



DEPARTMENT ORDER

IN THE MATTER OF

SHM ROCKLAND, LLC	) NATURAL RESOURCES PROTECTION ACT
Rockland, Knox County	) COASTAL WETLAND ALTERATION
MARINA EXPANSION AND DREDGE	) WATER QUALITY CERTIFICATION
L-20386-4P-P-N (approval)	)
L-20386-4E-Q-N (approval)	) FINDINGS OF FACT AND ORDER

Pursuant to the provisions of 38 M.R.S. §§ 480-A–480-JJ, Section 401 of the Clean Water Act (33 U.S.C. § 1341), and Chapters 310 and 315 of Department rules, the Department of Environmental Protection (Department) has considered the application of SHM ROCKLAND, LLC (applicant) with the supportive data, agency review comments, public comments, and other related materials on file and FINDS THE FOLLOWING FACTS:

1. PROJECT DESCRIPTION:

A. History of Project: In Department Order #L-20386-26-A-N/L-20386-4E-B-N, dated October 24, 2000 and corrected December 27, 2000, the Department approved the development of an operations center consisting of a 78,000-square-foot office building, an approximately 3.2-acre parking lot, a 7,800-square-foot daycare center, a 1,300-square-foot boathouse, a pavilion, and a 1,350-foot-long boardwalk. The development resulted in approximately 5.44 acres of impervious area. The development is located off Ocean Street in the City of Rockland.

In Department Order #L-20386-4C-C-N, dated December 20, 2000, the Department approved the restoration of a granite breakwater, the construction of a pier and wave fence, and the dredging of approximately 54,562 square feet of the coastal wetland. In Department Order #L-20386-26-G-B/L-20386-4E-H-N, dated July 23, 2008, the Department approved the expansion of the marina to include 40 additional slips and 98 pilings to support a floating dock. Subsequently, the Department has approved several modifications to the development. To date, the marina has resulted in approximately 1,084 square feet of fill and 3,211 square feet of shading impacts within the coastal wetland.

In Department Order #L-20386-26-N-T/L-20386-4E-O-T, dated May 17, 2021, the Department approved the transfer of the previous Department Orders as they pertain to the marina portion of the facility, consisting of 2.45 acres of upland and the existing pier and float systems, from Rockland Harbor Park, LLC to SHM Rockland, LLC.

B. Summary: The applicant proposes to expand the existing marina by constructing an extended access platform to the fixed pier, adding three new float configurations (Dock A, Dock B, and Dock C), and dredging approximately 138,000 square feet of the

subtidal coastal wetland, all as shown on a set of plans consisting of 17 sheets, the first of which is titled, "Legend," prepared by Landmark Corporation Surveyors and Engineers and dated by last revision October 2021. The proposed access platform, which will serve as a public viewing platform as well as an improved accessway onto the pier, will be 16 feet wide by 65 feet long and will extend along the shoreline south from the landward end of the existing fixed pier. The platform will be supported by an upland concrete retaining wall and up to 30 pilings set into concrete footings over an existing riprap revetment. The platform will result in approximately 116 square feet of direct impact and 205 square feet of shading impact over existing riprap within the coastal wetland.

The proposed Dock A float system will extend east and north of the existing pier. It will consist of a 24-foot by 24-foot access platform off the fixed pier; a six-foot-wide by 80-foot-long gangway ramp; a 15-foot-wide by 174-foot-long float extending north; two 12-foot-wide by 150-foot-long floats extending east; a 15-foot-wide by 150-foot-long float extending east; and a 20-foot-wide by 125-foot-long float extending north, forming a T-head with a 20-foot-wide by 90-foot-long float extending west and a 20-foot-wide by 150-foot-long float extending east. The proposed Dock A floats will be composed of a foam core encapsulated by reinforced concrete. The proposed Dock A T-head floats will have a four- to eight-foot draft designed to attenuate wave energy.

