



STATE OF MAINE
DEPARTMENT OF ENVIRONMENTAL PROTECTION
17 STATE HOUSE STATION AUGUSTA, MAINE 04333-0017

BOARD ORDER

IN THE MATTER OF

JEFFRY SPINNEY) NATURAL RESOURCES PROTECTION ACT
Alna, Lincoln County) COASTAL WETLAND ALTERATION
PIER SYSTEM AND BOAT RAMP)
L-28397-4E-C-Z)
APPEAL filed by)
Carol Ervin & Bailey Bolen,) APPEAL
Allen J. Philbrick, and William Weary)
APPEAL DENIED) FINDINGS OF FACT AND ORDER

Pursuant to the provisions of the Natural Resources Protection Act (NRPA) (38 M.R.S. §§ 480-A-480-JJ), Section 401 of the Federal Water Pollution Control Act (33 U.S.C. § 1341), *Rule Concerning the Processing of Applications and Other Administrative Matters*, Chapter 2, § 24, *Wetlands and Waterbodies Protection*, Chapter 310, and *Assessing and Mitigating Impacts to Existing Scenic and Aesthetic Uses*, Chapter 315, the Board of Environmental Protection (Board) has considered the appeal of CAROL ERVIN AND BAILEY BOLEN, ALLEN J. PHILBRICK, AND WILLIAM WEARY (collectively, the “appellants”) of the NRPA permit, #L-28397-4E-A-N, issued to JEFFRY SPINNEY (the “licensee”). The Board has considered the administrative record on appeal, including supplemental evidence admitted into the record, and FINDS THE FOLLOWING FACTS:

1. PROCEDURAL HISTORY:

On August 23, 2019, the licensee filed with the Department of Environmental Protection (Department) an application for a NRPA permit to construct a shared-use pier system and boat ramp on the Sheepscot River, in an area that constitutes a coastal wetland, in Alna. During its review of the application, the Department considered evidence filed by the applicant and evidence submitted by interested persons with regard to concerns about the proposed project. On March 13, 2020, the Department conditionally approved the application in Department Order #L-28397-4E-A-N (Department Order).

On March 27, 2020, the licensee filed an application for a minor revision to Special Condition #5 of the Department Order to remove the time-of-year work window restriction for the construction of the boat ramp. On June 1, 2020, the Department approved the minor revision application through issuance of Department Order #L-28397-4E-B-M.

On April 7, 2020, the appellants filed a timely appeal of the Department Order to the Board. The appellants requested that the Board reverse the approval and deny the NRPA permit application, and that the Board stay the Department Order.

On April 13, 2020, the Board acknowledged its receipt of the appeal and set a deadline for responses to the appeal of May 13, 2020, which provided a 30-day response period in accordance with Chapter 2, § 24(C)(1).

On April 17, 2020, the Board Chair denied the appellants' request for a stay of the Department Order. The Maine Administrative Procedure Act, 5 M.R.S. § 11004, allows a person to seek a stay of a licensing decision if they can demonstrate, among other criteria, irreparable injury to the petitioner. The Board Chair ruled that the appellants did not make a demonstration that there would be irreparable harm to themselves if the project were constructed during the processing of the appeal and later had to be removed.

During the 30-day response period for the appeal, six interested persons who had submitted written comments on the application filed letters of support for the appeal. These were filed by Kinne Stires in a letter dated April 19, 2020, supplemented by additional comments on April 24, 2020; by Mark DesMeules in a letter dated April 24, 2020; by Doreen Conboy in a letter dated May 4, 2020; by Nicholas Barth in comments dated May 10, 2020; by Cathy Johnson in a letter dated May 12, 2020; and by Jon Luoma in a letter dated May 13, 2020. Cathy Johnson's response letter included a request that the Board table its consideration of the appeal until a field survey of the natural resources in the vicinity of the project site could be completed.

On May 13, 2020, the licensee filed a response to the merits of the appeal and requested that the Board deny the appeal. The licensee also requested the admission into the record of two supplemental evidence documents, the adopted By-Laws of the Golden Ridge Sportsman's Club (By-Laws) and the executed Land Use License Agreement between the licensee and the club, both dated May 12, 2020.

On May 21, 2020, the appellants filed a letter objecting to the admittance of the licensee's proposed supplemental evidence on the basis that these materials could have been submitted earlier in the licensing process. The appellants further requested that if the Board admitted the documents into the record, the appellants be allowed an additional 20 days after that decision to file a response to the documents.

On June 5, 2020, the Board Chair granted the licensee's request to admit the adopted By-Laws into the record. Pursuant to Chapter 2, § 24(D), the Board may allow the record to be supplemented on appeal when it finds that the evidence offered is relevant and material, was brought to the attention of the Department at the earliest possible time and could not have been presented earlier in the licensing process. The Department reviewed a draft of the By-Laws during the review of the license application but did not require that the licensee submit a final copy of the By-Laws after they were adopted. The licensee therefore had no reason to submit the final By-Laws prior to the filing of the appeal. The Board Chair determined that

the By-Laws were raised as an issue in the appeal and are therefore relevant and material, and that the licensee provided them at the earliest opportunity. The Board Chair denied the licensee's request to admit the executed Land Use License Agreement into the record on the basis that Department staff needed to review any revisions to the document pursuant to Special Conditions #7 and #8 of the Department Order. The Board Chair denied the appellants' request for additional time to file a response to the admitted supplemental evidence, noting that the appellants would have the opportunity to comment orally on the adopted By-Laws at the Board meeting during consideration of the appeal. The Board Chair denied the interested person's request to table the processing of the appeal to allow for a field survey of the natural resources in the vicinity of the project site.

