

STATE OF MAINE
BOARD OF ENVIRONMENTAL PROTECTION



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GOVERNOR

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January 25, 2021

SENT VIA ELECTRONIC MAIL ONLY

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Re: Appeal of Spinney Order – proposed supplemental evidence and motion to continue

Dear Participants:

On April 6, 2020, Carol Ervin and Bailey Bolen, Allen J. Philbrick (Trustee of the James Erskine Philbrick Tree Farm Trust), and William A. Weary (Appellants) filed with the Board of Environmental Protection (Board) an appeal of the March 13, 2020, Order of the Commissioner of the Department of Environmental Protection conditionally approving the application of Jeffry Spinney (Licensee) to construct a pier system and permanent boat ramp (#L-28397-4E-A-N) (Department Order).

Evidence offered by the Department staff

On January 15, 2021, the Department of Environmental Protection (Department) staff submitted to the Chair a memorandum containing staff notes and photographs from a site visit conducted by Department staff on January 7, 2021. Pursuant to Chapter 2, § 24(D)(3), I accept into the record the staff memorandum and photographs as additional evidence and analysis submitted in response to issues raised on appeal.

Appellants' proposed supplemental evidence

On January 19, 2021, the Appellants requested that I accept into the record proposed supplemental evidence. The Appellants argue that “events since closing of the [evidentiary] record [on] May 12, 2020 have been multiple and complex, and materially affect the original permit and the appellants’ appeal of April 6, 2020” and “this information could not, by the exercise of reasonable diligence, have been discovered in time to be presented earlier in the licensing process.”¹

The Appellants’ proposed supplemental evidence consists of a nine-page letter with several electronic links to 25 proffered exhibits.²

On January 21, 2021, the Licensee filed a response in opposition to the Appellants’ motion to introduce the proposed supplemental evidence.

The record for the Board’s appellate review is “the administrative record prepared by Department staff in its review of the application, unless the Board admits supplemental evidence or decides to hold a hearing on the appeal.” Chapter 2, § 24(D). An appellant’s request for supplemental evidence to be admitted must be submitted with the appeal. Chapter 2, § 24(B)(3).

Even assuming an exception were to be made on the timing of this request, I find that the supplemental evidence now offered by the Appellants is not relevant and material to the issues before the Board in the appeal. Much of what the Appellants have submitted or referred to in a link relates to town planning board and appeal board proceedings that do not bear on the Board’s review of the Commissioner’s decision. Other portions of the proposed supplemental evidence relate to whether the project is – or will be – in compliance with the Department Order under appeal. Allegations about compliance with the permit and any potential initiation of enforcement proceedings are not for the Board to decide and, in this instance, are immaterial to the appeal before the Board. For these reasons, I decline to admit the entirety of the Appellants’ January 19, 2021, proposed supplemental evidence.

¹ The record in this matter is the record before the Department at the time the decision was made on the permit application, March 13, 2020, together with any supplementary evidence admitted in the appeal process.

² None of the 25 proffered exhibits are attached to the Appellants’ January 19, 2021, submission. Department staff, however, determined that the records apparently proposed as exhibits 20 through 25 are already in the administrative record.

Appellants' motion to continue

On January 19, 2021, the Appellants filed a motion to postpone the Board's consideration of the appeal for an additional 60 days. The basis for the Appellants' motion is to allow additional time for permitting and appeal proceedings at the town level to conclude so as "to prevent the Board from spending time on an appeal for a project that may become moot."

On January 21, 2021, the Licensee filed a response in opposition to the Appellants' motion to continue.

The municipal review process and any appeal from that process is not material to the Board's appellate review. The Board's charge is to review the administrative record for the Department Order under appeal, and to "affirm all or part, affirm with conditions, order a hearing to be held as expeditiously as possible, reverse all or part of the decision of the Commissioner, or remand the matter to the Commissioner for further proceedings." Chapter 2, § 24(G). I previously granted two continuances in this appeal proceeding – for a total of approximately four months – at the request of the Licensee and without objection from the Appellants, to enable a possible resolution of the dispute.³ Before me now is another motion to continue the appeal proceeding, this time however, without a suggestion that doing so may resolve the appeal pending before the Board. The motion to continue the appeal proceeding for an additional 60 days is denied and the Board will proceed with the processing of this appeal without delay.

If you have any questions, you may contact Board Executive Analyst William F. Hinkel at bill.hinkel@maine.gov (207) 314-1458 or Assistant Attorney General Peggy Bensinger at peggy.bensinger@maine.gov (207) 626-8578.

Respectfully,



Mark C. Draper, Chair
Board of Environmental Protection

cc (via e-mail only): Service List (rev. October 13, 2020)

³ On August 13, 2020, I granted a motion of the Licensee to continue, until October 12, 2020, the appeal proceeding. On October 22, 2020, I granted a motion of the Licensee for a second continuance, until December 15, 2020.