environments, ice buildup in the winter, scours plants and removes epifauna on tidal plants (Whitlatch 1982). Depending on the severity of the winter, shallow surface sediments can freeze 5 cm to 1cm below the surface (Whitlatch 1982). The freezing of sediments can kill benthic species or force them to burrow below surface layers. ..." This section was underlined in the DEP file copy.

Second, the Applicant has made recent email communications through Applicant's permitting expert, Joseph LeBlanc of LeBlanc Associates, Inc. ("LeBlanc") with the US Army Corps of Engineers ("Corps") (Appendix 7.). Both the technical report information and the communications with the Corps acknowledge minimal, if any, marine growth during the dormant winter months, particularly when principal trap storage is from December to March, as proposed by the Applicant.

This information is "relevant and material" to Special Condition #5. Whether lobster traps stored during the winter months unreasonably shade rockweed and/or other marine species adjacent to the pier and thus constitute an environmental impact is both relevant and material to Special Condition #5. The error was on DMR and DEP, not that of the Applicant. Applicant has timely brought forth new information from DMR, which was dated July 27, 2010. That information was unavailable at the time of DEP's review through no fault of lack of due

diligence on Applicant's part. In fact, Applicant's due diligence in this matter has included continued conversations made by LeBlanc, and Applicant with DEP and the Maine Lobstermen's Association to rectify this matter.¹

For these reasons, Applicant asks the Board to reopen the record. By reopening the record, the Board would allow DMR to meet with DEP staff, accurately discuss any effects trap storage would have, and properly resolve the issue of Special Condition #5. If no environmental impact is found, as Applicant expects will be the result of the Board's review, Applicant will have met all standards in 38 M.R.S. §480-D. Applicant, therefore, further requests pursuant to 38 M.R.S. §480-A et. seq. that his permit be modified by removing Special Condition #5 as required by Maine statutory law.

B. NEW INFORMATION: Applicant Does Not Have Any Viable Alternative Locations to Store 600 Traps

The second DMR error relates specifically to any available alternative locations at which Applicant could store his traps during winter months. Applicant also avers that DEP's own analysis of alternative locations was flawed based on the available record.

Special Condition #5 flowed from DEP findings that Applicant did not meet all of the standards in 38 M.R.S. §480-D. Without that finding, DEP is under no duty to investigate alternatives to the proposed use of the permit. We only reach the question of alternatives because DMR and DEP erroneously concluded that an unreasonable environmental impact will occur due to winter trap storage. Although Applicant has already established that new

¹ Upon receiving the conditioned permit, Applicant and LeBlanc discussed at length their options. LeBlanc followed up with DEP staff by telephone to inquire about Special Condition #5's inclusion in the permit because trap storage had never before been raised as a potential issue in the permitting process. Because the outcome of this issue could be precedent setting for working waterfront endeavors, Applicant and LeBlanc contacted the Maine Lobstermen's Association in late July. All of these actions show Applicant's surprise at Special Condition #5's inclusion and attempts to rectify the conditioned permit.

information has come forth clarifying that he meets all of section 480-D standards, new information similarly has come forward regarding DMR's understanding of alternative locations for trap storage.

In the DMR Letter, DMR also testifies that

2) DMR was not fully aware and therefore did not properly evaluate the true viability of the alternative sites for trap storage proposed by DEP. It is not apparent in the text of DEP's July denial that if the South Bristol pier itself cannot be utilized for the purpose of trap storage the applicant will need to store his 600 traps in at least three separate locations. DMR is concerned that the use of multiple alternative sites may not constitute a viable option and also that the three sites proposed may not be suitable individually or combined.

(DMR Letter, Appendix 4.)

DMR originally had commented, "upland storage is preferred and appears to be a viable option for the applicant." (Denial, 5-6.) DEP again relied on DMR's error in finding that 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." (Denial, 5.)

Because of this error, Applicant asks that the record be reopened for further correct factfinding to bring his permit in line with applicable law and available new information.

This information is "relevant and material" to Special Condition #5. Although analysis of alternative trap storage may be superfluous, the above information is nevertheless "relevant" and "material" to DEP's previous decision making. Once again, the error was on DMR and DEP, not that of the Applicant. Applicant has timely brought forth new information from DMR, which was dated July 27, 2010. The above information was unavailable at the time of DEP's review through no fault of lack of due diligence on Applicant's part.

For these reasons, Applicant asks the Board to reopen the record. Again, as stated before, by reopening the record, the Board would allow DMR to meet with DEP staff, accurately discuss any effects trap storage would have, and properly resolve the issue of Special Condition #5. If

no environmental impact is found, as Applicant expects will be the result of the Board's review, Applicant will have met all standards in 38 M.R.S. §480-D. Applicant, therefore, further requests pursuant to 38 M.R.S. §480-A et. seq. that his permit be modified by removing Special Condition #5 as required by with Maine statutory law.

3. **DEP Arbitrarily and Capriciously Found that Applicant Has Alternative Places to Store 600 Lobster Fishing Traps**

When, as here, an appellant challenges the findings of the administrative agency, the appellant cannot prevail unless he shows that the record compels contrary findings. *Lentine v. Town of St. George*, 599 A.2d 76, 80 (Me.1991). An administrative agency has acted arbitrarily or capriciously when its action is "willful and unreasoning" and "without consideration of facts or circumstances." *Cent. Me. Power Co. v. Waterville Urban Renewal Auth.*, 281 A.2d 233, 242 (Me.1971) (quotation marks omitted).

If reopened, the record containing new evidence clearly establishes that no practicable alternatives exist for Applicant to store his 600 lobster fishing traps. Moreover, Applicant argues that DEP nevertheless arbitrarily and capriciously concluded from previous available evidence that Applicant has alternative areas to store his traps. DEP summarized the issue by stating, "The applicant currently uses a family-owned pier and multiple moorings during the fishing off-season for lobster trap storage, service, and repair." (Denial, Appendix 1, page 2.) Applicant here refutes this conclusion and all other findings and conclusions by the DEP regarding alternative storage areas. For ease of understanding, DEP analyzed four separate alternatives. We too will deal with each in turn.

A. Use of Upland Area

DEP made multiple findings and conclusions regarding the 0.4 acres from which the Pier extends into Clark Cove. Applicant partially agrees with the DEP finding that “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.” (Denial, Appendix 1, page 5.) That fact is true – 600 traps could not be stored on this piece of land. Applicant, however, does take issue with the ensuing conclusions that “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 [DEP] 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.” (Denial, Appendix 1, page 5.)

The latter conclusion ignores DEP’s own observations and conclusions made upon viewing the postage-sized lot (Appendix 8). On March 11, 2010, DEP Project Manager Eric Ham found the septic tank and leach field location on the west (water) side and related, specially prepared overlying surface area, which are designed to meet the requirements of the Maine Department of Human Services/Health Engineering, effectively preclude winter on-site storage. The septic tank and leach field also prevent reasonable passage for handling and/or moving the Applicant’s 600 traps upland and beyond (Appendix 9).

Furthermore, the well-drilling firm that drilled the wells at this site, advised the Applicant not to store traps on (the east side of) the property because it lies over the aquifer that supplies the drilled wells (Appendix 10). Repeated trap storage use could contaminate the aquifer with migrating salt runoff. Reduced vegetation in the area due to trap storage also would result in greater runoff away from the aquifer and reduce aquifer recharge.

DEP's conclusion also ignores the realities of the 95-year-old land owner, Ms. Edlund, who requires 24-hour care. The remaining portion of the east side of the upland property, on which DEP supposes some traps could be stored, in fact is used as parking spaces for Ms. Edlund's caregivers and service personnel, as well as the Applicant and his sternman. No other parking area exists on the property. Further, this parking area is adjacent to the well field and aquifer described above.

Moreover, the right-of-way to this property only allows ingress and egress, not trap storage or other storage.

For the above reasons, trap storage of any kind is not practicable in the upland area. When all evidence is considered, it is arbitrary and capricious for DEP to require Applicant to store his traps there, in total or in part.

B. Use of Mooring and Float at "The Gut"

DEP looked to Applicant's mooring ("Mooring #287") at what DEP described as a commercial docking facility known as "The Gut" located in Damariscotta River, north of Rutherford Island. (Denial, Appendix 1, page 4.) DEP further commented that Applicant stated that numerous fishermen use the facility, and the mooring cannot store all 600 of his traps.² (Denial, Appendix 1, page 4.) DEP erroneously concluded that Applicant's float in the "The Gut" can be used in combination with other alternative locations to store all of the applicant's traps at any given period of time. (Denial, Appendix 1, page 5.)

DEP's conclusion willfully ignores the realities of the "The Gut" and the size of the Applicant's float. During the DEP staff's extensive and thorough investigation and review of the permit application for the Applicant's Clark Cove dock, the DEP Project Manager went out by

² Applicant respectfully clarifies that "The Gut" is the Town of South Bristol's internal harbor, not a "commercial docking facility", and that Mooring #287 resides in this very crowded harbor.

boat with the South Bristol Harbormaster and actually measured the moored float in "The Gut", due to the claims by the disgruntled Clark Cove neighbors that this float was perfectly suitable for storing and servicing the Applicant's 600 traps. DEP found that the float, moored on the Applicant's mooring #287 in "The Gut", measured in the 10' by 10' +/- range, as noted by DEP staff in the Applicant's Clark Cove DEP permit.