On June 8 and June 10, 2020, the licensee filed two letters with the Board, dated June 5 and June 9, 2020, respectively, in response to the interested persons' letters of support for the appeal. The licensee objected to not receiving copies of the interested persons' letters at the time they were filed, which prevented him from responding to them during the 30-day response period. The licensee's letters contained comments, annotated photographs, and maps, some of which were already in the record and some of which were not in the record.

On June 17, 2020, Department staff requested that the Board admit to the record the licensee's executed Land Use License Agreement, dated June 3, 2020, because it was required to be submitted to the Department in accordance with Special Condition #7 of the Department Order. As required by Special Condition #8 of the Department Order, the Department reviewed the revisions to the document. The Department accepted the revisions as minor and non-substantive.

On June 19, 2020, the Board Chair ruled that the letters filed by the licensee on June 8 and June 10, 2020, would not be admitted to the record. Chapter 2, § 24(D) only provides an opportunity to respond to the appeal itself. It does not provide for rebuttal to other persons' responses to the appeal. The Board Chair noted that the licensee would have the opportunity to present oral arguments and reference maps and photographs in the existing record during consideration of the appeal. The Board Chair accepted into the record the executed Land Use License Agreement offered by Department staff pursuant to Chapter 2, § 24(D)(3).

On August 11, 2020, the licensee filed a motion to postpone the Board's scheduled consideration of the appeal for at least 60 days to allow the licensee to consider alternate designs for the project which would potentially make the Department Order unnecessary. The appellants filed a joint response, dated August 12, 2020, stating that they did not object to the requested continuance. On August 13, 2020, the Board Chair granted the licensee's request for a continuance until October 12, 2020.

On August 11, 2020, the licensee filed a proposal with the Department to relinquish the portion of the Department Order pertaining to the installation of permanent pilings to support the pier. Chapter 2 does not allow for the partial surrender of a license. The Department Order was not changed in response to that request.

On October 12, 2020, the licensee filed a second motion to continue the Board's consideration of the appeal for another 60 days to enable a possible resolution of the dispute. The appellants filed a joint response, dated October 14, 2020, stating that they did not object to the further continuance. On October 22, 2020, the Board Chair granted the licensee's request for a further continuance until December 15, 2020.

The licensee constructed the permanent boat ramp on or around December 27, 2020. Department staff inspected the project site on January 7, 2021. On January 15, 2021, Department staff submitted to the Board Chair a memorandum requesting that the Board accept into the record the staff notes and photographs from the site inspection as additional evidence and analysis submitted by Department staff in response to issues raised on appeal.

On January 19, 2021, the appellants filed a motion to postpone the Board's consideration of the appeal for an additional 60 days to allow time for the resolution of municipal permitting challenges. The appellants also requested that the Board admit to the record additional supplemental evidence.

On January 21, 2021, the licensee filed a letter of objection to the appellants' proposed supplemental evidence on the basis that the new evidence relates to issues of compliance, which are not the subject of the appeal. The licensee also objected to the motion to continue the Board's consideration of the appeal, stating that the municipal appeals will not necessarily succeed and that the licensee is no longer considering proposing changes to the project design, as he was at the time of the prior continuance requests.

On January 25, 2021, the Board Chair accepted into the record the Department's January 15, 2021 memorandum pursuant to Chapter 2, § 24(D)(3). The Board Chair ruled that the supplemental evidence proposed by the appellants was not timely and was not relevant and material to the issues before the Board in the appeal and therefore not admitted to the record. The Board Chair denied the appellants' motion to further postpone the Board's consideration of the appeal on the basis that the municipal appeal processes are not material to the Board's appellate review.

2. PROJECT DESCRIPTION:

The Department Order approved the construction of a pier system consisting of a permanent access platform and four pilings in the upland, a four-foot-wide by 40-foot-long seasonal ramp, and a T-shaped seasonal float system consisting of a five-foot-wide by seven-foot-long landing float and an eight-foot-wide by 24-foot-long main float. It also included the construction of a 12-foot-wide by 36-foot-long permanent boat ramp, consisting of a subbase layer of six- to eight-inch diameter stones laid over geotextile fabric and surfaced with a top layer of three- to eight-inch diameter stones. The project will result in approximately 440 square feet of direct impact to the coastal wetland due to ramp construction and mooring blocks and approximately 370 square feet of indirect impact to the coastal wetland due to shading from the seasonal ramp and floats. The project was approved as a shared-use facility for the benefit of a recreation club known as the Golden Ridge Sportsman's Club.

3. STANDING:

The appellants own property that either directly abuts the project site or is located directly across the Sheepscot River (approximately 200 feet) from the project site. The appellants assert that they are aggrieved persons based on adverse impacts to their use and enjoyment of their respective properties and the river/coastal wetland. The Board finds that the appellants have demonstrated they are aggrieved persons for the purpose of this appeal, as defined in Chapter 2, § 1(B).