The proposed Dock B float system will extend west and north of the existing pier, will be accessed by an existing gangway ramp, and will replace a portion of the existing timber floats at the marina. Dock B will consist of a 10-foot-wide by 170-foot-long float extending west; a 12-foot-wide by 48-foot-long float extending north; and a 12-foot-wide by 155-foot-wide float extending west. The northernmost float of Dock B will connect to the Dock A T-head. The proposed Dock B floats will be composed of a foam core encapsulated by reinforced concrete.

The proposed Dock C float system will consist of a float tree extending west off existing floats to provide slips for smaller vessels. This system will consist of a 10-foot-wide by 49-foot-long float extending west; a 10-foot-wide by 248-foot-long float stem extending northwest; seven four-foot-wide by 30-foot-long finger floats extending off the southwest side of the float stem; six four-foot-wide by 40-foot-long finger floats extending off the northeast side of the float stem; and a 10-foot-wide by 80-foot-long float capping the northwest end of the float stem. The proposed Dock C floats will be composed of timber decking over polytube floatation pontoons.

The three new dock systems will be supported by up to 24 new 16-inch-diameter steel pipe pilings, up to 37 new 20-inch-diameter steel pipe pilings, and up to 43 new 12-inch-diameter timber pilings. The applicant proposes to remove nine existing 12-inch-diameter timber pilings, resulting in a net increase of approximately 119 square feet of direct impacts to the coastal wetland. The proposed dock systems will result in a net increase of approximately 24,738 square feet of shading impacts over the subtidal coastal wetland. The proposed float layout is shown on Sheet 3 and the proposed pile configuration is shown on Sheet 5 of the plan set referenced above.

The proposed dredge will encompass approximately 138,000 square feet of subtidal coastal wetland and will remove approximately 12,520 cubic yards of material. The dredge depth will range from six to 13 feet below the elevation of mean low water (MLW). Dredge material will be transported to an upland location for use as beneficial fill.

The applicant intends to include the proposed marina expansion in its annual notification to the Department pursuant to 38 M.R.S. § 488(29), the Site Location of Development Act (Site Law) exemption for new construction at an existing licensed development. The applicant must include plans for the marina expansion and any other activities undertaken pursuant to this exemption in its next application for new construction or a modification of the underlying Site Law permit for the facility.

C. Current Use of the Site: The site of the proposed project is a 2.45-acre lot developed with a parking lot, walking paths, a gazebo, a restaurant, and a commercial pier system. The applicant's lot is part of a larger parcel of land subject to the underlying Site Law permit. The parcel is identified as Lot B13 on Map 5B of the City of Rockland's tax maps.

D. Public Comments: While the application was being reviewed, the Department received comments from 39 interested persons and entities opposed to the proposed project. One interested person withdrew their concerns after further review of the application. The Department reviewed all comments from the interested persons. The Department did not receive any requests for a public hearing during the 20-day period specified in the Department's Chapter 2 Rules governing the processing of applications.

The interested persons expressed a range of concerns, including impacts to scenic and aesthetic qualities of the area; the impact of increased large vessel traffic on existing recreational boating and commercial fishing uses; the effect of the project on public access to the shore; and noise from onboard generators. These concerns are all related to existing uses of the project site and are discussed in Finding 2. Several interested persons raised concerns about the impact of the proposed dredge on marine habitats, fisheries, and birds. These issues are discussed in Finding 4. A number of commenters expressed concern regarding the impact of the proposed project on water quality due to potential fuel spills, sewage discharges, and other effluent from vessels using the marina. Water quality is discussed in Finding 5.