Further, in a previous response by the Applicant to neighbors' questions, the following information was forwarded to DEP staff on December 11, 2007:

You can barely turn around safely on such a relatively small float in a choppy harbor, due to all the boat traffic constantly churning the waters up. The idea of working on 6 traps at such a location, never mind 600 traps, is absurd. You would constantly be losing tools, equipment, traps and yourself overboard in such a confined space. This only reflects, once again, how little the plaintiffs or their representatives know about fishermen or their occupational requirements, and further, how ridiculous their claims are.

(Appendix 11.)

Moreover, it is unreasonable, in any shape or manner, to conclude that the minimal, fractional portion of the Applicant's 600 each, 4' long x 2' wide x 1.5' high traps that could be "stored" on this small float could significantly contribute, in any reasonable manner, to the Applicant's winter 600 trap storage needs. DEP staff's reference to storage "at any one time", as described above, is without basis. There is only one winter storage period in each twelve-month period. During this period the traps are stored and that's that.

Please note again that Applicant previously advised DEP that the main purpose of the Mooring #287 and the associated float is for safe harbor (Appendix 8), and certainly not non-functional, remote trap storage seven to eight miles by water from the Applicant's Clark Cove pier. DEP staff was also advised that the Applicant was on a waiting list for four years for this assigned #287 Mooring location in "The Gut", which represents safe harbor for the Applicant.

"The Gut" acts as safe harbor to many other South Bristol area fishermen, when they are

working their traps down at this end of South Bristol, and a storm comes in, regardless of where they call their home port. This is the principle purpose for this Mooring #287 float, not trap storage.

In summary, this small moored float does not represent, nor could it reasonably contribute to, any practical, cumulative alternative winter trap storage capacity, given the Applicant's 600 traps. The DEP staff rejected the float as a reasonable alternative when DEP staff issued the Applicant's Clark Cove dock permit the first time.³ Conditions have not changed since. Neither should DEP's analysis.

C. Jones Point Pier (AKA "S-Road Pier") and Multiple Moorings

DEP erroneously concluded, "The applicant currently uses [the S-Road Pier] during the fishing off-season for lobster trap storage, service, and repair." (Denial, Appendix 1, page 2). The DEP further found, "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, [Applicant] shall abandon usage of this pier." (Denial, Appendix 1, page 4). DEP's findings assume many things: 1) that the S-Road Pier is still available for trap storage by Applicant, 2) Applicant still uses the S-Road Pier for this purpose, and 3) that the S-Road pier is a viable alternative.

None of this is true. And the record reflects it. The S-Road Pier is in complete disrepair. It is unsafe to even walk on any area of it other than directly above the supportive under beams (stringers). The Pier certainly would be subject to possible collapse under the weight of any

³ DEP has issued the Applicant the Clark's Cove dock permit *four* times. Disgruntled neighbors have acted as roadblocks throughout the process. It is impossible for the Applicant to believe that these interested parties have not had some effect in guiding the outcome of the permit, specifically Special Condition #5.

stored traps (Appendix 12. Because of concern for his own safety, Applicant already has abandoned use of the Pier, as early as 2008.

Safety issues aside, the Pier is not functional for working water usage. Surrounded by rocky ledge, neither the Applicant nor any other reasonable fisherman would elect to maneuver a lobster boat, loaded with traps, directly to or from the S-Road Pier when substantially safer, more practical options are available to them at the Applicant's Clark Cove pier. Strong currents plague the S-Road pier area as well. Instead, any trap storage at the S-Road pier would require first tying up to the Clarke Cove Pier, unloading 600 traps, loading all the traps via multiple trips onto a pickup truck, driving six miles to the S-Road Pier, unloading the traps, then navigating the dilapidated S-Road Pier, and finally restacking the traps. These facts led DEP to rightfully reject the S-Road Pier as a viable, reasonable alternative for commercial fishing access and related activities, at the earlier stages of Applicant's Clark's Cove dock permitting process. It is arbitrary for DEP to resurrect such an outlandish option and argue now it is a practicable alternative.

D. Mooring #9

DEP referred to applicant's use of Mooring #9 "seaward of the (S-Road) pier". DEP also added that "[t]he applicant currently uses this site during the off-season for trap storage, service and repair." (Denial, Appendix 1, page 4). This statement is also not true. Upon completion of the Applicant's Clark's Cove pier in 2008, the reference mooring, Mooring #9, was relocated by the Applicant, six miles north to Clark's Cove, for the purpose of mooring the Applicant's lobster boat in close proximity to the Applicant's new pier, for immediate, daily access. Since then, it no longer is an "alternative" place to store traps.

E. Combination of All the Sites

DEP effectively found that “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 [(S-Road Pier)], or a combination of all sites.” (Denial, Appendix 1, page 5.) DEP also found the use of these sites to be practicable. According to DEP regulations, “practicable” means “[a]vailable and feasible considering cost, existing technology and logistics based on the overall purpose of the project.” 2 C.M.R. 06-096 310.3(R).

The purpose of Applicant’s project was to establish a working waterfront pier. As such, Applicants intentions were to use the pier for multiple purposes, such as to service, repair, ready, and stage trap strings and related gear at the beginning of and throughout the fishing season; to unstage trap strings and gear at the end of the season; and to store all 600 traps trap during winter periods. One must wonder for what other purposes the Applicant would erect such an expensive structure. No reasonable lobsterman would agree that parsing traps among an upland area, a float located seven to eight miles away by boat, and a ready-to-collapse pier would be practicable. It is not logical, efficient, or cost effective. It also is not a storage plan in line with existing Working Waterfront legislation that attempts to preserve traditional uses of coastal areas, such as lobstering, boating, and storing gear.

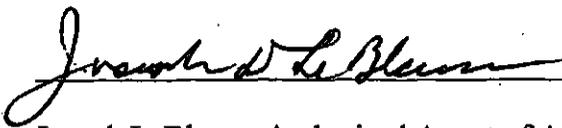
In reality, the Applicant could not practicably store 600 traps by parsing them among three sites described by DEP. They are too far spaced out for practical logistics and cost. When considering cost, time must also be considered. It would be extremely labor intensive to haul 600 traps at the end of the season; walk them up the Applicant’s perfectly storage-capable 110’ Clark Cove pier; stack some on the upland parcel, making parking impossible for the landowner and endangering the owner’s leach field, well field, and/or aquifer; loading the rest in a truck by

multiple trips; bringing some down to the S-Road Pier, which is completely unsafe on foot, by boat, or any other method; and then transporting the remainder by boat seven to eight miles away to a 10' x 10' float in the busy, choppy waters of the continually crowded "The Gut." This scenario does not even pass the straight-faced test.

For further practicable reasons, the Applicant wants all of his traps at the same location during winter storage periods for orderly maintenance and repair. Remotely "stored" traps at "The Gut" would not be readily accessible on a float during the winter storage period. Dispersed gear would no longer be under the direct control of or observation by the Applicant and thus would be subject to theft or malicious actions by third parties (both of which have occurred several times in the last few years, in the South Bristol area).

4. Conclusion

Based on the new information from the DMR and reasonable consideration of the ample record before the Board, the Applicant respectfully asks that the record be reopened for review, that new findings of no unreasonable use or environmental impact be made, that a finding of no viable alternatives for trap storage be entered, and Special Condition #5 be removed from the Applicant's permit.



Joseph LeBlanc - Authorized Agent of Applicant David E. Rice (Appendix 13)
President
LeBlanc Associates, Inc.
67 Dipper Cove Road
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207-833-6462

08/11/10

Date

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**Items with strikethrough are
supplemental evidence that
were not admitted to the record.**



STATE OF MAINE
Department of Environmental Protection

APPENDIX 1

JOHN ELIAS BALDACCI
GOVERNOR

David P. Littell
COMMISSIONER

July, 2010

David E. Rice
P.O. Box 15
Walpole, ME 04573

RE: Natural Resources Protection Act Application, South Bristol, #L-23698-4E-B-M (Denial)

Dear Mr. Rice:

Please find enclosed a signed copy of a denial of your request to modify the project approved in Board Order #L-23698-4E-A-Z. After carefully considering all of the issues related to the proposed lobster trap storage, the Department determined that the proposed project does not meet the standards of the Natural Resources Protection Act because the project is not a water dependent use as defined in Chapter 310 of the Department's Rules. You will also find attached some materials that describe the Department's appeal procedures for your information.

If you have any questions about the permit or thoughts on how the Department processed this application please get in touch with me directly. I can be reached at (207) 446-1586 or at beth.callahan@maine.gov.