4. BASIS FOR APPEAL:

The appellants assert that the Department erred in finding that:

- A. The proposed activity will not unreasonably interfere with existing scenic, aesthetic, recreational, or navigational uses. NRPA Standards at 38 M.R.S. § 480-D(1).
- B. The proposed activity will not unreasonably harm any significant wildlife 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. NRPA Standards at 38 M.R.S. § 480-D(3).

In addition, the appellants claim that the Department Order contains inconsistencies and errors that render it unenforceable, that the Department improperly assisted the licensee in obtaining his permit, and that the Department did not independently investigate information submitted by the licensee.

5. REMEDY REQUESTED:

The appellants request that the Board reverse the Department Order.

6. DISCUSSION AND RESPONSE TO APPEAL

A. EXISTING SCENIC, AESTHETIC, RECREATIONAL, & NAVIGATIONAL USES:

The appellants challenge the Department's finding that the project will not unreasonably interfere with existing scenic, aesthetic, recreational, and navigational uses of the protected natural resource, a coastal wetland, pursuant to 38 M.R.S. § 480-D(1). The appellants' arguments on this finding can be broken down broadly into concerns regarding visual impact (scenic and aesthetic uses) and concerns regarding boat traffic and noise (recreational and navigational uses). These are discussed below in Finding 6(A)(1) and Finding 6(A)(2).

- 1. Scenic & Aesthetic Uses: The appellants state that the river in the vicinity of the project site is pristine and undeveloped, and that the Department was incorrect to consider any existing structures or development located south of the transmission line

corridor, which is located 2,000 feet south of the project site, as relevant to the visual impact review. The appellants further contend that the reference map for the photographic survey submitted by the licensee during the Department's review is misleading because it includes points that represent natural features as well as structures. The appellants object to the statement in the Department Order that the project will blend with the natural shoreline. The appellants also allege that the Department's conclusions regarding visual impact were based on the visibility of the project from a trail rather than from the river. In support of their arguments, the appellants cite 38 M.R.S. § 480-D(1), the NRPA standard pertaining to existing uses, as well as Department rule Chapter 315, *Assessing and Mitigating Impacts to Existing Scenic and Aesthetic Uses*. The appellants assert that the Department should have required the licensee to hire a design professional to conduct a formal visual impact assessment as allowed by Chapter 315, § 7.

In their comments in support of the appeal, the interested persons echo the appellants' statements that the Sheepscot River near the project site is undeveloped, and that the project will adversely affect the public's visual enjoyment of the resource.

In response to the appeal, the licensee states that the project will not have an unreasonable impact on the scenic and aesthetic character of the resource. The licensee argues that despite the appellants' claims about the uniqueness of the Sheepscot River, the river is not afforded special protections under state or federal law other than those that apply to all tidal rivers in Maine. The licensee argues that it is reasonable to consider the "Scope of Review" set forth in Chapter 315, § 4, as extending at least 1.5 miles north and south of the project site, that within this area, both north and south of the project site, there are existing structures visible from the resource, and that some of these are owned by the appellants or interested persons opposed to the licensee's project. As specific examples, the licensee references photographs in the permitting record that document an existing dock system and an existing boathouse, both located within one mile of the project site. The licensee also points to the 100-foot-wide transmission line corridor located 2,000 feet south of the project site, and several structures located on the river north of the project site, including a platform, bridge, retaining wall, and skidway. During the review process, the licensee submitted a map and photographs of some of these structures and documentation of Town of Alna approvals for others.

The licensee argues that the size and design of the pier system is reasonable and comparable to others in the surrounding area, that the aluminum ramp will have a low profile, and the floats will be located relatively close to shore as evidenced by the photographic simulations in the licensing record. The licensee states that the dimensions of the seasonal ramp and floats have been minimized to the extent practicable for the project purpose, and that the licensee decreased the size of the float system in response to Department comments during the review. The licensee adds that the aluminum ramp and floats are seasonal, no permanent feature of the pier system will extend beyond the shoreline, and no trees will be removed for the proposed project.

Pursuant to 38 M.R.S. § 480-D(1), the NRPA requires that an applicant demonstrate that a proposed activity will not unreasonably interfere with existing scenic and aesthetic uses. The project site is located along the Sheepscot River, approximately 2.4 miles north (upstream) of the reversing falls in Sheepscot Village, and approximately 4.3 miles south (downstream) of Head Tide Dam. The Sheepscot River is a scenic resource as defined in Chapter 315, § 5(H) and § 10(F). The project is not located on an outstanding river segment as defined in 38 M.R.S. § 480-P. Chapter 315, § 4 describes the Department's "Scope of Review" for assessing scenic impacts:

The potential impacts of a proposed activity will be determined by the Department considering the presence of a scenic resource listed in Section 10, the significance of the scenic resource, the existing character of the surrounding area, the expectations of the typical viewer, the extent and intransience of the activity, the project purpose, and the context of the proposed activity. Unreasonable 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.

Neither the NRPA nor Department rule specifies a precise radius of impact for conducting a visual impact assessment. Chapter 315, § 7 states that, "The radius of the impact area to be analyzed must be based on the relative size and scope of the proposed activity given the specific location." The Department Order reflects that the Department focused its visual impact review on areas of the river within approximately 1.5 miles of the project site. This area does not include the majority of Sheepscot Village, which is located at the confluence of the Dyer River and the Sheepscot River and which contains a greater density of development than the area located within 1.5 miles of the project site.

