

**IN RE: APPEAL OF DEPARTMENT ORDER L-28397-4E-A-N
Jeffry Spinney, Licensee. Pier System and Boat Ramp, Alna**

APPEAL RESPONSE BY LICENSEE JEFFRY SPINNEY

Please accept this response on behalf of Jeffry Spinney (“Licensee”) to the appeal filed by Carol Ervin, Bailey Bolen, Allen J. Philbrick and William A. Weary (hereinafter “Appellants”) with regard to the above-referenced NRPA permit (“Project”).

1. Standard of Review

The Board of Environmental Protection is accorded substantial deference in interpreting and applying environmental statutes and rules. *S.D. Warren Co. v. Board of Environmental Protection*, 2005 ME 27, ¶¶ 5-6, 868 A.2d 210. Factual findings will be affirmed if those findings are supported by competent evidence in the record, even if the record also contains contrary evidence. *Friends of Lincoln Lakes v. Board of Environmental Protection*, 2010 ME 18, ¶¶ 13-14. When 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). A court will not find that an administrative agency has acted arbitrarily or capriciously unless 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) (internal citations omitted).

2. Existing Scenic, Aesthetic, Recreational or Navigational Uses.

The only approval standard at issue in this appeal is the requirement that the Project “will not unreasonably interfere with existing scenic, aesthetic, recreational and navigational uses.” 38 M.R.S. § 480-D(1).” Before considering any possible impacts on the resource, it is important to note that the Sheepscot River, while beautiful and important, is not subject to any special designations or protections under state or federal law that justify a heightened standard of review for this Project. The Project should be evaluated with the same scrutiny given to any dock on any river, unless special circumstances are shown to exist at the Project site.

Appellants generally challenge the placement of this (and presumably any dock) at any point north of their own properties, some of are already benefitted by structures in the shoreline. They criticize the Department’s consideration of the Licensee’s view survey in support of its finding that the Project would not unreasonably interfere with existing scenic, aesthetic, recreational or navigational uses. Specifically, Appellants note that the Licensee’s view survey focused on the two miles south of the project location, and not on northerly areas of the river. The Licensee’s visual survey includes docks and structures noted within the entire survey area, and did extend north of the project. It does note the existence of several structures within the river and on the shoreline, both north and south of the Project.

The Department correctly focused on the area within 1.5 miles of the project site in terms of its scenic and aesthetic impacts, as Chapter 315, Section 4 requires consideration of the character of the “surrounding area.” From the aerial and shoreline photographs provided in the record, there is no question that the Department is correct in its finding that the area “contains occasional residential structures, lawns, and docks that are partially or wholly visible from the resource during at least one season of the year,” and also that, “[a] transmission line corridor

crosses the river approximately 2,000 feet south of the project site.” A photograph of the transmission line, which is high-voltage and includes a cleared area of approximately 100 feet in width, is attached as Exhibit 1. Photographs of a dock located approximately .8 miles south of the Project and of a boat house located approximately .9 south of the Project are attached as Exhibits 2 and 3, respectively. The Licensee further provided the Department with an extensive visual survey of the area, documented by an annotated Google map showing photographs of all structures and views noted.¹ The survey depicted several structures visible from the river in areas north of the Project, including a wooden launch platform, a bridge, multiple cabins and small buildings, additional power lines, a retaining wall, and a permanent skidway permitted for owners Conroy and Barth by the Alna Planning Board in 2008. Notably, many of these structures and docks are owned by individuals who commented in opposition to the Project.

The Department correctly found that the project site is located approximately midway between Sheepscot Village and Head Tide Dam. It would therefore be inappropriate for the Department to focus only on the northerly areas of the river emphasized by the Appellant, since the project has equal (if not more) accessibility to the more heavily developed southerly areas of the river. Further, if the Appellants’ concern is boat traffic on the areas north of the Project, it should not be forgotten that those areas are equally usable by boaters accessing the river from points south of the Project, where there are already several docks. Denying the Project will not limit boat traffic in the northerly areas of the river, because those areas are accessible to points south, and because the Project site can and still be used to launch boats as it always has been.