Many of the interested persons cited concerns regarding the proposed project's impact on air quality and climate change due to large vessels burning fossil fuels. In response to these concerns, the applicant stated that the proposed project will provide additional dockage as well as electric power hook-ups for vessels of any size that would potentially use the marina, eliminating the need for those vessels to operate fossil-fuel-burning generators while berthed at the marina. The Department determined that the impact of the proposed project on air quality and climate change due to vessels burning fossil fuels while not berthed at the marina is beyond the scope of the Department's review of this application under the Natural Resources Protection Act (NRPA). Some commenters

expressed concern that the proposed project will encourage additional development in the harbor; will highlight or lead to wealth inequity in the area; or will have a negative impact on local businesses. The Department determined that these concerns are also beyond the scope of the Department's review of the application.

Some commenters contended that there are feasible alternatives that would result in less damage to the environment and fewer adverse impacts to existing scenic and navigational uses than the proposed project. One interested person refuted the findings of the applicant's functions and values assessment of the coastal wetland. Alternatives and the functional assessment are discussed in Finding 6.

Some of the interested persons stated that the application was incomplete and contained misleading information. Specifically, commenters pointed out that the applicant's plan set did not show the proposed project in the context of the wider harbor area; that the plans did not show the outlines of the maximum size vessels that may use the expanded marina; and that the application omitted the term "megayacht." The Department considered these concerns but determined that the information on file, the responses provided by the applicant during the review, and the site visit by Department staff provided sufficient detail on site context and the size and nature of vessels expected to use the project site for the Department to conduct its review.

## 2. EXISTING SCENIC, AESTHETIC, RECREATIONAL OR NAVIGATIONAL USES:

The NRPA, in 38 M.R.S. § 480-D(1), requires the applicant to demonstrate that the proposed project will not unreasonably interfere with existing scenic, aesthetic, recreational and navigational uses.

A. Scenic and Aesthetic Uses: In accordance with Chapter 315, *Assessing and Mitigating Impacts to Scenic and Aesthetic Uses* (06-096 C.M.R. ch. 315, effective June 29, 2003), the applicant submitted a copy of the Department's Visual Evaluation Field Survey Checklist as Appendix A to the application along with a description of the property and the proposed project. The applicant also submitted several photographs of the proposed project site and surroundings. Department staff visited the project site on November 5, 2021.

The proposed project is located in Rockland Harbor, which is a scenic resource visited by the general public, in part, for the use, observation, enjoyment and appreciation of its natural and cultural visual qualities. The project site is located adjacent to Sandy Beach (also known as South End Beach), a 200-foot-long municipal beach. The project parcel contains a paved walkway that is part of the Harbor Walk, a system of paths on multiple public and privately-owned, waterfront properties that connects several public spaces and viewpoints along the shoreline including Sandy Beach, Harbor Park, and Buoy Park, all of which are located within 0.2 miles of the project site, and all of which meet the Chapter 315 definition of a scenic resource of local significance. The project site is located approximately 1.35 miles from the Breakwater and the Breakwater Lighthouse, both of which are listed on the National Register of Historic Places as areas of local

significance. The harbor is developed with two municipal piers, a coast guard station, and numerous commercial piers and buildings, including the applicant's existing pier, which are visible from the scenic resources listed above.

To reduce the visibility of the proposed project from the harbor and nearby scenic viewpoints, the applicant designed the expanded marina with materials similar to those of other commercial piers in the immediate area. In response to public feedback during project design, the applicant reduced the size of the proposed float system and redesigned the layout to avoid vessels being berthed broadside to viewpoints to the west, including Buoy Park, a municipal pier (the Public Landing), and the boardwalk portion of the Harbor Walk. The applicant reduced the proposed landward extension of the fixed pier, eliminating a proposed vehicle and crane access platform for servicing boats. The applicant also eliminated the need for an additional timber wave fence to the east by designing the proposed floats of Dock A to be concrete-encased wave-attenuating floats.