The licensee submitted an interactive map and photographic survey of the project site and surrounding area via an email dated October 16, 2019. This information was organized by Department staff in a document entitled, "Photos and Notes from Interactive Map." The Board finds significant to the analysis the following photographs showing permanent structures, lawns, or houses within 1.5 miles of the project site (the distance from each location to the project site, in river miles, was noted in the record by Department staff in another document entitled, "Selected Photos from Map"):

- Photo 13, walkway through marsh, 0.7 mi south of project site
- Photo 17, dock, 0.83 mi south of project site
- Photo 19, boathouse, 0.95 mi south of project site
- Photos 20 & 21, dock/lawn/house, 1.2 mi south of project site
- Photo 27, house/lawn, 0.3 mi north of project site
- Photo 36, platform, 0.2 mi north of project site
- Photo 38, old brick yard, 0.14 mi south of project site
- Photo 42, transmission line corridor, 0.35 mi south of project site
- Photo 45-47, house near transmission corridor, 0.44 mi south of project site

The licensee also submitted photographic simulations of the proposed pier system in additional emails dated October 16, 2019, to demonstrate lines of sight. The licensee estimated that the visibility of the project would potentially extend approximately 900 feet to the north and approximately 1,150 feet to the south. The licensing record also contains photographs, submitted by interested persons during the review, showing the licensee's previous seasonal dock in place at the project site in 2007 and 2012. Department staff visited the project site on September 6, 2019, and the record includes photographs and notes from that visit showing the existing launch area and remnants of the previous seasonal dock system.

During the review, the licensee reduced the size of the floats, eliminated proposed riprap from the plans, moved the permanent portion of the pier back from the shoreline, and revised the design of the permanent boat ramp to consist of aggregate rocks rather than concrete planks, further minimizing the visual contrast of the project. These minimization strategies are evident on the revised plans, dated December 9, 2019, and revised notes dated December 10, 2019. The Board finds that both the pier system and boat ramp were minimized in size, and the boat ramp was redesigned to be constructed with materials that will blend better with the natural shoreline.

During the project review, Department staff utilized the Department's Visual Impact Assessment Matrix, which considers, among many other factors, whether or not the project is visible from a public trail or park. In completing the matrix, staff noted that the project site cannot be seen from a public trail or park, possibly leading to the appellants' misconception that the entire assessment was based on the view from a trail. The Department's assessment of the visual impact of the project, and the Board's, is based on the view of the project site as seen from the river. Based on the maps and photographs in the record, the Board finds credible the applicant's assessment that the project would be visible from approximately 900 feet to the north and approximately 1,150 feet to the south.

Based on Chapter 315, § 7, the Department has the discretion to require, or not require, a visual impact assessment for a given project, and whether to require that the assessment be completed by a design professional. Based on the size, scope, and nature of the project and the surrounding area, the Department determined that a professional visual impact assessment was not necessary.

The Board has considered the information contained in the licensing record and the arguments of the appellants, interested persons, and licensee. The Board finds that the Department's use of a 1.5-mile radius to assess visual impact reasonable based on the relative size and scope of the proposed activity and given the specific location. The Board also finds that there are existing permanent structures on the shoreline in the vicinity and that the licensee's pier system and boat ramp are comparable to other systems in the area and to typical structures on tidal rivers. Based on the size, design, and materials to be used, and the character of the area, the Board finds that the project will not have an unreasonable impact on the existing scenic and aesthetic uses of the resource.

2. Recreational & Navigational Uses: The appellants challenge the Department's finding that the project will not unreasonably interfere with existing recreational and navigational uses of the protected natural resource. The appellants state that the project will result in increased motorized boat traffic, which will adversely affect the quiet enjoyment of the river by recreationalists on foot and people using non-motorized vessels. The appellants point out that the application materials projected approximately 25 club members, which the appellants assert will result in at least 25 additional motorized vessels on the river. The appellants also cite public comment letters in the record which state that there is currently little to no use of motorized boats on the river. The appellants claim that any comment letters that make statements to the contrary are referring to historic use and not current use. The appellants claim that the Department ignored comments in opposition to the project in favor of those in support. The appellants object to the fact that noise was not addressed in the Department Order, and note that boating speed is limited in the project vicinity to no more than headway speed and that motorboat use is therefore inappropriate.

The interested persons responding to the appeal state that there has been little to no motorized boat use near the project site during the past 50 years, and that the project will increase motorized boat traffic in the area, which will interfere with the use of kayaks and canoes on the river.

In response to the appeal, the licensee points out that the appellants have no evidence that the project will increase boat traffic on the river, or that the use of motorized boats will interfere with the use of kayaks and canoes. The licensee argues that the project site is already used to launch motorized boats and has contained a seasonal dock system in recent years. The permitting record reflects that the licensee currently launches his own motorized vessels from the project site. The licensee adds that the record contains comments from several interested persons in support of the project who claim they have personally used or observed motorized boats on this section of the river. The licensee asserts that the river in this area is navigable for small, motorized boats, that these types of vessels already have access to this area from private docks located near Sheepscot Village and from the project site itself, and that motorized boats will not exclude or diminish the enjoyment of kayak and canoe users. The licensee further argues that the small size of the facility and the parking area in the upland will limit the number of motorized boats being launched and used at any given time from this site.

The licensee argues that an appellate court has determined that the speculation that boat traffic will increase as the result of a project is not, on its own, a sufficient basis for the denial of a license.