The Appellants merely speculate that boat traffic will increase, and that enjoyment of the

¹ The Department viewed this interactive map as part of its review process. Photographs taken from the map are excerpted in the record, and the map itself may be viewed at <https://goo.gl/maps/SHvB1teMsWYyVZ57>.

river will be diminished as a result of the Project, without offering any evidence of either. In *Hannum v. Maine Board of Environmental Protection*, Dkt. No. AP-04-08 (Han. Super. 2005), the Court reversed the Board's denial of a dock permit that was based upon concerns about increased boat traffic resulting from the dock. The Court found that vague and speculative concerns about the impact of increased boat traffic were not a sufficient basis upon which to support a denial. Such impacts would have to be specific and quantified in order to justify a finding that this standard is not met. On appeal, the Law Court in *Hannum* upheld the Board's denial of a dock permit based upon the effects of boat traffic, but only because there was significant expert testimony in the record and findings of fact demonstrating that there was an endangered tern nest as well as a seal colony in the area of the proposed dock, and that both of them would be directly harmed by the proposed 90-foot dock. *Hannum v. Bd. of Env'tl Protection*, 2006 ME 51, ¶ 31. The Court's decision was also heavily influenced by findings on the record that the applicant had available, reasonable alternatives to the proposed dock. *Id.*

In contrast to *Hannum*, The Appellants in this case have not provided any evidence that the Project would increase boat traffic generally, or motorized boat traffic specifically on this area of the river. Evidence in the record indicates that the Licensee and his guests already use the temporary dock and existing landing located on the property to launch boats. The Appellants do not specify or quantify the impacts they allege will be suffered due to the Project. Generally speaking, their concerns seem to be that increased boat traffic, particularly motorized boat traffic, will interrupt their quiet enjoyment of the river from canoes or kayaks. Such concerns do not relate to the approval standard. The scenic views of the river can be enjoyed equally whether there are other boats on the water or not. While navigation is an appropriate consideration under

the approval standard, again, there is no evidence in the record that boats launched at the Project site will disrupt the ability of other boats to navigate this part of the river.

To the extent there are concerns about scenic or aesthetic uses in the vicinity of the Project, it is important to remember that the applicable standard simply requires the Project to not have an *unreasonable* impact on those uses. Pursuant to the applicable Rule, “[u]nreasonable adverse visual impacts are those that are expected to unreasonably interfere with the general public’s visual enjoyment and appreciation of a scenic resource, or those that otherwise unreasonably impair the character or quality of such a place.” Ch. 315 CMR § 4. Obviously, every dock and waterfront structure has some impact on the scenic nature of a river. However, the Department was correct in finding that the Licensee is employing a dock size, location and design that will minimize visual impacts, as compared to existing ramp and float systems in the area as well as other design choices that could have been employed for the Project. It is notable that there are no permanent elements of the dock extending past the shoreline; this is a fully temporary dock with the only permanent component being the platform and pilings installed in the upland, to which the dock will be attached when in place. The ramp and rails are of standard low-profile aluminum and obstruct views no more than necessary in order to serve their purpose. During the approval process, as noted in the permit decision, the Licensee made several design changes in order to address Department concerns. The Licensee’s photo-simulations in particular demonstrate how the dock as approved will be aligned relatively close to the shoreline, which minimizes both the distance from which it can be seen as well as its overall visual impact. The Appellants have not challenged these photo-simulations, which clearly demonstrate that the Project will not unreasonably dominate one’s view when traveling the River. Also important to

minimizing impacts is the fact that no trees will be removed, and that the dock and ramp are of a size that similar to others shown in the visual survey.

The Appellants also challenge that the Department used the Visual Impact Assessment Matrix to evaluate the Project, and claim that the Matrix is not intended to determine the impact of a development when viewed from the water. The Department's standard Visual Impact matrix is intended to and does consider visibility from the water as well as from other public resources. Under this matrix, the scenic significance of the view from the water was categorized as "medium" because it might be viewed by over 25 people per day. This was measured against the visual impact of the Project, which considered its landscape compatibility, scale contrast and spatial dominance. After applying this standard analysis, the Department determined that the visual impacts of the Project are within an acceptable (not unreasonable) range. The visual matrix was correctly applied by the Department in rendering its conclusion that the Project would not have an unreasonable impact on other scenic and aesthetic uses along the River.

3. Actual and Proposed Usage.

The Appellants challenge the Department's reliance on satellite imagery and photographs submitted by the Licensee to demonstrate that motorized boats have been used along this portion of the Sheepscot River. This information is objective and reliable, and was easily verifiable by the Department. Members of the public also presented letters demonstrating that there have been motorized boats on this portion of the Sheepscot throughout past decades. The fact remains that this area of the river is navigable to small, motorized boats. They are used both south and north of the Project site. The Appellants concede that motorized boats are used southerly of the

Project site. There is nothing preventing those boats from accessing the Project site and areas north, just as the Project can be used to access the southerly areas.

Again, there is nothing in the applicable law or regulations that prohibits a new dock because it will introduce or increase motorized boat traffic. The standard is whether the Project will unreasonably interfere with other uses. The Army Corps of Engineers has reviewed potential impacts on navigation and found there to be no concerns. The application adequately demonstrated that the Licensee has maintained a seasonal dock in this area, and that it and the landing area have been used by the Licensee and his invitees since 2003 to launch jet skis and small, motorized and unmotorized boats. (Commenter William Weary provided a photograph in the record which depicted a jet ski on the Licensee's temporary dock). Because of the small size of the dock and the physical limitation of parking at the landing to one or two trucks, there will be no significant increase in the amount of boat traffic originating from the Project. The dock and landing will also be used just as much, if not more, for non-motorized boats. Further, the Appellants have not presented any information that boats using the dock and landing will in any way impede others' use of the river for canoeing and kayaking. There would have to be a demonstrated unreasonable impact on these uses in order for the relevant standard to be deemed unmet.