In their comments, many of the interested persons expressed concern that the applicant will revoke public access to the Harbor Walk on their property and that large vessels berthed at the marina will block views of or from the scenic features listed above. Herein, "large vessel" refers to a vessel greater than 70 feet in length. A subset of commenters expressed concerns about light pollution at night and the visual impact of tour buses, which could be chartered by marina patrons for transportation to nearby points of interest, parked in the upland near Sandy Beach. A number of commenters also raised concerns about noise from electric generators of vessels berthed at the expanded marina.

The Department provided a consolidated list of these comments to the applicant and requested a response. In its response, the applicant stated that the portion of the Harbor Walk on its property will remain open to the public, and that the applicant will work with the City to create a formal agreement for continued public access to the walkway. The applicant also responded that the proposed landward extension of the pier will be open to the public, and that the existing gate on the pier will be moved seaward, such that the proposed project will provide a 120-foot-long viewing platform open to the public, with views to the east beyond the expanded marina.

The applicant stated that the size of the vessels that will use the expanded marina is expected to range from 20 feet to 200 feet long, but the majority of the vessels berthed at the marina will continue to range from 30 to 60 feet long. The applicant stated that the vertical height of most large vessels that may use the pier is approximately 25 feet above the water, or 7.5 to 17.5 feet above the height of the existing fixed pier, depending on the tide. The applicant noted that the proposed project is primarily for transient dockage, defined as a stay no longer than 15 consecutive days, and that the average size vessel at the marina during the summer of 2020 was approximately 56 feet long, and the average stay of a vessel over 70 feet long was only 2.6 days. The proposed Dock C, located innermost in the harbor, will be dedicated to vessels approximately 30-40 feet in length, whereas large vessels will be located farther from the Harbor Walk at Docks A or B. The applicant noted that a similar version of Dock C was previously approved in Department

Order #L-20386-26-G-B/L-20386-4E-H-N, although it was not constructed, and that previous approved versions of Dock A extended farther seaward than the proposed project. The applicant pointed out that large vessels already use the harbor, and submitted a photograph dated June 2019, of a 200-foot-long cruise ship berthed at the Public Landing, facing broadside to Harbor Park. The applicant stated that currently, cruise ships and other large vessels often anchor in the outer harbor, where they can block views of many of the scenic features noted above, such as the Breakwater and Breakwater Lighthouse, whereas vessels berthed at the expanded marina will have a more limited visual impact, primarily only affecting views of existing developed areas in the harbor such as other commercial marinas, the Municipal Fish Pier, and the Dragon Cement pier. The applicant concluded that the proposed project would have minimal impact on views of significant scenic features.

The applicant stated that the expansion will use lighting similar to that of the existing pier, which consists of lighting of the dock walking surface and potentially low-voltage lighting directed at the floats. The Department determined that this lighting is compatible with the existing visual landscape of the harbor at night. The applicant stated that the proposed dock systems will include electrical hook-ups for small and large vessels, and therefore the proposed project will not result in additional noise from onboard generators. The applicant further stated that accommodations for buses are not contemplated in this application, and any upland alterations to accommodate buses would require review and approval by the Department in a future application. The Department acknowledges that buses could potentially use the existing parking lot and nearby side streets, if allowed by local ordinance to do so. However, the Department determined that this activity is ultimately outside the scope of the Department's review.

In assessing the visual impact of the proposed project, the Department considered the information in the NRPA application, the interested persons' comments, the applicant's responses, observations by Department staff at the site visit, and other related materials on file. Some commenters stated that the applicant should provide a visual assessment report with photographic simulations or concept drawings; however, the Department determined that the information in the permitting record is sufficient for the Department's review. During the review, the Department considered views from Rockland Harbor, the Harbor Walk, Sandy Beach, Harbor Park, and Buoy Park, which are located in close proximity to the project site and were of particular concern to the interested persons. The Department took into consideration the developed nature of Rockland Harbor, the size and layout of the proposed marina expansion, and the existing viewsheds from the scenic resources. The Department determined that the viewshed foreground of the Harbor Walk, Harbor Park, and Buoy Park are dominated by existing pier and float systems, some of which currently berth large vessels during the summer. Sandy Beach, which faces northeast, has a viewshed of 120 degrees, bounded to the southeast by the Dragon Cement pier and bounded to the north by the applicant's existing pier. Department staff determined that the proposed expansion of the marina will affect approximately 17 degrees of the far west extent of the beach viewshed. The blocked views include other commercial marinas to the north as well as a small portion of the harbor mooring field. The proposed project will not interfere with views from the beach of the Breakwater,