Pursuant to 38 M.R.S. § 480-D(1), the NRPA requires that an applicant demonstrate that a proposed activity will not unreasonably interfere with existing recreational and navigational uses.

To demonstrate that the project itself will not physically block navigation by motorized or non-motorized vessels, the licensee, in correspondence dated September 13, 2019, compared the length of the pier system to the width of the river. The licensee submitted an overhead aerial image of the project site, with measurements taken with mapping software to demonstrate that the river is approximately 200 feet wide at the project site. The pier system, as approved in the Department Order, will extend approximately 50 feet from the shoreline, leaving available approximately 75% of the river for navigation. Based on this information in the record, the Board finds that the licensee's pier system will not block navigation of the river channel or unreasonably interfere with existing recreational and navigational uses.

In correspondence to the Department dated November 6, 2019, the licensee stated that the recreation club is not expected to grow substantially beyond approximately 25 members, and that the members collectively own approximately 10 motorized boats ranging in size from 12 to 17 feet long, as well as a number of kayaks and canoes. The licensee stated that the limited parking at the site will naturally limit the number of boats using the site at any given time. The licensee's current use of the area to launch and operate motorized vessels is reflected in photographs in the record including photographs 20 and 24 in "Photos and Notes from Interactive Map."

During the review, the Department received letters from ten interested persons in support of the project. Of these, eight stated they have personally observed or participated in the use of motorized boats on the Sheepscot River between the reversing falls and Head Tide Dam. About half of these letters make reference to current or recent use, while the others refer to observations from prior decades, but within living memory. The Department also received letters from approximately 26 interested persons or entities in opposition to the project. Of these, 11 stated that there is currently little to no motorized boat use on the river above Sheepscot Village.

The NRPA does not directly regulate boat use. The operation of boats is regulated by the Department's sister agencies and the United States Coast Guard. For example, the Maine Department of Inland Fisheries and Wildlife (MDIFW) has promulgated rules governing the horsepower of motors used on watercraft for certain inland water bodies. The Sheepscot River is not one of the water bodies for which motorboat use is restricted. However, when a proposed project could increase boat use in a protected natural resource to such an extent and in such a manner that it could adversely impact existing uses of the resource the Department may consider that effect of the project. In response to concerns from interested persons, the Department consulted with the MDIFW and the Maine Department of Marine Resources (DMR) and confirmed that boating speed within 200 feet of any shoreline is limited to headway speed, pursuant to 12 M.R.S. § 13068-A(13). "Headway speed" is defined in the statute as "the minimum speed necessary to maintain steerage and control of the watercraft while the watercraft is moving." The speed limit rule does not apply to boat operators "while actively fishing." Given the width of the river in the vicinity of the project (approximately 200 feet), this restriction on boating speed may reduce the potential impacts motorized boating would

have on the use of the river in this location by non-motorized boats, however, the enforcement of this law is not within the purview of the Department. The speed limit does not preclude the launching and use of motorized boats at the project site. To address the concerns on this issue, the Department added Special Condition #4 to the Department Order, which states:

Prior to operation of the boat ramp, the applicant shall post a permanent sign in a visible location at the boat launch identifying the river as a “no wake” zone or “headway speed only” zone. The applicant shall post on the same sign or on an additional sign posted nearby in a visible location, in reasonably-sized lettering, the following text: “NOTICE: The operation of any watercraft above headway speed within 200 feet of any shoreline is a Class E crime (38 M.R.S. §§ 281-285).”

The NRPA statute does not include a specific standard regarding noise. Noise may be considered if a proposal would result in noise to an extent that it impacted existing uses of the protected resource, 38 M.R.S. § 480-D(1). The project’s noise impact on the river depends on a number of factors, such as type and number of vessels being launched on a given day and the speed of those vessels as they travel on the river. The Board finds that it is reasonable to conclude that the 2-3 boats that would potentially use the project site at any one time, traveling at or close to headway speed on the river, would not result in an unreasonable impact to existing uses. As described above, the NRPA does not directly regulate boat use or speed, nor does it regulate the unamplified sound of the human voice.

The Board has considered the information contained in the licensing record and the arguments of the appellants, interested persons, and licensee. With regard to the conflicting statements about the current use of motorized boats on the river, the Board finds that it is reasonable to conclude, in consideration of all comments in the record, that while the operation of motorized boats may not be the primary use of the river, it is an existing use. The Board finds that the appellants’ claim that the Department ignored public comments is not supported. The Board finds that the project has the potential, as a secondary impact, to increase motorized boat traffic on the river to some extent, but this potential increase is incremental and does not support a finding of unreasonable impact to other uses of the resource. The Board also finds that Special Condition #4 of the Department Order addresses boat speed and, by extension, noise impacts. In light of all of the above, the Board finds that the project will not have an unreasonable impact on the existing recreational and navigational uses of the resource.

B. HABITAT AND FISHERIES CONSIDERATIONS:

The appellants challenge the Department’s finding that the proposed activity will not unreasonably harm any significant wildlife 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, pursuant to 38 M.R.S. §

480-D(3). The project will result in approximately 440 square feet of direct impact to the coastal wetland due to ramp construction and mooring blocks and approximately 370 square feet of indirect impact to the coastal wetland due to shading from the seasonal ramp and floats. The appellants' arguments focus on the existence of alternative sites and the legitimacy of the club with regard to the project's status as a shared-use facility. These two topics are discussed below in Finding 6(B)(1) and Finding 6(B)(2).

