

DRAFT BOARD ORDER

BOARD ORDER

IN THE MATTER OF

BOB PRATT AND KATHY PRATT) PETITION TO REVOKE
Owls Head, Knox County)
Permit By Rule # 49587) DISMISSAL

Pursuant to 38 M.R.S. § 341-D (3) and the Department’s *Chapter 2: Rules Concerning the Processing of Applications and Other Administrative Matters, 06-096 CMR 2 § 27*, the Board of Environmental Protection has considered the Petition for Revocation filed by Richard Hurlbert and Audrey McGlashan (petitioners), its supportive data, the response of the permit holder and other related materials on file and FINDS THE FOLLOWING FACTS:

1. HISTORY:

On January 27, 2010, Bob Pratt and Kathy Pratt submitted a Permit by Rule Notification form pursuant to Chapter 305, Section 10 of the Department’s rules, (#49587) to obtain approval to construct a footbridge over a ponded stream to access the coastal shoreline on their property. On February 9, 2010, Department staff advised Bob Pratt that additional plans showing the span of the bridge should be submitted in support of the Permit by Rule request. On February 17, 2010 the requested plans detailing the span of the bridge were submitted. The Permit by Rule was approved by the Department on February 17, 2010.

2. BASIS FOR PETITION:

On March 15, 2011 Richard Hurlbert and Audrey McGlashan filed a petition seeking revocation of Permit by Rule # 49587 issued to Bob Pratt and Kathy Pratt for construction of the bridge crossing. The Petitioners cite the following reasons as the bases for the petition.

- A. Failure to disclose fully all relevant facts: The petitioners state that the permittees failed to fully disclose all relevant facts regarding the nature of the resource being crossed. They contend that the resource is not a man-made pond but rather a wetland.
- B. Failure to give public notice: The petitioners state that public notice of the proposed project was required and not provided by the applicants, the Department, or the Town of Owls Head.

C. Local Permitting Requirements: The petitioners contend the following:

1. The Town of Owls Head Code Enforcement Officer (Code Officer) issued the local permit in error because a bridge permit needs to be issued by the Town's planning board;
2. The Code Officer erred in placing "P.B.R. from D.E.P." under the notes section and not under requirements section of the Town of Owl's Head Building/Use Permit; and
3. The Town of Owls Head building permit should but does not place restrictions on the use of motorized vehicles on the bridge structure.

3. PERMITTEES' RESPONSE TO PETITION:

In a response dated March 25, 2011, the permittees argue that the pending petition should be dismissed because all the relevant facts were disclosed in their notification and supplementary evidence and there has been no change in circumstances that would support revocation of the Permit by Rule. Specifically the permittees argue that:

- A. Disclosure of all relevant facts: The resource being crossed is a man-made pond in a stream. The so-called "ice pond" on the property has an outlet stream which flows into a second man-made pond (the area being crossed) before entering the ocean. The resource in question is well documented in a written history of the Town of Owls Head, and a recounting of that history was submitted by the permittees in support of the Permit by Rule request. The ice pond above the pond being crossed was used to harvest ice for shipping all over the world.
- B. Public notice: Compliance with the town ordinances is properly the subject of an appeal by the petitioner of the town's decision with regard to this project. Under the Department's rules, an applicant for a Permit by Rule is not required to give notice to abutting landowners.
- C. Local permitting requirements:
 1. Local permitting requirements for a bridge/access way: The Town of Owls Head Code Enforcement Officer issued building permit #4715 to Robert Pratt and Kathy Pratt on May 21, 2010 for a shoreland access structure across a pond.
 2. Placement of Permit by Rule information on local permit: The Code Officer did not err by placing the notation "P.B.R. from D.E.P." under notes since the Permit by Rule had already been approved by the Department.

3. Use of motorized vehicles on the structure: The Pratt's original proposal to the town was for a 6-foot wide bridge structure to allow a boat to be launched from the property. However, given that the town ordinance only allows for a 4-foot wide the structure in the shoreland zone, the dimensions of the bridge were reduced to meet the town's standards. Only the smallest tractors have a width of less than 4 feet so the potential for motorized use of the bridge is limited.