Yours sincerely,

Beth Callahan, Project Manager
Division of Land Resource Regulation
Bureau of Land & Water Quality

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

DEPARTMENT ORDER

IN THE MATTER OF

DAVID E. RICE
South Bristol, Lincoln County
REMOVAL OF SPECIAL CONDITION #5
L-23698-4E-B-M (denial)

) NATURAL RESOURCES PROTECTION
) COASTAL WETLAND ALTERATION
) WATER QUALITY CERTIFICATION
) 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.

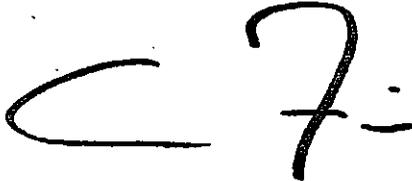
BASED on the above findings of fact, and subject to the conditions listed below, the Department makes the following conclusions pursuant to 38 M.R.S.A. Sections 480-A et seq. and Section 401 of the Federal Water Pollution Control Act:

- 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...

bc/ats#70201/123698bm



DEP INFORMATION SHEET

Appealing a Commissioner's Licensing Decision

Dated: May 2004

Contact: (207) 287-2811

SUMMARY

There are two methods available to an aggrieved person seeking to appeal a licensing decision made by the Department of Environmental Protection's (DEP) Commissioner: (1) in an administrative process before the Board of Environmental Protection (Board); or (2) in a judicial process before Maine's Superior Court. This INFORMATION SHEET, in conjunction with consulting statutory and regulatory provisions referred to herein, can help aggrieved persons with understanding their rights and obligations in filing an administrative or judicial appeal.

I. ADMINISTRATIVE APPEALS TO THE BOARD

LEGAL REFERENCES

DEP's General Laws, 38 M.R.S.A. § 341-D(4), and its Rules Concerning the Processing of Applications and Other Administrative Matters (Chapter 2), 06-096 CMR 2.24 (April 1, 2003).

HOW LONG YOU HAVE TO SUBMIT AN APPEAL TO THE BOARD

The Board must receive a written notice of appeal within 30 calendar days of the date on which the Commissioner's decision was filed with the Board. Appeals filed after 30 calendar days will be rejected.

HOW TO SUBMIT AN APPEAL TO THE BOARD

Signed original appeal documents must be sent to: Chair, Board of Environmental Protection, c/o Department of Environmental Protection, 17 State House Station, Augusta, ME 04333-0017; faxes are acceptable for purposes of meeting the deadline when followed by receipt of mailed original documents within five (5) working days. Receipt on a particular day must be by 5:00 PM at DEP's offices in Augusta; materials received after 5:00 PM are not considered received until the following day. The person appealing a licensing decision must also send the DEP's Commissioner and the applicant a copy of the documents. All the information listed in the next section must be submitted at the time the appeal is filed. Only the extraordinary circumstances described at the end of that section will justify evidence not in the DEP's record at the time of decision being added to the record for consideration by the Board as part of an appeal.

WHAT YOUR APPEAL PAPERWORK MUST CONTAIN

The materials constituting an appeal must contain the following information at the time submitted:

1. *Aggrieved Status.* Standing to maintain an appeal requires the appellant to show they are particularly injured by the Commissioner's decision.
2. *The findings, conclusions or conditions objected to or believed to be in error.* Specific references and facts regarding the appellant's issues with the decision must be provided in the notice of appeal.
3. *The basis of the objections or challenge.* If possible, specific regulations, statutes or other facts should be referenced. This may include citing omissions of relevant requirements, and errors believed to have been made in interpretations, conclusions, and relevant requirements.
4. *The remedy sought.* This can range from reversal of the Commissioner's decision on the license or permit to changes in specific permit conditions.
5. *All the matters to be contested.* The Board will limit its consideration to those arguments specifically raised in the written notice of appeal.

6. *Request for hearing.* The Board will hear presentations on appeals at its regularly scheduled meetings, unless a public hearing is requested and granted. A request for public hearing on an appeal must be filed as part of the notice of appeal.

7. *New or additional evidence to be offered.* The Board may allow new or additional evidence as part of an appeal only when the person seeking to add information to the record can show due diligence in bringing the evidence to the DEP's attention at the earliest possible time in the licensing process or show that the evidence itself is newly discovered and could not have been presented earlier in the process. Specific requirements for additional evidence are found in Chapter 2, Section 24(B)(5)

OTHER CONSIDERATIONS IN APPEALING A DECISION TO THE BOARD

1. *Be familiar with all relevant material in the DEP record.* A license file is public information made easily accessible by DEP. Upon request, the DEP will make the material available during normal working hours, provide space to review the file, and provide opportunity for photocopying materials. There is a charge for copies or copying services.

2. *Be familiar with the regulations and laws under which the application was processed, and the procedural rules governing your appeal.* DEP staff will provide this information on request and answer questions regarding applicable requirements.

3. *The filing of an appeal does not operate as a stay to any decision.* An applicant proceeding with a project pending the outcome of an appeal runs the risk of the decision being reversed or modified as a result of the appeal.

WHAT TO EXPECT ONCE YOU FILE A TIMELY APPEAL WITH THE BOARD

The Board will formally acknowledge initiation of the appeals procedure, including the name of the DEP project manager assigned to the specific appeal, within 15 days of receiving a timely filing. The notice of appeal, all materials accepted by the Board Chair as additional evidence, and any materials submitted in response to the appeal will be sent to Board members along with a briefing and recommendation from DEP staff. Parties filing appeals and interested persons are notified in advance of the final date set for Board consideration of an appeal or request for public hearing. With or without holding a public hearing, the Board may affirm, amend, or reverse a Commissioner decision. The Board will notify parties to an appeal and interested persons of its decision.

II APPEALS TO MAINE SUPERIOR COURT

Maine law allows aggrieved persons to appeal final Commissioner licensing decisions to Maine's Superior Court, see 38 M.R.S.A. § 346(1); 06-096 CMR 2.26; 5 M.R.S.A. § 11001; & MRCivP 80C. Parties to the licensing decision must file a petition for review within 30 days after receipt of notice of the Commissioner's written decision. A petition for review by any other person aggrieved must be filed within 40-days from the date the written decision is rendered. The laws cited in this paragraph and other legal procedures govern the contents and processing of a Superior Court appeal.

ADDITIONAL INFORMATION: If you have questions or need additional information on the appeal process, contact the DEP's Director of Procedures and Enforcement at (207) 287-2811.

Note: The DEP provides this INFORMATION SHEET for general guidance only; it is not intended for use as a legal reference. Maine law governs an appellant's rights.

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QUITCLAIM DEED

KNOW ALL MEN BY THESE PRESENTS

That ELINOR G. EDLUND of 313 Clarks Cove Road, Walpole, Maine 04573, for consideration paid, releases to the said ELINOR G. EDLUND and THE FIRST NATIONAL BANK OF DAMARISCOTTA, CO-TRUSTEES OF THE ELINOR G. EDLUND DECLARATION OF TRUST AND REVOCABLE LIVING TRUST AGREEMENT RESTATED IN ITS ENTIRETY DATED 9/25/97, a certain lot or parcel of land with the buildings thereon situated in the Town of South Bristol, at Clark's Cove, so-called, County of Lincoln and State of Maine, bounded and described as follows:

BEGINNING at the steep rock landing adjoining the land now or formerly of Harold Rounds; thence by a stone wall at land of said Rounds N 63 degrees E 175 feet to an iron pipe; thence by land of the Grantors; now or formerly, S 27 degrees E, 100 feet to an iron pipe; thence S 63 degrees W by land of the Grantors 200 feet to an iron pipe; thence same course 23 feet, more or less, to highwater mark at the shore of the Damariscotta River; thence along the shore at highwater mark Northerly to the point of beginning.

Together with a right of way from the aforementioned premises, following along the Southerly side of the stone wall mentioned above to the highway.

Reference may be had to a deed from Edward A. Myers and Julia B. Myers to Elinor G. Edlund dated July 17, 1953 and recorded in the Lincoln County Registry of Deeds at Book 508, Page 327.

Charles A. Edlund joins in this deed releasing any right, title and interest which he may have as spouse to Elinor G. Edlund in the aforesaid property.

Witness our hands and seals this 25th day of September, 1997.

[Signature]
Witness

Elinor G. Edlund
Elinor G. Edlund

[Signature]
Witness

Charles A. Edlund
Charles A. Edlund

STATE OF MAINE
LINCOLN, ss.

NO TRANSFER TAX
NECESSARY

September 25, 1997

Personally appeared the above named Elinor G. Edlund and Charles A. Edlund acknowledged the foregoing instrument to be their free act and deed.

[Signature]
Notary Public/Attorney at Law

Present in Lincoln ss.
Recorded in Lincoln ss.