1. Practical Alternatives Less Damaging to the Environment: The appellants challenge the Department's finding that the proposed project represents the least environmentally damaging alternative that meets the overall purpose of the project. The appellants assert that viable alternatives less damaging to the environment exist, and therefore the project will result in an unreasonable impact as described in Chapter 310, § 5(A). The appellants point out that the licensee already launches his vessel from the project site without a dock or permanent ramp. The appellants claim that the licensee addressed only seven out of a total of eight alternative launch sites proposed by interested persons during the review, and that the alternative that was not considered was the public boat launch in the Town of Wiscasset, located approximately seven miles downstream of the project site. The interested persons, in response to the appeal, concur that the Wiscasset public launch is an adequate alternative to the project.

In response to the appeal, the licensee states that the purpose of the project is to launch and operate boats upstream of the reversing falls in Sheepscot Village, and the Wiscasset public launch site is not feasible for this purpose due to distance and due to its location downstream of the reversing falls. The licensee states that traversing the falls by boat is dangerous and is not possible at all tides. The licensee suggests that the use of the Wiscasset boat launch to reach the upper Sheepscot River would result in greater environmental impact due to boats being driven over greater distances, at greater speeds, to achieve the project purpose. The licensee claims that an analysis of alternatives less damaging to the environment is not necessary because the Department determined that the project will not have any impacts on the environment.

The Department Order and the record do not support the licensee's claim that the Department determined that the project will have no impacts on the environment, only that the resulting impacts will not be unreasonable.

Under the provisions of Chapter 310, § 4, the tidal and subtidal lands at the project site are wetlands of special significance. Pursuant to Chapter 310, § 5(A), activities proposed in, on or over wetlands of special significance are presumed to have a practicable alternative less damaging to the environment and their impact is considered unreasonable, except for certain types of projects, including projects designed for water dependent uses. While this proposed project is a water dependent use, pursuant to Chapter 310, § 5(A), an applicant proposing such an activity is still required to provide an analysis of alternatives, and the licensee did analyze potential alternatives to the construction of this project, including the no-build alternative. As described in Chapter 310, § 9(A), an alternatives analysis must address the project need, avoidance options, and minimization strategies.

In his application, the licensee stated that the purpose of the project is to improve the safety and stability of the existing launch area, prevent erosion of the shoreline, and provide access for club members to swim, boat, hunt, and fish. The record also contains ten letters of support from interested persons, five of which directly expressed a need for a safe and accessible launch site for trailered boats in this segment of the river. To demonstrate that the existing launch area does not meet this need, the licensee submitted photographs that show that the substrate at the existing launch area is mud, which prevents the regular launching of boats on trailers without causing erosion or causing vehicles to be mired. Department staff confirmed these site conditions during the site visit on September 6, 2019. In the application, the licensee analyzed two other potential launch areas on his property and demonstrated that each would result in greater impact to the environment than the proposed site. The licensee addressed minimization strategies through revisions to the plan dated December 9, 2019; however, since the appellants do not raise minimization as an issue, the Board will not discuss those changes at length here. The project will result in 440 square feet of direct impact to the coastal wetland and 370 square feet of indirect impact due to shading.

During the review, the Department compiled a list of seven alternative access points and asked the licensee to address the feasibility of each one as an alternative to the proposed project. This list was sent to the licensee in an email dated October 16, 2019. The sites were listed as follows:

- a. Head Tide Dam
- b. Bass Falls Preserve
- c. Sheepscot Village
- d. Wiscasset
- e. Kings Mills
- f. Coopers Mills
- g. Drucker Preserve

This list includes the public launch site in Wiscasset, as well as the six sites specifically listed and numbered 1–6 on page 6 of a comment letter, dated September 27, 2019, submitted by the appellants Carol Ervin and Bailey Bolen. Their letter also mentioned six additional points of access in the narrative on page 7 of the comment letter, all of which are located below the reversing falls. The Department did not require the licensee to provide a formal response to those sites because the alternatives analysis of the licensee's NRPA application already stated that the reversing falls make the river segment at the project site effectively inaccessible from points south of the falls, excluding those points as viable alternatives for the project purpose. The licensee addressed the feasibility of the sites on the above list (a–g) in emails dated October 17, 2019. The response cites the following reasons for why each site is not practicable: not accessible to a boat trailer, has no parking for vehicles with trailers, is private property, is located north of Head Tide Dam and therefore upstream of navigable tidal waters, or is too far to feasibly launch a vessel and navigate to the project site. The licensee noted that Drucker Preserve is co-located with Kings Mills and shares the same limitations as an access point. In specific response to the alternative of the Wiscasset public boat launch,

the licensee cited the seven-mile distance of that launch from the project site, traffic, parking, and the physical barrier of the reversing falls as limitations to using this site.

After considering the analysis of the alternatives contained in the licensing record, the arguments of the appellants, the arguments of the interested persons, and the licensee's response, the Board finds that the licensee's alternatives analysis adequately demonstrates that the project represents the least environmentally damaging practicable alternative that meets the overall purpose of the project.