4. Identity and nature of the Licensee.

The Appellants suggest that Golden Ridge Sportsman's Club ("GRSC"), which will hold

a license for use of the permitted dock and landing area, is not a legitimate entity.² The Licensee submitted evidence of GRSC's corporate registration with its application, along with draft bylaws and a draft license.³ The corporation was registered in May of 2019, just before the NRPA application was submitted, so it is understandable that the bylaws had not yet been formally adopted. Further, the license was not necessary until the Project received applicable permitting, and so only the draft was submitted at the time of application. GRSC remains a properly registered mutual benefit nonprofit corporation, and bylaws have been adopted. Mr. Spinney is the duly elected President of the corporation. The license was accepted by the Board of Directors, not Mr. Spinney individually as shown in the draft. If there are any concerns as to the legitimacy or permanency of GRSC, those concerns are adequately addressed by the permit conditions, which require that the Licensee be able to demonstrate that the GRSC remains in good standing with the Maine Secretary of State. The Appellants' concerns about the Club not making actual use of the Project can also be adequately addressed, should they arise, through the enforcement mechanisms that are available to the Department where a Licensee is using a permitted project in a manner not contemplated by the application.

5. Alterations of the Shoreland.

The Appellants argue there is inconsistency between the Department's findings that (1) the Licensee does not propose to remove any trees; and that (2) any shrubs or trees incidentally removed will be replaced. These statements are not inconsistent. The Licensee's plan does not call for the permanent removal of trees. No cutting or clearing is necessary as the work is being

² In contrast to their claim that the GRSC is not a legitimate organization, the Appellants also claim that the GRSC is a "business." GRSC is a mutual benefit nonprofit corporation, and it is clear from its Bylaws that it has no profit motive.

³ The Licensee has separately submitted the approved bylaws and license as requested supplemental evidence.

conducted in existing open areas. The latter statement regarding incidental removal of trees is standard language in a NRPA permit intended to ensure that the site is returned to its preexisting condition after the completion of the work. If the Department were to correct this “inconsistency” as the Appellants demand, the decision would either be incorrect (because it would mischaracterize the content of the application) or would lack an important safeguard to protect the site.

6. Alternative Sites.

Appellants, for the purposes of the appeal, focus on claimed viability of the Wiscasset public boat launch as a feasible location from which to access this area of the Sheepscot River. Appellants suggest this is a “practical alternative that would be less damaging to the environment.” First, the Department concluded that there would be no impacts from the Project on the environment. The Appellants do not raise any issues in their appeal related to claimed environmental harms from the project. It is therefore not even necessary to consider whether there would be a “less damaging” alternative to the Project.

The Appellants principally challenge the use of motorboats on this section of the river. If the boats that would otherwise be using the subject dock and landing were to instead launch from the Wiscasset public landing, this would not eliminate boat traffic on this section of the river. Rather, it would increase traffic on the southerly areas of the river as boaters travel the seven miles to reach these waters. In *Hannum v. Maine Board of Environmental Protection*, supra, the Superior Court noted that it is a logical inconsistency to challenge that a proposed dock should be denied because it will increase boat traffic, but also argue that it should be denied because there are alternative launch points from which boats can access the dock site.

In the present case, the proposed alternative in Wiscasset is particularly unreasonable. Boaters traveling from the Wiscasset launch site would be covering a larger distance and likely using higher speeds to travel the distance to this point in the river, which would likely be more harmful to the environment and navigation. Most importantly, the Wiscasset landing is located southerly of the reversing falls, which obviously pose an extreme navigational hazard that can be tackled only by very experienced boaters, and only at very specific tides. Boaters who do not navigate the falls correctly risk being stranded on the wrong side, not to mention capsizing and other accidents (which of course cause environmental harm). The Department did consider these risks, and appropriately found that the Wiscasset landing is “not practicable for the purpose of launching motorized vessels for use above the reversing falls in Sheepscot Village.” In the absence of any practical alternatives, the minimal impacts of the Project, if any, are certainly acceptable under the NRPA permit standards.

In consideration of the foregoing, Licensee Jeffrey Spinney respectfully requests that the subject appeal be denied.

Dated: May 13, 2020

Appellee/Licensee Jeffrey Spinney

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IN RE: APPEAL OF DEPARTMENT ORDER L-28397-4E-A-N
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Exh. 1



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EXHIBIT 2



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