

MacNeil, Jami

From: Hinkel, Bill
Sent: Tuesday, January 26, 2021 1:53 PM
To: Nicholas Barth; Burke, Ruth A; Hinkel, Bill; Bensinger, Peggy; Elwell, Caleb; MacNeil, Jami; Hallowell, Dawn; Carol Ervin; Bailey Bolen; Allen J. Philbrick; plyons@eatonpeabody.com; William A. Weary; Kristin Collins (kcollins@preti.com); Jeffrey Spinney; Cathy Johnson (cjohnson@tidewater.net); Doreen Conboy; Mark P. Desmeules; A. McKinne Stires; Jon Luoma
Subject: Spinney appeal - Response to Mr. Barth inquiry and revised service list
Attachments: 2021-01-26 Spinney Appeal Service List.pdf

Mr. Barth:

This e-mail is in response to the questions you raised in your January 25th e-mail.

The Board Chair based his decision not to admit proposed supplemental evidence offered by the Appellants on January 19, 2021, on the fact that portions of the proposed supplemental evidence relate to whether the project is in compliance with the Department Order under appeal. Allegations about compliance with the permit are not for the Board to decide and are not at issue in the appeal before the Board. The issues before the Board in the appeal concern whether the licensing criteria were met and whether the permit application should have been approved.

Department staff are responsible for evaluating compliance with permit conditions and deciding on an appropriate response when permit conditions are not met. Matters related solely to Department staff's oversight of compliance with permit conditions are not relevant to the merits of the permit approval itself. The Board must consider only the record of evidence related to the issuance of the permit, not information related to events that have taken place subsequent to the issuance of the permit, such as the as-built configuration of the approved project or town planning board decisions. Questions or concerns related to permit compliance should be directed to Department staff – in this instance Jami MacNeil. The Department's decisions on whether a violation of the terms and conditions of a permit has occurred and if so, whether an enforcement action should be initiated are discretionary and are not subject to an appeal.

The Board's options for deciding an appeal of a licensing decision are to affirm all or part, affirm with conditions, order a hearing to be held on the appeal, reverse all or part of the decision of the Commissioner, or remand the matter to the Commissioner for further proceedings. With respect to your questions about a remand, the Board may remand a matter, here a permit application, to the Commissioner but the Board would not be remanding it to the Commissioner for a determination concerning compliance with the permit that was issued. Examples of when a remand would take place would include when the Board finds that a procedural error, such as a failure to give notice to an abutter, was made in the processing of the application that could be cured by a remand, or when the Board wishes to have the Department gather more information on whether the application meets the licensing criteria.

Unrelated to your e-mail, I have updated the service list to include Assistant Attorney General Caleb Elwell. Please be sure to use the revised service list (attached) when sending correspondence in this matter.

Respectfully,

William F. Hinkel
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From: Nicholas Barth <barthnicholas242@gmail.com>

Sent: Monday, January 25, 2021 5:27 PM

To: Hinkel, Bill <Bill.Hinkel@maine.gov>

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

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Mr. Hinkel,

Could you clarify the present status relating to DEP approval of the Spinney now completed boat launch accessing the Upper Estuary of the Sheepscot River? Am I correct that the BEP Chair has ruled that the appellants have no standing to challenge the completed work for the now existing boat launch? **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)**

Could you also tell me if the DEP staff administrative procedural process for reviewing the Spinney NRPA related project, under BEP review, is within the scope for a remand to the DEP Commissioner for further BEP proceedings per Chapter 2, § 24(G)? If not, could you clarify?

Is it reasonable to assume that a faulty DEP staff administrative procedural process relating to the Spinney NRPA application process can be grounds for a BEP remand to the DEP Commissioner for corrective actions?

Thank you for a prompt response.

Nicholas Barth