2. Shared-Use Facility: The appellants claim that the licensee failed to demonstrate that the pier and boat ramp will be a shared-use facility, because he did not demonstrate that the Golden Ridge Sportsman's Club is a legitimate club. The appellants argue that the Department would not have issued to the licensee to an individual, which incentivized the creation of the club. The appellants also point out that it is simple and inexpensive to register a corporation, but the club did not submit documentation that it took the additional steps necessary, pursuant to 13-B M.R.S. §§ 101 et seq., to become a corporation under Maine law, such as holding an organizational meeting, electing officers, and adopting by-laws. The appellants object that the Department Order does not require the licensee to submit the final, adopted by-laws for the club, and that the Department did not require a final executed Land Use License Agreement, which grants the club permission to access to the facility, prior to the issuance of the Department Order. The appellants point to the fact that the draft Land Use License Agreement submitted during the review lists the licensee as both the grantor and the grantee of the agreement, indicating there are no other officers or members of the club. The appellants assert that the requirement that the licensee submit a Certificate of Good Standing for the club upon request by the Department, as required by Special Condition #10 of the Department Order, is meaningless because such certificates are readily issued without question. One of the interested persons also contends that the club was created only for the purpose of obtaining a license, and that there is no evidence that the club exists.

In response to the appeal, the licensee states that the club is a registered non-profit corporation, and that the licensee submitted evidence of its registration, as well as draft by-laws and a draft Land Use License Agreement, to the Department during the review. The licensee states that the club only became registered in May 2019 and did not have time to formalize and adopt the by-laws prior to filing the application. The licensee further argues that the Land Use License Agreement was not necessary until and unless the project was approved, so it was not executed until after the license was issued. The licensee adds that the by-laws have now been adopted, the licensee is president of the club, and the Land Use License Agreement was signed by a board of three officers, not just the licensee as originally shown in the draft. The licensee argues that the on-going legitimacy of the club is adequately addressed through the special conditions of the Department Order and could be further addressed through enforcement action by the Department if necessary.

The NRPA does not contain any requirements regarding shared-use facilities. However, as set forth in Chapter 310, §5(D)(2), the determination of whether the impacts of a proposed project are reasonable includes a consideration of the frequency of similar impacts, which may be reduced if multiple people share one access point to the resource. In addition, the analysis of the reasonableness includes a balancing of the impacts to the resource with the type and degree of benefit or usefulness of the proposed project. The status of shared use versus individual use is therefore relevant in the establishment of the project purpose and the determination of reasonableness of impacts.

In correspondence with the licensee dated May 10, 2019, Department staff stated that the Department does not typically issue licenses for boat ramps to be used only by private individuals, but it has issued licenses for boat ramps that will be used by multiple people, such as those proposed by municipalities, condominium associations, and businesses. In the same correspondence, Department staff cautioned the licensee about the difficulty in obtaining such a license and stated that any application for such a project would require a thorough and detailed alternatives analysis.

In support of the project purpose being a shared-use facility, the licensee submitted draft by-laws for the club, dated November 2, 2019, and revised November 11, 2019. The licensee submitted a draft Land Use License Agreement on November 4, 2019, followed by a revised draft dated November 7, 2019. The licensee also submitted a draft membership application on November 4, 2019. On January 6, 2020, the licensee submitted evidence that the club was a registered non-profit corporation with a status of “good standing” in the State of Maine.

As described in Finding 1 above, the Board admitted the adopted by-laws for the club, dated May 12, 2020, and the executed Land Use License Agreement, dated June 3, 2020, into the record as supplemental evidence. The by-laws are signed by an officer of the club other than the licensee. The Land Use License Agreement is signed by the licensee, as President, and two other club officers, who form the Board of Directors for the club.

To ensure that the pier system and boat ramp remain a shared-use facility and do not revert to individual use, the Department included special conditions in the Department Order. Special Condition #10 of the Department Order requires not only that the licensee produce evidence, upon request by the Department, that the club is in good standing, but also that the club remains active:

Upon request by the Department, at any time during the life of the project, the applicant shall submit information to the Department demonstrating that the Golden Ridge Sportsman’s Club is active and in good standing with the Maine Department of the Secretary of State.

In addition, Special Condition #9 requires that the club’s access agreement remain valid, or the licensee must remove the permanent boat ramp and reduce the size of the float system:

If the Land Use License Agreement is terminated by the Licensor or Licensee and is not replaced by another instrument of legal access for the Golden Ridge Sportsman's Club within six months of the agreement termination, or if the club is dissolved, the applicant shall remove the boat ramp, restore the coastal wetland to its natural condition, and reduce the size of the main seasonal float to eight feet wide by 12 feet long.

The Board has considered the information in the licensing record, the appellants' arguments, the interested persons' arguments, and the licensee's response. The Board notes that the appellants both argue that the proposed boat launch should be denied because it will draw many users and motorized boats to the area and argue that it should be denied because it will not be a shared-use facility. The Board also finds that even if the licensee only formalized the club in response to the information conveyed by the Department during the pre-application process, this does not obviate the need for the project. The Board also finds that the Certificate of Good Standing, however easily obtained, provides supporting evidence that the club is an organized entity. Given that the shared-use status of the project is related to the standards of the NRPA but not directly required under the law, and in light of the other evidence in the record supporting the existence of the club, the Board finds that it was not necessary for the licensee to demonstrate that the club had taken the additional steps of incorporation pursuant to 13-B M.R.S. §§ 101 et seq. The Board further finds that the licensee adequately demonstrated that the purpose of the project is to create a shared-use facility, and that in light of that demonstrated project purpose, the impacts to the coastal wetland are reasonable.