Breakwater Lighthouse, islands, or other land masses to the east. Department staff also considered the potential view of the proposed project from the Breakwater and visited the landward end of the Breakwater on November 5, 2021; however, given the distance to the project site and the highly developed nature of the harbor, the Department determined that the proposed project will be consistent with the existing use of the harbor and will result in little to no additional impact on views from the Breakwater.

The Department staff utilized the Department's Visual Impact Assessment Matrix in its evaluation of the proposed project. The Matrix is used to assess the visual impact severity of a proposed project based on the distance and visibility of the project from a natural landmark or other outstanding natural or cultural feature, State, National, or locally-designated park or trail, and on the approximate number of people likely to view the project from the resource or a public way per day. The severity rating is also based on the visual elements of landscape compatibility, scale contrast, and spatial dominance as defined in Chapter 315, § 9. The Department determined that the visual impact of the proposed project was acceptable with mitigation. As discussed above, the applicant reduced the size and revised the layout of the proposed project considerably during the design phase, in response to concerns about visual impact. The applicant also proposes to create a public viewing platform and to maintain public access to the Harbor Walk over its private property. In light of these mitigation measures and based on the information submitted in the application, information submitted during the review, the visual impact rating, and the site visit, the Department determined that the location and scale of the proposed activity is compatible with the existing visual quality and landscape characteristics found within the viewshed of the scenic resources in the project area.

B. Recreational and Navigational Uses: The proposed project is located in a working harbor used by numerous recreational and commercial vessels. A federal navigation channel and a city channel are located in close proximity to the project site.

Several of the interested persons expressed concern that the proposed project will pose a safety risk and navigational obstacle for recreationists using kayaks, row boats, and paddleboards. Some contended that the proposed project will generally increase vessel traffic, including the number of dinghies using the Public Landing, and interfere with the use of the harbor by commercial fishermen. The interested persons also objected that the proposed project will require the relocation of moorings, resulting in financial hardship and inconvenience for the mooring user or the City.

The applicant responded that the expansion of the marina will reduce traffic in the harbor by reducing the number of vessels at anchor, which in turn will reduce tender boat and dinghy traffic. This will also reduce congestion at the public docks, which are currently often crowded with tenders and dinghies in the summer. The applicant clarified that the proposed project will not affect public access to the Public Landing docks and facilities, and that the proposed marina includes space for dinghies for its patrons. The applicant also stated that any traffic to and from the marina is and will continue to be within designated channels, and it is incumbent upon small crafts to remain diligent when navigating the marked harbor channels. The applicant also stated that the proposed

project is located outside the commercial fishing district. The applicant stated that the proposed project will require the relocation of approximately 16 moorings, and that the applicant intends to cover the cost of those relocations. The applicant also stated that the City has been contemplating a reorganization of the mooring field in the next few years regardless of the proposed project.

The Rockland Harbormaster reviewed the proposed project and commented that to prevent navigational hazards, the applicant should not berth vessels within the city channel without prior authorization from the Harbormaster's office, which would only be granted on a case-by-case basis for brief offloading/loading activities or in emergencies. The Harbormaster recommended that vessels berthed at the T-head of Dock A, which is adjacent to the city channel, should be no wider than 20 feet to avoid intrusion into the channel. The Harbormaster also commented that the 60-foot opening between the southern dock of the Public Landing and the northwest corner of the proposed Dock C should remain open for inbound and outbound traffic to both the Public Landing and to Dock C. The Harbormaster confirmed that 16 moorings have been identified for relocation for the proposed project, that efforts to address the cost and logistics of these relocations are ongoing between the applicant and City, and that the City is considering a wider reorganization of the mooring field. The applicant agreed to the Harbormaster's recommendations to not allow vessels wider than 20 feet to berth on the northern side of the Dock A T-head, and to not allow any vessel to berth on the northwest end of Dock C, without prior approval from the Harbormaster.