Robert B. Grogan

31 OCT -6 AM 11:27

LICENSE AGREEMENT

KNOW ALL MEN BY THESE PRESENTS, that ELINOR G. EDLUND of 313 Clarks Cove Road, Walpole, Maine and THE FIRST, NA Co-Trustees of the Elinor G. Edlund Declaration of Trust restatement in the entirety on September 25, 1997 "Grantor" owner of a parcel of property at 313 Clarks Cove Road, Walpole, Lincoln County, Maine and being the premises conveyed by Elinor G. Edlund to the said Trustees by deed dated September 25, 1997 and recorded in the Lincoln County Registry of Deeds in Book 2277, Page 288, "the Premises", do hereby COVENANT AND AGREE and grant to David E. Rice of 36 Split Rock Road, Walpole, Maine 04573 "RICE" the following License:

A 10 year license to use the dock and float for commercial purposes, including the right to make repair, replacement or improvement of the dock and float. This license includes the right of access to the dock over the Premises of the Grantor.

IN WITNESS WHEREOF, the said Grantor, has hereunto set his hand this 30th day of Oct., 2006.

[Signature]
Witness

Elinor G. Edlund
Elinor G. Edlund
Trustee of the Elinor G. Edlund Trust

[Signature]
Witness

Edythe A. Jordan
The First, NA
Trustee of the Elinor G. Edlund Trust

STATE OF MAINE
Lincoln, ss.

October 30, 2006

Personally appeared the above named Elinor G. Edlund and Edythe A. Jordan and acknowledged the foregoing instrument to be their free act and deed, in said capacity, before me,

Anne Thorndike Sewell
Notary Public/Attorney at Law
Anne Thorndike Sewell
Notary Public
Maine
Commission Expires 04/25/2011

Print name: _____

Seen and Agreed: David E. Rice
David E. Rice

2 of 3

RESTATED FIRST AMENDMENT
To the Elinor G. Edlund Declaration of Trust
Restated in the entirety on September 25, 1997

KNOW ALL MEN BY THESE PRESENTS, that ELINOR G. EDLUND of 313 Clarks Cove Road Walpole, Maine, Grantor, and the said ELINOR G. EDLUND and THE FIRST, NA Co-Trustees of the Elinor G. Edlund Declaration of Trust restatement in the entirety on September 25, 1997 (the Trust) hereby agree to the following Restated First Amendment to the Trust as follows:

Whereas, the Trustees have previously executed a certain First Refusal to Purchase which is intended to grant to David E. Rice of 36 Split Rock Road, Walpole, Maine 04573 "RICE" an opportunity to purchase the home of Elinor G. Edlund in Walpole, Maine; and,

Whereas, the Grantor is now desirous of granting to David E. Rice a license for 10 years to make commercial use of the dock ; and

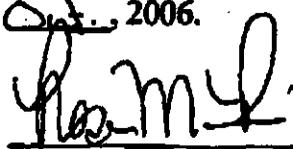
Whereas, after thoughtful deliberation with my siblings and other advisors, the Grantor is desirous to further amend this trust to in order to leave the Grantor's residential property in South Bristol, Maine to David E. Rice at the time of her death, in grateful recognition of all that David and his father Mervin Rice have done for the Grantor during her lifetime.

Therefore, the Grantor now and hereby amends the Trust as follows:

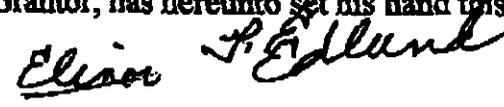
1. The Trustee shall enter into the "Dock License Agreement" attached hereto as Exhibit A, which provides David E. Rice with the opportunity make use of and improvements to the dock at the Elinor G. Edlund home in Walpole, Maine in accordance with its terms. SAC
2. Upon the death of Elinor G. Edlund, the Trustee shall distribute the entire right, title and interest to the real property in Walpole, Maine being the same premises described in the deed to this Trustee recorded in Book 2277, Page 288 and attached hereto. John A. Gregory

In all other respects Elinor G. Edlund ratifies and confirms the Trust as restated September 25, 1997.

IN WITNESS WHEREOF, the said Grantor, has hereunto set his hand this 30th day of

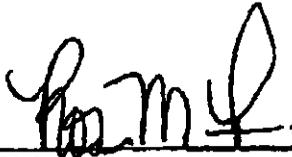
Sept. 2006.


Witness

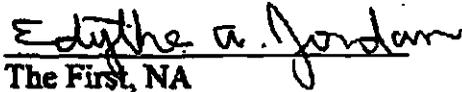


Elinor G. Edlund
Grantor and Trustee of the Elinor G. Edlund Trust

3 of 3



Witness

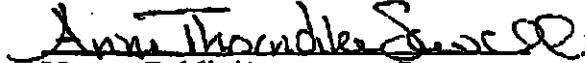


The First, NA
Trustee of the Elinor G. Edlund Trust

STATE OF MAINE
Lincoln, ss.

Oct. 30, 2006

Personally appeared the above named Elinor G. Edlund and acknowledged the foregoing instrument to be her free act and deed, in said capacity, before me,


Notary Public/Attorney at Law

Print name: _____

Anna Thomdike Sewell
Notary Public
Maine
Commission Expires 04/25/2010



STATE OF MAINE
DEPARTMENT OF
MARINE RESOURCES
21 STATE HOUSE STATION
AUGUSTA, MAINE
04333-0021

APPENDIX 4

JOHN ELIAS BALDACCI
GOVERNOR

GEORGE D. LAPOINTE
COMMISSIONER

July 27, 2010

Andrew Fisk
Bureau of Land and Water Quality
Maine Department of Environmental Protection
17 State House Station
Augusta, Maine 04333-0017

RE: David E. Rice, Commercial pier/lobster trap storage, South Bristol

Dear Andy,

Last week the Department of Marine Resources (DMR) received the July 2010 Maine Department of Environmental Protection (DEP) denial of Mr. Rice's request for removal of Special Condition #5 ("No trap storage will be permitted on the permanent pier.") from the Board of Environmental Protection's Order #L-23698-4E-A-Z. Upon review of the project, the request of the applicant and the subsequent denial by DEP I must inform you that this agency erred in the comments it sent Beth Callahan of your staff in our memo dated August 31, 2009 regarding the request for seasonal trap storage on the recently constructed permanent pier.

Specifically: this agency did not fully evaluate the following two points upon which we based our August 2009 comments recommending that the permit condition prohibiting storage of traps be retained:

- 1) DMR was not fully aware and therefore did not properly evaluate the seasonal time frame that was being proposed for trap storage. It is now apparent in the text of DEP's July denial that the primary time during which the traps will be stored on the pier will be December through March. DMR does not believe this will pose a consequential impact due to shading of nearby marine vegetation. In addition, and in a larger context, this agency feels that the entire issue of shading caused by the short or long term storage of lobster traps on piers needs a thorough evaluation. Toward that end we believe it is important that that we meet with you and your staff directly to discuss what short term or cumulative impacts would occur from lobster trap shading at various times of year.
- 2) DMR was not fully aware and therefore did not properly evaluate the true viability of the alternative sites for trap storage proposed by DEP. It is now apparent in the text of DEP's July denial that if the South Bristol pier itself cannot be utilized for the purpose of trap storage the applicant will need to store his 600 traps in at least three separate locations. DMR is concerned that the use of multiple alternative sites may not constitute a viable option and also that the three sites proposed may not be suitable individually or combined.



PRINTED ON RECYCLED PAPER

OFFICES AT STEVENS SCHOOL COMPLEX, HALLOWELL

PHONE: (207) 624-6550

TTY: (207) 287-4474

<http://www.maine.gov/dmr>

FAX: (207) 624-6024



STATE OF MAINE
DEPARTMENT OF
MARINE RESOURCES
21 STATE HOUSE STATION
AUGUSTA, MAINE
04333-0021

JOHN ELIAS BALDACCII
GOVERNOR

GEORGE D. LAPOINTE
COMMISSIONER

For the above stated reasons this agency feels our August 31st, 2009 comments to DEP Project Manager Beth Callahan are invalid. At this time we are unaware of any criteria from our perspective that would justify the continued imposition of the ban on trap storage as contemplated by Special Condition #5. Should there be a means for DEP to reopen consideration of the request by the applicant to eliminate Special Condition #5 we would respectfully request that that occur as soon as feasible. It is our sincere hope that the applicant not be compelled to file an appeal to the Board of Environmental Protection or Maine's Superior Court given the considerable expense such an appeal would involve and given that DEP's July 2010 denial was partially based on insufficient technical review provided by DMR regarding the issued of trap storage.

Thank you for your attention to this matter and I sincerely regret any inconvenience this notification may cause you and your staff.