C. OTHER CONSIDERATIONS:

The appellants claim that the Department Order is vague and inconsistent, and therefore unenforceable. With regard to this argument, the appellants refer to two statements in the Department Order, one of which states that no tree removal is proposed for the project, and one of which states that any trees removed incidentally will be replanted according to the local shoreland zoning ordinance. The appellants claim that because the project plans do not show existing vegetation, it is impossible to know if tree removal will be necessary for the project.

The appellants, as well as the interested persons, claim that the Department Order does not recognize the importance of this section of the river nor the monetary investments in conservation efforts by local, state, federal, or non-governmental agencies and organizations. The appellants also assert that the Department inappropriately assisted the licensee during the application process, and that the Department did not verify information submitted by the licensee during the review.

In response, the licensee asserts that the Department Order's statements on tree removal are not contradictory, but correctly represent the intention of the licensee to not remove trees, while providing a contingency in the event that trees are incidentally removed

during construction. The application states, in Attachments 2 and 7, that no tree removal is proposed for the project. Attachment 8 of the application indicates that the licensee intends to replant any trees that are accidentally damaged during installation. During the site visit in September of 2019, Department staff observed that existing openings on the shoreline can accommodate the proposed ramp and pier system without the removal of trees. Therefore, the Department Order includes both statements to reflect the licensee's proposal to retain the trees as well as the contingency plan to replant if vegetation is accidentally damaged.

The Board finds that the Department Order describes a project that does not include the removal of trees and therefore that is an enforceable term of the permit. The provision regarding replanting is a contingency plan to ensure no ultimate harm to the shoreline vegetation. Moreover, an argument that any error or inconsistency within the Department Order would render the permit unenforceable is contrary to Special Condition #3 of the Department Order, which states:

Severability. The invalidity or unenforceability of any provision, or part thereof, of this License shall not affect the remainder of the provision or any other provisions. This License shall be construed and enforced in all respects as if such invalid or unenforceable provision or part thereof had been omitted.

With regard to the appellants' arguments that significant effort and funds have been put towards preserving this area, the Board acknowledges the concerns of interested persons regarding the conservation efforts of individuals and various groups. The Board further acknowledges that, as noted in the Department Order, the Sheepscot River from Head Tide Dam to the reversing falls has been designated an Ecological Focus Area by Maine Natural Areas Program (MNAP). While Focus Areas are areas of high-quality wildlife habitat and natural communities, they are identified by MNAP to be used as a non-regulatory planning tool for municipalities and organizations with conservation objectives. The NRPA, in 38 M.R.S. § 480-D(3), requires that the Department consider whether a proposed activity will unreasonably harm habitats or fisheries. Pursuant to Chapter 310, § 5(D), in considering the reasonableness of impacts, the Department considers various factors including the degree of harm or benefit to the resource, the duration of the activity and the ability of the resource to recover, and the proximity of the activity to protected areas. The Board finds that based on the size and nature of the boat ramp and pier system, the project will not unreasonably interfere with continued conservation efforts targeted within the Focus Area and the habitat benefits they may provide in connection to the resource.

On the issue of the Department providing assistance to the licensee during the application process, the licensing record contains numerous correspondence between the Department and the licensee, as well as numerous correspondence between the Department and interested persons in opposition to the project, in which the Department provided factual information in response to questions about the licensing process. Most applicants for permits from the Department seek and are afforded assistance with understanding the

process, what materials should be submitted, and the licensing criteria. In correspondence to the licensee dated May 10, 2019, the Department emphasized the difficulties in meeting the standards of the NRPA for this type of activity and encouraged the licensee to evaluate alternatives that would not require a license under the NRPA.

Regarding independent review and verification, the record reflects that the Department conferred with multiple agencies to independently review various aspects of the application, including MDIFW, MNAP, DMR, the Department's Bureau of Remediation and Waste Management, and the Maine Department of Agriculture, Conservation and Forestry. Department staff conducted a site visit at the project site in September of 2019 to verify site conditions.

The Board considered the information in the licensing record, the appellants' arguments, the interested persons' arguments, and the licensee's response. The Board finds that the statements in the Department Order regarding tree removal are not inconsistent. The Board finds that the Department acted appropriately in offering guidance and feedback to the licensee during the application review process and that the record shows that the Department conducted a fair and independent review of the application.

Based on the above findings, the Board concludes that:

1. The appellants filed a timely appeal.
2. The licensee's proposal to construct a pier system and permanent boat ramp for shared use by a recreational club in the Town of Alna meets the criteria for a license pursuant to the Natural Resources Protection Act, 38 M.R.S §480-D.

THEREFORE, the Board DENIES the appeal of CAROL ERVIN AND BAILEY BOLEN, ALLEN J. PHILBRICK, AND WILLIAM WEARY. The Board AFFIRMS the Department's Order #L-28397-4E-A-N, dated March 13, 2020, which approves the application of JEFFRY SPINNEY to construct a pier system and permanent boat ramp.

All other Findings of Fact, Conclusions and Conditions remain as approved in Department Order #L-28397-4E-A-N, and subsequent orders, and are incorporated herein.

DONE AND DATED AT AUGUSTA, MAINE, THIS 18th DAY OF FEBRUARY, 2021.

BOARD OF ENVIRONMENTAL PROTECTION

By:



Mark C. Draper, Chair