4. APPLICABLE REVIEW STANDARD:

Pursuant to 38 M.R.S. § 341-D(3) after written notice and an opportunity for a hearing pursuant to the Maine Administrative Procedure Act, 5 M.R.S. § 9051 et seq., the Board may act in accordance with the Maine Administrative Procedure Act to revoke or suspend a license, whenever the Board finds that certain conditions exist. Such conditions include when the licensee has misrepresented or failed to disclose fully all relevant facts, the licensee has violated any condition of the license, and the licensee has violated any law administered by the Department.

The Department's Rules Concerning the Processing of Applications and Other Administrative Matters (06-096 CMR 2.27) provide that when a petition to revoke, modify, or suspend a permit has been filed, after notice of opportunity for the petitioner and licensee to be heard, the Board shall either dismiss the petition or schedule a hearing on the petition.

Whether to dismiss the petition or proceed to hearing is discretionary with the Board. Factors to consider in exercising that discretion include whether the petition describes a sufficient factual basis, which, if proven at hearing, would support the requested action.

5. DISCUSSION AND DEPARTMENT RECOMMENDATION:

The Board has considered the petitioners' arguments in support of their petition for revocation and makes the following findings.

- A. Disclosure of all relevant facts: The petitioners claim that the resource being affected is properly characterized as a wetland and not a ponded stream. The body of water to be crossed was inspected by Department staff during a December 15, 2009 site visit. During that site visit, the Department staff determined that the pond to be crossed had been dug in the stream many years ago. A stream is regulated as a river, stream, or brook under the Natural Resources Protection Act regardless of whether it has been altered by humans. Constructing a permanent crossing over this resource qualifies for a Permit by Rule under Section 10(A) Chapter 305 Permit by Rule Standards. The

petitioner has provided no evidence to support the argument that the area in question is a wetland rather than a stream.

- B. Public notice: Public notice of a Request for a Permit by Rule is not required under pursuant to *Chapter 2§ 2 (B)*.
- C. Local permitting requirements:
 - 1. Local permitting requirements for a bridge/access way: The Petitioners contend that the proposed project does not comply with the permitting requirements for the Town of Owls Head Land Use and Shoreland Zoning Ordinances. During a site visit the Department's Shoreland Zoning coordinator advised that a four foot wide constructed access way would conform with the local ordinance. Evidence has not been submitted to support the argument that the bridge needed to have planning board approval versus code enforcement officer approval.
 - 2. Placement of Permit by Rule information on local permit: The Petitioners contend that the placement of the notation regarding the approval of the Permit by Rule was in the wrong location on the Town of Owls Head's permit for the project. This matter is not germane to findings the Board must make in order to act on a petition to revoke a permit of the Department (see *Rules Concerning the Processing of Applications and Other Administrative Matters (06-096 CMR 2.27)*).
 - 3. Use of motorized vehicles on the structure: The Department's standards for a Stream Crossing Permit by Rule under Chapter 305 §10 do not place any limitations on the types of use allowed once the structure is completed. Crossings approved under Section 10 are not limited to foot traffic.

BASED on the above findings, the Board concludes that:

- 1. A petitioner for revocation of a permit must bring forth sufficient and persuasive evidence that, if proven, would result in the Board's finding that one of the criteria listed in 38 M.R.S. § 341-D(3) is met and that necessitates action by the Board. The Petitioner has not submitted persuasive evidence that the licensee has misrepresented or failed to disclose fully all relevant facts, the licensee has violated any condition of the license, or the licensee has violated any law administered by the Department.
- 2. A number of the issues raised by the petitioners pertain to permitting at the local level and are not subject to review by the Board.

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) DISMISSAL

3. The Petition does not describe a sufficient factual basis that, if proven at hearing, would support granting the Petitioner's request that the Board act to revoke Department Permit-by-Rule #49587 approving the construction of a bridge crossing.

THEREFORE, the Board DISMISSES the petition of Richard Hurlbert and Audrey McGlashan for revocation of Permit by Rule # 49587.

DONE AND DATED AT AUGUSTA, MAINE, THIS _____ DAY OF _____, 2011.

BOARD OF ENVIRONMENTAL PROTECTION

By: _____
Susan M. Lessard, Chair