Sincerely,

David Butler
Deputy Commissioner

Cc: George Lapointe, Commissioner DMR
Linda Mercer, DMR
Brian Swan, DMR
James Cassida, DEP
Beth Callahan, DEP



PRINTED ON RECYCLED PAPER

OFFICES AT STEVENS SCHOOL COMPLEX, HALLOWELL

PHONE: (207) 624-6550

TTY: (207) 287-4474

<http://www.maine.gov/dmr>

FAX: (207) 624-6024

SHADING EFFECTS; CHAIN OF EMR's (DEP-DMR field staff)

State House Station 17 Augusta, Maine 04333

1 of 5

07/24/09
BETH CALLAHAN DEP
QUERY TO BRIAN SWAN, DMRRequest for Project Review**TO:** Brian Swan, Department of Marine Resources**FROM:** Beth Callahan, DEP Project Manager**DATE:** July 24, 2009

This constitutes a request for your agency's review of the project identified below and your submission of comments in accordance with our Memorandum of Agreement on Project Reviews. Questions may be directed to, Beth Callahan, Bureau of Land & Water Quality, at 287-7898 (fax: 287-7826, email: Beth.Callahan@Maine.gov)

The deadline for agency comments is August 24, 2007 or ASAP

DEP Application #: L-23698-4E-B-M Applicant Name: David Rice

Project Name: Condition Removal/Revision

Contact: Joseph LeBlanc, LeBlanc Associates, Inc. Tel #: (207) 833-6462

Location: South Bristol

Notes to Reviewers: The applicant proposes to remove or revise Condition #5 of Department Order #L-23698-4E-A-A, which states "No trap storage will be permitted on the permanent pier." The proposed project site is located on Damariscotta River within Clark Cove in the Town of South Bristol, Maine.

DMR's opinion regarding potential indirect impacts though shading effects as a result of trap storage would be very much appreciated. Please feel free to let me know if there is any additional information that you need.

After a thorough review of the above project, as presented to us, and consideration of our agency's standards, programs and responsibilities, the following comments are submitted to the Department of Environmental Protection.

Check if requesting copy of draft Findings of Fact and Order.

(Comments must be signed and dated in order to be accepted by this Department. If additional space is needed, please attach another sheet).

Hi Joe,

Give me a call tomorrow or when you're free and we can try to figure out what to do next.

(2 of 5)

Thanks,
BETH CALLAHAN
Project Manager
ME Dept. of Environmental Protection
Division of Land Resource Regulation

From: Swan, Brian
Sent: Monday, August 31, 2009 12:36 PM
To: Callahan, Beth
Subject: Rice Project Comments

8/31/09

BRIAN SWAN, DMR STAFF
RESPONSE TO BETH CALLAHAN, DEP
[with attached (unsigned) copy]

Hi Beth,

Comments attached. A signed copy will be in the mail.

Give me a call if you'd like to talk about this.

Brian

*Comments prepared by
DMR Staff BRIAN SWAN;
forwarded to Beth Callahan
by BRIAN SWAN*

TO: Beth Callahan, Project Manager
Dept. of Environmental Protection (DEP),
Bureau of Land and Water Quality Control

FROM: Department of Marine Resources (DMR)

SUBJECT: REQUEST FOR PROJECT REVIEW,

PROJECT: DEP Application #: L-23698-4E-B-N
Applicant: David E. Rice
Location: South Bristol (Clark Cove, Damariscotta River)
Type of Project: Trap Storage on Pier

The above proposed project has been carefully reviewed and considered by DMR personnel.

DMR personnel visited the site on July 16, 2007 at 0845 at approximately low water, and again on August 9, 2007 at 1430 at low water.

DMR understands that the applicant is requesting the DEP remove or revise a condition on his current permit that prohibits trap storage on his pier.

DMR commented on the applicant's pier proposal on September 6, 2007 (attached). DMR concluded at that time that the "project as proposed should not result in any significant adverse impacts to traditional fishing activity, recreation, navigation or riparian access. The width of the proposed pier deck to its height is more than the usually recommended 1:1. Shading and subsequent loss of marine vegetation would likely result." DMR recommended at that time "that consideration be given to further reducing the width of the pier decking [to reduce shading]..."

Storage of traps would contribute to shading of marine vegetation and the deposition of debris from trap maintenance onto the intertidal and surrounding waters. Upland storage of traps, where possible, is preferred. In this case that appears to be a viable option. DMR recommends that the current permit condition that prohibits storage of traps on the pier remain in effect.

GEORGE D. LAPOINTE
COMMISSIONER OF DMR
Date: August 31, 2009

Callahan, Beth

From: Joe LeBlanc [leblancjd@suscom-maine.net]
Sent: Monday, August 31, 2009 5:59 PM
To: Callahan, Beth
Subject: 08-31-09 Re: Rice Project Comments
Attachments: 09-12-02 Rice Pier Length & Width MDEP Query.wps

8/31/09
LEBLANC ASSOCIATES, PERMIT AGENT
RESPONSE, ON BEHALF OF APPLICANT,
DAVID RICE, TO DMR (PRESUMED
UNSOLICITED) COMMENTS SENT
TO BETH CALLAHAN, DEP

4 of 5

Hi Beth,

Thanks for forwarding DMR comments.

These are our comments:

- David Rice (Applicant) originally wanted a 16' wide pier, which is permitted by the DEP, and most Maine towns, for a commercial structure.
- as you also know, the DEP also allows a wider commercial pier than 16' with reasonable justification.
- following discussions with the Applicant, he agreed to the narrower, 12' wide pier, to reasonably reduce the impact, which thought process was clearly described in the NRPA application, and which width is now permitted. This was further amplified to the DEP in writing, when DMR made its initial comments in 2007, regarding the pier width (please see attached Supplemental Response #4 to the DEP, dated 09-12-07).
- as you also know, the DEP also permits a commercial building on a commercial pier, subject to a 20' height restriction, which is considered reasonable by the DEP, yet, given its height, would create potentially greater shading than trap storage
- **the bulk of the traps will be stored during the non-growing season, from approximately November through March, such that shadowing, if any, would not have any significant impact.**
- regarding, cleaning traps, lobstermen up and down the coast, clean their boat, traps and equipment, on the boats, off the boats, using sea water and high pressure hoses, not chemicals.
- any debris from the traps came from the ocean in the first place. The Applicant will be introducing no new material to the waters other than what came from the ocean in the first place.
- carrying all these traps upland in the fall, and then back onto the pier in the spring is totally unnecessary, requires unnecessary additional manpower, time and cost, and will potentially impact the leach field on this relatively small lot. This was all detailed in our discussions/proposal to remove the trap storage restriction
- finally, it would be interesting to hear DMR defend their comments in front of a room full of lobstermen.

In summary, there is no reasonable basis for DMR's comments, given the above. The idea that storing and maintaining traps on a pier would cause any significant shading impact or other unreasonable impacts, is, with all due respect, without reasonable merit.

Again, the most significant factor is that the bulk of the traps will be stored during the non-growing season, from approximately November through March, such that shadowing, if any, would not have any significant impact.

Hopefully, we can now put his to bed. If not, it may be time for a meeting with Brian Swan, George LaPointe, Jim C, Mike M and David present, and a few other lobstermen we will bring along for good measure.

Best Regards, Joe

ps: hope you have been a having a good summer !

— Original Message —

From: Callahan, Beth
To: Joe LeBlanc
Sent: Monday, August 31, 2009 4:12 PM
Subject: FW: Rice Project Comments

TO: Beth Callahan, Project Manager
Dept. of Environmental Protection (DEP),
Bureau of Land and Water Quality Control

FROM: Department of Marine Resources (DMR)

SUBJECT: REQUEST FOR PROJECT REVIEW,

PROJECT: DEP Application #: L-23697-4E-A-N
Applicant: David E. Rice
Location: South Bristol (Clark Cove, Damariscotta River)
Type of Project: Pier, Ramp & Float Replacement & Expansion

DMR to DEP 07/16/07

5 of 5

*NOTE SHADING COMMENT;
DEP SUBSEQUENTLY ISSUED
THE DECK PERMIT ON 10/11/07
(# L-23698-4E-R-N) AFTER
TAKING ALL COMMENTS INTO CONSIDERATION.*

The above proposed project has been carefully reviewed and considered by DMR personnel.

DMR personnel visited the site on July 16, 2007 at 0845 at approximately low water, and again on August 9, 2007 at 1430 at low water.

DMR understands that the applicant is proposing to remove an existing 5 ft. x 30 ft. pile supported pier constructed in the 1950s that had at one time a 3 ft. x 30 ft. ramp and 10 ft. x 15 ft. float that extended approximately 20 ft. beyond MLW. This would be replaced with a 12 ft. x 110 ft. pile supported pier (21, 12 in. dia. piles) that would extend 64 ft. beyond MLW with an east - west orientation and an average deck of ~ 7 ft. above the intertidal substrate. A 4 ft. x 34 ft. ramp would connect to a 12 ft. x 20 ft. float to provide ~ 4 ft. of water at MLW according to the permit application. The pier would be accessed by a 6 ft. x 6 ft. platform and a 4 ft. x 14 ft. stairway from the upland. The stairway would be fitted with a trap slide. The applicant also proposes to construct an 8 ft. x 10 ft. x 10 ft. high equipment shed on the pier above Mean High Water (MHW). The applicant stated he does not intend to store lobster bait at this site, and intends to continue to sell his catch at the Gut in South Bristol.