The Department of Marine Resources (DMR) reviewed the proposed project and stated that there are no commercial fisheries present within the proposed marina expansion and dredge locations, and that shellfish harvesting is prohibited in this area due to poor water quality and the presence of commercial marinas. The proposed project will therefore not interfere with commercial fishing or shellfish harvesting.

Based on the nature of the proposed project and its location, as well as the Harbormaster's comments and DMR's review, the Department determined that the proposed project is compatible with continued use of the harbor by small recreational vessels, and that the proposed project will not unreasonably interfere with any other existing recreational or navigational uses of the resource.

The Department finds that the proposed activity will not unreasonably interfere with existing scenic, aesthetic, recreational or navigational uses of the coastal wetland.

3. SOIL EROSION:

The NRPA, in 38 M.R.S. § 480-D(2), requires the applicant to demonstrate that the proposed project will not cause unreasonable erosion of soil or sediment nor unreasonably inhibit the natural transfer of soil from the terrestrial to the marine or freshwater environment.

The applicant submitted a construction plan and erosion control plan as Attachments 7 and 8 of the NRPA application. Sampling of the sediment within the project area indicates that most of the surficial material to be dredged is composed of fine-grained sand, silt, and clay. Disturbed sandy sediment would be expected to settle quickly to the bottom after agitation and any sediment plume would be expected to quickly dissipate following cessation of dredging operations, while silt and clay-sized material will remain in suspension for a longer period. The applicant stated that prior to dredging, the contractor will deploy a turbidity curtain around the work area to contain suspended solids as necessary. The dredging activity will be conducted mechanically by a barge-mounted crane with a clamshell bucket. Transportation of dredged material is discussed further in Finding 8.

The dredged material will be deposited onto a barge scow and transported one mile by water to an upland dewatering site at the Prock Marine Company yard in Rockland. The dewatering area will be constructed of concrete barriers and lined with geotextiles and hay bales. The dewatered dredge spoils will then be transported over land to a gravel pit located in the Town of Cushing. The dredged material will be applied in upland areas within the gravel pit in accordance with a beneficial use permit, as discussed further in Finding 5. The applicant proposes to begin the dredge in the fall or winter of 2021.

The proposed pilings will be installed from a barge. To minimize the impact of underwater noise on marine fauna, pilings will be driven using a soft-start technique consisting of an initial set of three strikes for 15 seconds at reduced energy followed by a one-minute waiting period between subsequent three-strike sets, followed immediately by pile driving at full rate and energy. The soft-start procedure will be reinstated any time pile driving ceases for more than 30 minutes. The proposed floating docks will be constructed at an offsite location and towed or trucked to the project site for installation. The proposed gangway access platform and ramp will be constructed off the east side of the existing fixed pier to connect to Dock A. The proposed access/viewing platform will be constructed from land. The platform will be supported by pilings with concrete footers set into existing riprap.

The applicant does not propose any upland soil disturbance; however, the applicant stated that sediment barriers will be installed downgradient of any areas of incidentally disturbed soil and any stockpiles of erodible materials to minimize potential erosion and sedimentation off the site. Upon project completion and final site stabilization, all construction equipment and debris will be removed from the site. Any remaining areas of disturbed soil will be temporarily stabilized with seed and mulch until they can be permanently seeded and stabilized.

