

STATE OF MAINE
BOARD OF ENVIRONMENTAL PROTECTION



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GOVERNOR

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February 17, 2021

SENT VIA ELECTRONIC MAIL ONLY

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Re: Appeal of Spinney Order – Request for Reconsideration of Proposed Supplemental Evidence Ruling; Comments from Respondent Barth

Dear Participants:

On April 6, 2020, Carol Ervin, 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 on a Natural Resources Protection Act (NRPA) permit application filed by Jeffry Spinney. That Order (#L-28397-4E-A-N) (Department Order) conditionally approved a permit for Mr. Spinney (Appellee) to construct a pier system and permanent boat ramp.

On January 19, 2021 the Appellants requested that a list of proposed supplemental evidence be admitted into the record. On January 25, 2021, I ruled that the additional proposed supplemental evidence was not admitted, on the basis that it was untimely and consisted largely of electronic links, which are not permissible under Chapter 2, § 24(B)(2). In addition, many of the proposed documents

were not relevant to the issues before the Board in this appeal. On February 12, 2021, Gordon Smith entered his appearance on behalf of Carol Ervin, Bill Weary, and Allen Philbrick, three of the four Appellants, and on their behalf requested reconsideration of the January 25, 2021, ruling on two specific pieces of proposed supplemental evidence. On February 13, 2021, the Appellee, through its counsel, Kristin Collins, responded, arguing that the Appellants' request should be rejected as untimely.

The Ervin, Philbrick, and Weary appellants argue that a copy of an electronic mail document dated November 28, 2020, from Mr. Spinney to Alna Planning Board Chair Jim Amaral and Planning Board members Joel Verney and Beth Whitney is relevant to the permitting standards and arguments on appeal that Mr. Spinney's boat ramp does not meet the Department's shared use policy under the NRPA. The Appellee disagrees that the document is relevant to the appeal before the Board and argues that in any case its introduction as proposed supplemental evidence is untimely.

The November 28, 2020, document was not admitted as supplemental evidence on the basis that it was not submitted with the appeal, the timing required pursuant to Chapter 2, § 24(B)(3). While that timing would not have been possible because the document appears to have been written eight months following the issuance of the Department Order, the document was submitted in an electronic link in the January 19, 2021, filing, which is not permitted under Chapter 2, § 24(B)(2). The document was attached to Mr. Smith's filing of February 12, 2021, requesting reconsideration, but that was submitted three business days before the Board will consider the appeal. In addition, the full text of the e-mail shows that it is addressing the issue of an allegation of bias on the part of a decision maker in the municipal proceeding and it is not directly relevant to whether the NRPA application before Department was correctly decided. My decision not to admit the November 28, 2020, document stands.

The second document on which reconsideration is requested is a January 6, 2021, Settlement Agreement between Mr. Spinney and the Town of Alna. Appellants Ervin, Philbrick, and Weary argue that this document is relevant to the NRPA permitting standards and arguments on appeal related to Department's shared use policy and the validity of Mr. Spinney's alternatives analysis under Department rule Chapter 310 and that it could not have been brought to the Board's attention earlier. The Appellee argues that the Settlement Agreement should be rejected as untimely and not relevant to the Board's consideration of the appeal.

The January 6, 2021, Settlement Agreement was not admitted as supplemental evidence on the bases that it was not submitted with the appeal, as required pursuant to Chapter 2, § 24(B)(3), and that it relates to permit compliance rather than the appeal before the Board. My decision not to admit the January 6, 2021, Settlement Agreement on the bases of timeliness and relevancy stands.

On February 15, 2021, Nicholas Barth, a respondent in this appeal proceeding, submitted comments on the proposed Board Order to be considered by the Board on February 18, 2021. The Board's rules for appeal proceedings do not provide for the submission of written comments on a proposed Board Order. Chapter 2, § 24(F)(4) does, however, provide that the Board Chair may allow other persons, including respondents, to provide oral comment on the appeal at the meeting during which the appeal is considered. If Mr. Barth (or a designated spokesperson if he is unable to attend the February 18, 2021, meeting) wishes to orally comment on the appeal at the Board meeting, he may request that, and the Chair has discretion to allow it. Mr. Barth's written comments are not admitted.

Please note that the enclosed service list has been updated to include Mr. Smith.

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

Enclosure: Service List (rev. February 16, 2021)

cc (via e-mail only): Service List (rev. February 16, 2021)