The upland is a small lot with a house located ~ 50 ft. from the edge of the supratidal bank. The supratidal is ledge outcrop rising ~ 4 ft. high from MHW with a 4 ft. high vegetated bank above that. The extreme upper intertidal is ledge. Below this the intertidal is ledge/stone/cobble/gravel with ~ 75% rockweed cover. There is a commercial pier in the cove about 300 ft. to the southeast. A mooring with a sailboat is situated ~ 75+ ft. from the seaward end of the proposed float. There appeared to be a couple of other moorings, not used recently, further out beyond this first mooring. A mooring with floats for trap storage is located ~ 200 ft. south of the proposed float. An aquaculture lease, ~ 15 acres in size, for suspended culture of blue mussels, oysters, hard clams and soft-shell clams is located in the cove ~ 400 ft. from the end of the proposed float at its closest point. Lobster traps are located outside of the cove.

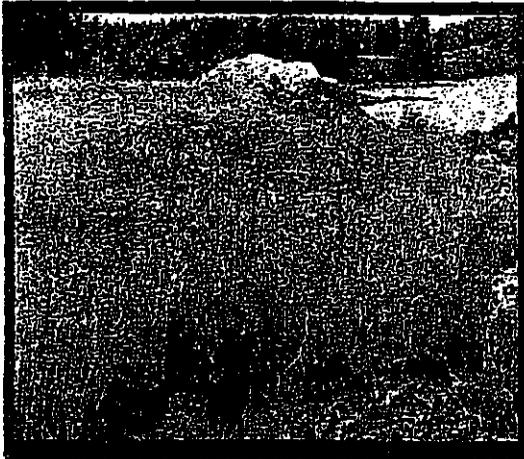
This project as proposed should not result in any significant adverse impacts to traditional fishing activity, recreation, navigation or riparian access. The width of the proposed pier deck to its height is more than the usually recommended 1:1. Shading and subsequent loss of marine vegetation would likely result.

DMR recommends that consideration be given to further reducing the width of the pier decking, and that if access to the existing mooring with sailboat becomes a problem due to the proposed pier, ramp and float and its use that the applicant bear the cost of moving that mooring to a better location.

GEORGE D. LAPOINTE
COMMISSIONER OF DMR
Date: September 6, 2007

[PARTIAL REPORT (2pp only) IN BETH CALLAHAN, DEP PROJECT
file folder (07/26/10). SOURCE NOT IDENTIFIED. CLEARLY
DESCRIBES MARINE SPECIES DIE-OFF IN THE WINTER MONTHS.]

1 of 2



August 1999



March 1999

Photo #1. These two photos were taken at the same coastal location in the summer and the winter. The photo on the left shows a close up of the tall grasses of the fringing salt marsh in August. The photo on the right shows the fringing salt marsh after it has died back and been scoured by rafting ice. A majority of the functions and values of salt marsh are not apparent in the wintertime.

The marine environment, like terrestrial habitats, fluctuates annually and seasonally. Intertidal and shallow subtidal habitats are influenced by the atmosphere and the oceans. Variations in the physical properties of marine waters drive changes in the plant and animal community. For example, temperature and rainfall greatly influence interannual and seasonal variability. Warmer summer temperatures in the oceans favor species, like the green crab, that can tolerate warm temperatures, reproduce successfully and flourish. Conversely, warm temperatures kill boreal cold water species or cause them to move offshore seeking cooler waters in the summer. Heavy rainfall or flooding events can also destroy many intertidal invertebrates while favoring the growth of some forms of macroalgae and phytoplankton.

Highlighted
in Beth
Callahan
Folder

In the winter, 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. In low energy environments, ice buildup in the winter scours plants and removes epifauna and infauna on tidal flats (Whitlatch 1982). Depending on the severity of the winter, shallow surface sediments can freeze 5 cm to 10 cm below the surface (Whitlatch 1982). The freezing of sediments can kill benthic species or force them to burrow below surface layers. Frozen sediments reduce access and foraging by birds (Whitlatch 1982). Dense algal mats on tidal flats can form in the winter due to the reduced grazing pressures from herbivores (Whitlatch 1982). Many species, like the mudsnails, *Nassarius obsoletus*, over-winter subtidally to avoid low temperatures on intertidal flats (Whitlatch 1982). Adult lobsters also move offshore in the winter (Diane Cowan, personal communication). Some fish swim south to warmer waters. Abundance and diversity of marine life in the subtidal may be greater in the winter than the summer

due to offshore migrations of intertidal species and southward migrations of northern species seeking warmer waters off the coast of Maine (Les Watling, personal communication).

As the days lengthen and the temperatures warm in the spring and summer, species return to the intertidal environment to develop, breed and forage. Planktonic larvae, like barnacles, crabs and snails, settle out of the water column and colonize intertidal habitats between April and July. Mudsnailes and other marine invertebrates that survived the winter return to the flats in the spring, feed and reproduce in the summer releasing their young into the height of the plankton bloom (Whitlatch 1982). Sand worms burrow out of the mud and spawn between March and June (Whitlatch 1982). Adult and larval fish are seasonal intertidal visitors, foraging during summer months on organisms living in intertidal flats and salt marsh (Whitlatch 1982). Adult lobsters return to low intertidal habitats in late spring and summer. The highest population density of juvenile and adult lobsters in low intertidal mixed coarse habitats is between May and November (Diane Cowan, personal communication).

Birds also have seasonal migrations and foraging and breeding behaviors. Shorebirds have a spring migration to the Canadian arctic breeding grounds and a fall migration to South American wintering grounds (MIF&W 1994). The fall migration is between July and November and the spring migration is between mid-April and early June (USF&W 1980). As many as 150,000 shorebirds, passing through Cobscook Bay in Downeast Maine, forage and roost on intertidal flats during the fall migration (MIF&W 1994). The spring shorebird migration brings fewer numbers of birds to Maine (MIF&W 1994). In Casco Bay and other places in Maine, large numbers of waterfowl such as eiders, old squaws and gulls, over-winter and feed on offshore islands in the winter. In the summer great black-backed gulls, terns, double-crested cormorants, herring gulls, and eiders nest and raise chicks on offshore islands and exposed ledges of Maine (USF&W 1980).

Management Considerations

Highlights items

Seasonal and interannual variability need to be considered while reviewing marine wetland assessments. Winter sampling will miss many species that live and breed on intertidal habitats in the summer thus underestimating the use of the habitat by flora and fauna. If ice scour doesn't affect the habitat, rockweed and other macroalgae may survive throughout the winter months but the fauna associated with the macroalgae will be minimal. Only species tolerant of freezing temperatures will be present in the intertidal in the wintertime.

- Field studies should be conducted between April and November before cool temperatures limit the availability of species.

07-02-08;08:18AM

2 of 3

2 / 7

SUBSURFACE WASTEWATER DISPOSAL SYSTEM APPLICATION

Maine Dept. Health & Human Services
Division of Health, Environment & Safety

PROPERTY LOCATION

SOUTH BRISTOL PERMIT # 1388 APPLICANTS COPY

City, Town, or Plantation: SOUTH BRISTOL

Street or Road: CLARKS COVE ROAD

Subdivision, Lot #: _____

Date Permit Issued: 2/21/08 FEE: 100.00 Double Fee Charged

Stuart Wynn L.P.I. # 121014
Local Plumbing Inspector Signature

OWNER/APPLICANT INFORMATION

Name (Last, First, MI): BY REGISTRATION: EDWARD ELINOR GREGORY Owner Applicant

Mailing Address of Owner/Applicant: P.O. BOX 760 DANABSCOTTA, ME 04543

Daytime Tel. #: 563-8104

THE WORK SPECIFIED IN THIS APPLICATION IS HEREBY AUTHORIZED TO BE INSTALLED IN ACCORDANCE WITH THE RULES. THIS PERMIT EXPIRES AFTER TWO YEARS FROM DATE ISSUED UNLESS WORK HAS COMMENCED.

OWNER OR APPLICANT STATEMENT

I hereby acknowledge that the information submitted is correct to the best of my knowledge and I understand that any falsification is a violation of the Department and/or Local Plumbing Inspector's Permit.

Kenneth Knight 7/21/08
Signature of Owner/Applicant Date

CAUTION: INSPECTION REQUIRED

I have inspected the installation authorized above and found it to be in compliance with the Subsurface Wastewater Disposal Rules Application.

Stuart Wynn 8-18-08
Local Plumbing Inspector Signature Date

PERMIT INFORMATION

TYPE OF APPLICATION

1. First Time System
 2. Replacement System
Type replaced: SEWAGE TANK / TANK
Year installed: 1950's

3. Expanded System
 4. Experimental System
 5. Seasonal Conversion

SIZE OF PROPERTY
1+ SQ. FT. ACRES

SHORELAND ZONING
 Yes No

THIS APPLICATION REQUIRES

1. No Rule Variance
 2. First Time System Variance
 3. Replacement System Variance
 4. Minimum Lot Size Variance
 5. Seasonal Conversion Permit

DISPOSAL SYSTEM TO SERVE

1. Single Family Dwelling, Unit No. of Bedrooms: 2
 2. Multiple Family Dwelling, No. of Units: _____
 3. Other: _____ (specify) _____
Current Use: Seasonal Year Round Undeveloped

DISPOSAL SYSTEM COMPONENTS

1. Complete Non-engineered System
 2. Alternative System (graywater & all toilet)
 3. Alternative Toilet, specify: _____
 4. Non-engineered Treatment Tank (only)
 5. Holding Tank, _____ gallons
 6. Non-engineered Disposal Field (only)
 7. Separated Laundry System
 8. Complete Engineered System (2000 gpd or more)
 9. Engineered Treatment Tank (only)
 10. Engineered Disposal Field (only)
 11. Pre-treatment, specify: _____
 12. Miscellaneous Components: _____

TYPE OF WATER SUPPLY

1. Drilled Well 2. Dug Well 3. Private
 4. Public 5. Other

DESIGN DETAILS (SYSTEM LAYOUT SHOWN ON PAGE 3)

TREATMENT TANK

1. Concrete WITH 12" 2.00 AC
 a. Regular 2.00 AC
 b. Low Profile
 2. Plastic 1100 PATEL
 3. Other: _____
CAPACITY: 1,000 GAL

SOIL DATA & DESIGN CLASS

PROFILE CONDITION DESIGN: 1 1 D 1 3

at Observation Hole # 1
Depth: 11'
of Moisture/Sat. Soil Factor

DISPOSAL FIELD TYPE & SIZE

1. Stone Bed 2. Stone Trench
 3. Proprietary Device
 a. cluster array c. Linear
 b. regular load d. H-20 load
 4. Other: _____
SIZE: 200 sq. ft. or in. ft.

DISPOSAL FIELD SIZING

1. Small—2.0 sq. ft./gpd
 2. Medium—2.6 sq. ft./gpd
 3. Medium—Large—3.3 sq. ft./gpd
 4. Large—4.1 sq. ft./gpd
 5. Extra Large—5.0 sq. ft./gpd

GARBAGE DISPOSAL UNIT

1. No 2. Yes 3. Maybe
If Yes or Maybe, specify one below:
 a. multi-compartment tank
 b. _____ tanks in series
 c. increase in tank capacity
 d. Filter on Tank Outlet

EFFLUENT INJECTOR PUMP

1. Not Required
 2. May Be Required
 3. Required
Specify only for engineered systems;
DOSE: _____ gallons

DESIGN FLOW

180 gallons per day
BASED ON:
 1. Table 501.1 (dwelling unit(s))
 2. Table 501.2 (other facilities)
SHOW CALCULATIONS for other facilities

3. Section 502.0 (meter readings).
ATTACH WATER METER DATA

LATITUDE AND LONGITUDE
at center of disposal area
Lat. 43 d 55 m 707 s
Lon. 067 d 24 m 258 s
if g.p.a. state margin of error: 5'

SITE EVALUATOR STATEMENT

I certify that on 4/22/08 (date) completed a site evaluation on this property and state that the data reported are accurate and that the proposed system is in compliance with the State of Maine Subsurface Wastewater Disposal Rules (10-144A CMR 241).

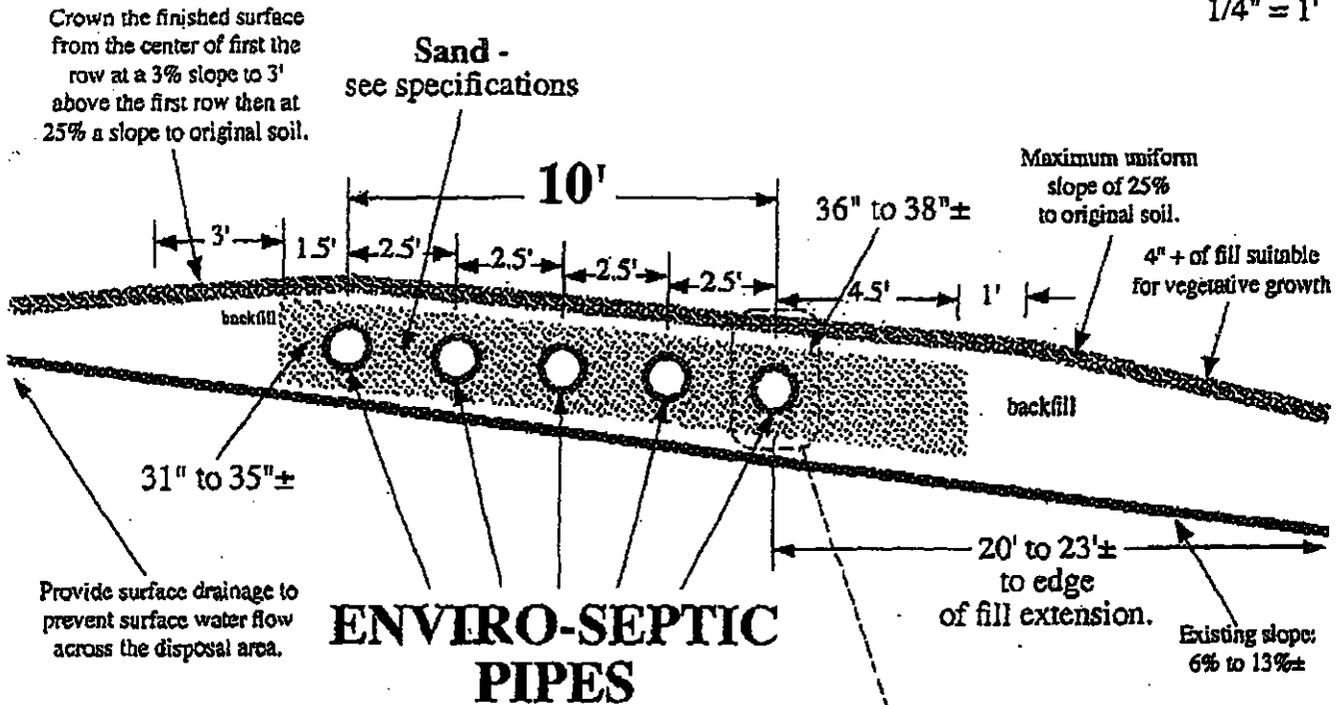
Matthew Page SE # 394 Date 5/1/08
Site Evaluator Signature
Ken Cotton & Associates Telephone Number 207-677-2700
Site Evaluator Name Printed E-mail Address soiltest@tidewater.net

Note: Changes to or deviations from the design should be confirmed with the Site Evaluator. HHE-200 Rev. 4/05

EDLUND PROPERTY

3 of 3

Scale:
1/4" = 1'



Notes:

Remove vegetation and organic layer and scarify soil surface under drainfield and fill extension area before installing fill.

The soil texture for backfill is coarse sand to gravelly coarse sand with approximately 4 to 8 percent of the sand, silt and clay fraction passing a #200 sieve. The upper limit of clay sized particles in the sand, silt, and clay fraction shall be approximately 2%. The backfill shall contain approximately 15% to 30% (by weight) coarse fragments (gravel 2mm to 3 inches).

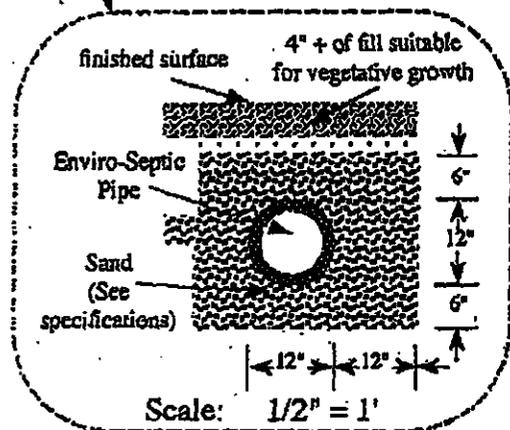
A minimum of 4 inches of backfill materials must be mixed (by plowing, disking, or rototilling) into the original soil to form a transitional horizon.

Enviro-Septic pipe requires a minimum of 6 inches of sand around the circumference. See the **Enviro-Septic Installation Handbook for sand specifications and other installation requirements.**

Bottom of pipe shall be level with a minimum grade tolerance of 1 inch per 100 feet.

Provide surface drainage away from drainfield area.

Seed and mulch finished surface to prevent erosion.



Reference Elevation is: 0"

	Bottom of Pipe	Top of Pipe
Upper Row:	-56"	-44"
Row #2:	-59"	-47"
Row #3:	-62"	-50"
Row #4:	-65"	-53"
Row #5:	-68"	-56"

Licensed Site Evaluator #394

DAVID E. RICE
South Bristol, Maine

PIER, RAMP & FLOAT SYSTEM

SUPPLEMENTAL INFORMATION

December 11, 2007

MOORING # 287: RESPONSE TO DEP QUERIES #4 & #5 ENCLOSED (ONLY)

4. & 5. BOAT MOORING #287 (IN EASTERN GUT); USE & PURPOSE

David Rice currently moors his boat on a moored float which he owns, which is located in the South Bristol eastern "gut", due to the demands on boat mooring capacity in this South Bristol Harbor, "safe harbor" area.

This "boat-mooring" arrangement has apparently been recently portrayed as a further "revelation" by the plaintiffs who have vehemently opposed Mr. Rice's proposed commercial dock in Clark's Cove. Further, these parties, have implied that having a mooring for a boat on a "10' x 10' float", in the middle of a small harbor, is all that is required to carry on a 600 trap lobster fisherman's livelihood.

Frankly, you can barely turn around safely on such a float in a choppy harbor, due to all the boat traffic constantly churning the waters up. The idea of working on 6 traps at such a location, never mind 600 traps, is absurd. You would constantly be losing tools, equipment, traps and yourself overboard in such a confined space. This only reflects, once again, how little the plaintiffs or their representatives know about fishermen or their occupational requirements, and further, how ridiculous their claims are.

Further, this arrangement, wherein Mr. Rice's boat is moored in the middle of an overcrowded harbor, several miles away from a pier with only 25% tidal access (as described above), combines unnecessary and impractical hardship for the applicant who already puts in long hours on the water during the fishing season; reasonably needs all-tide access to the pier, ramp and float system, regardless of the tide cycle, when leaving early in the morning, and returning at the end of the fishing day, every fishing day; and requires the capacity to readily handle, traps and related gear, directly on and off the pier to the boat, throughout the lobster fishing season, in a safe, practical manner, as he circulates, services, periodically rests, and repair his 600 traps, during the commercial fishing season

Mr. Rice was on a waiting list for 4 years for this assigned mooring location in the gut, which represents safe harbor for many fishermen, when they are working their traps down at this end of South Bristol, regardless of where they call their home port.

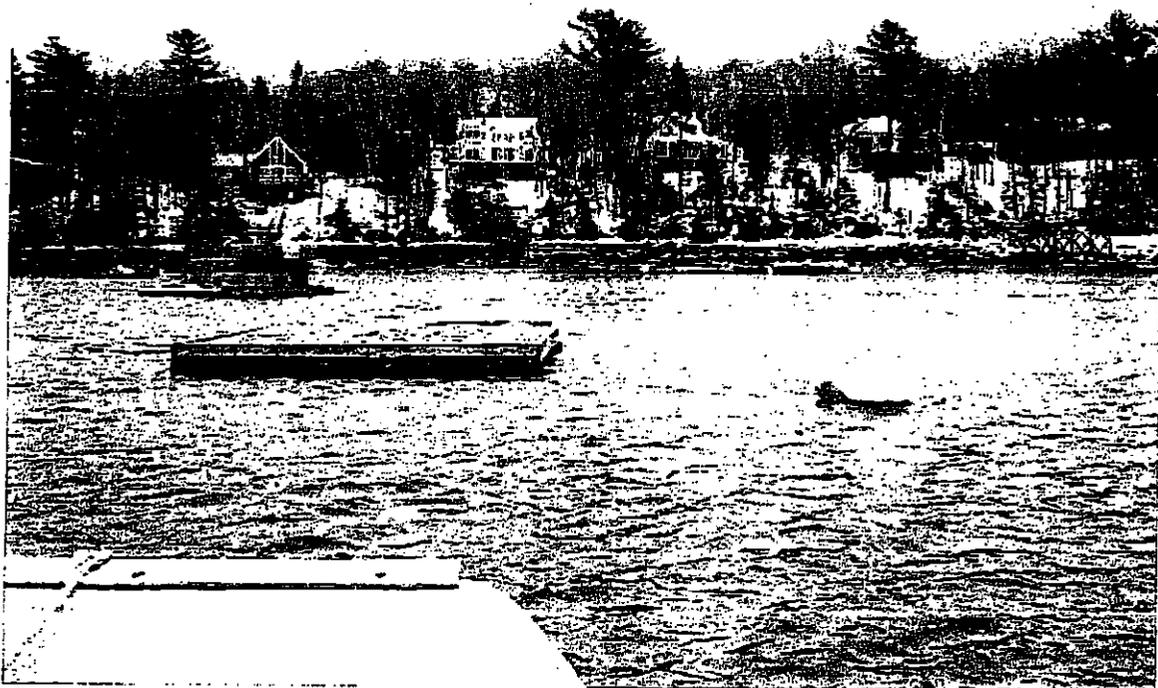
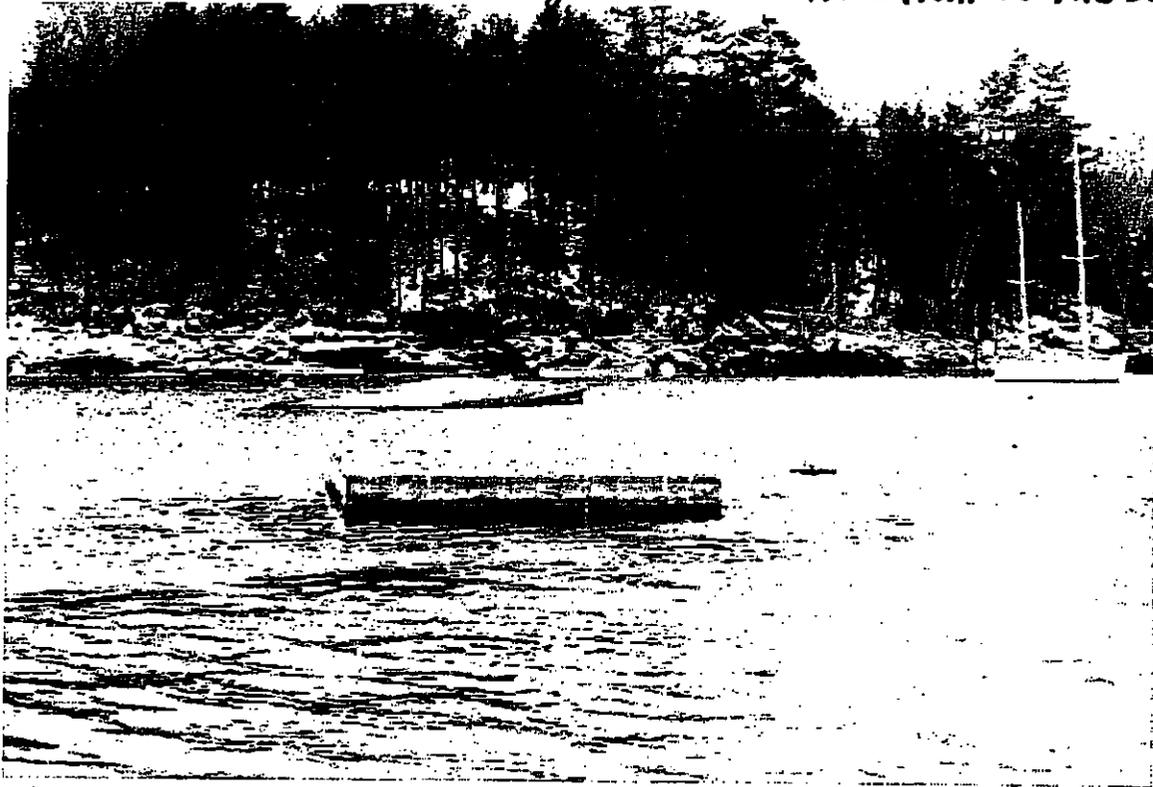
In summary, as described above, despite these distractions which the plaintiffs unceasingly pump out in multi-page correspondences, the main consideration, regarding alternatives, as described in the NRPA application, and amplified in item 2. above, is that the existing pier access arrangements are impractical and unreasonable, regardless of where or how Mr. Rice currently moors his lobster boat overnight.

March 6, 2009

Float + Mooring at "The Gut"

(photo from DEP file)

MOORING # 287 + 10'x10'± float in "The Gut"



December 12, 2006
(date)

Proprietary Agreement

Mr. Joseph D. LeBlanc, President
LEBLANC ASSOCIATES, Inc.
67 Dipper Cove Road
Orr's Island, ME 04066

**RE: Agent Representation Authorization
Pier, Ramp & Float System Permitting**

DAVID RICE
(Applicant name)

CLARKS COVE ROAD
(address)
SOUTH BRISTOL, ME

MAIL ADDRESS:

PO BOX 15
WALPOLE, ME 04573

Dear Joe:

This letter authorizes LEBLANC ASSOCIATES, Inc. to represent the above-named party before any and all government agencies and other parties including, but not limited to:

1. U.S. Army Corps of Engineers
2. Maine Department of Environmental Protection
3. Maine Department of Inland Fisheries and Wildlife
4. Maine Department of Conservation, Bureau of Parks and Lands
5. Local municipality permitting authority.

concerning obtaining certain permits required to construct or modify a Pier, Ramp and/or Float System at the location described above, in the municipality of South Bristol, Maine.

Sincerely,

DAVID RICE
(print name of Applicant)

David Rice
(signed by)

12/18/06
(date)

(title)