Based on these methods, the Department does not anticipate any unreasonable erosion will result. The Department finds that the activity will not cause unreasonable erosion of soil or sediment nor unreasonably inhibit the natural transfer of soil from the terrestrial to the marine or freshwater environment provided that the applicant's contractor deploys and maintains a turbidity curtain around the area of active dredging to contain suspended solids.

#### 4. HABITAT CONSIDERATIONS:

The NRPA, in 38 M.R.S. § 480-D(3), requires the applicant to demonstrate that the proposed project will not unreasonably harm 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.

The project site is a developed waterfront and harbor. The intertidal substrate is a mixture of boulders, cobbles, and mixed coarse and fine sediments grading to mudflat. The shoreline in the immediate vicinity of the fixed pier is armored with riprap. A 200-foot-long beach is located southeast of the project site. The only proposed intertidal activity is the landward extension of the fixed pier to provide an access/viewing platform, which will be located entirely over existing riprap. The proposed dredge will be located within the subtidal zone. According to the Department's Geographic Information System database there are no mapped Essential or Significant Wildlife Habitats located at the site.

The applicant submitted an assessment of the subtidal habitat completed by Eco-Analysts, Inc. based on multiple site visits conducted between 2017 and 2021, the latest of which took place on June 17, 2021. The report characterized the subtidal habitat within the area of the proposed marina expansion and dredge as fine sediments overlaying glacial till, with widely scattered cobbles and occasional woody debris and abandoned granite mooring blocks. The report stated that no eelgrass was present. Rockweed and two species of kelp were observed on the existing pier and abandoned mooring blocks. Blue mussels, sandworms, rock barnacles, and periwinkles were also noted as present.

In their comments, some interested persons expressed concern that the proposed project will have adverse impacts to marine wildlife, particularly birds such as the great blue heron and sea duck species, as well as lobster habitats, commercial fisheries, and other marine life due to the dredge, the expanded marina, and underwater noise from vessels using the marina.

In its review, DMR commented that the proposed project site does not contain eelgrass or commercial fisheries within the proposed marina expansion and dredge locations. Shellfish harvesting at the project site is prohibited. DMR stated that it anticipates that the proposed project will result in minimal to no impacts to shellfish, diadromous fish species, and scallop and lobster fisheries, provided that dredging is conducted during a work window of November 8 and April 8 to minimize potential impacts to fish in the area.

The applicant does not propose any new direct or indirect impacts to the intertidal coastal wetland, except for a small area of existing riprap. The proposed dredge and pile installation will be temporary disturbances. As discussed in Finding 3, the applicant will install pilings with a soft-start technique, which will minimize the potential effects of

vibration on fish and other marine life. As discussed in Finding 2, vessels berthed at the marina will not need to operate their generators, further minimizing underwater vibrations. The dredge will remove or displace subtidal benthic organisms within the project area; however, based on DMR's comments, the proposed project will not unreasonably affect the populations of these species or their ability to recover and recolonize the project area over time. Birds, as well as fish, are capable of avoiding the area of disturbance until the proposed project is complete. Further, the proposed in-water work will be conducted during a winter work window and is anticipated to be complete by the spring of 2022. The Department determined that the proposed project will not significantly reduce or degrade the habitat available to birds in the harbor.

Based on the size and nature of the proposed project, the proposed construction methods included in the application, DMR's review, and a review of this material above, the Department finds that the 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 provided that the dredging operations are limited to the period between November 8 and April 8.

#### 5. WATER QUALITY CONSIDERATIONS:

The NRPA, in 38 M.R.S. § 480-D(5), requires the applicant to demonstrate that the proposed project will not violate any state water quality law, including those governing the classification of the State's waters.

The applicant proposes to use lumber treated with chromated copper arsenate (CCA) or alkaline copper quaternary (ACQ) for the pilings and proposed timber floats. To protect water quality, all treated lumber must be cured on dry land in a manner that exposes all surfaces to the air for 21 days prior to the start of construction. The applicant proposes to use concrete to support the landward extension of the pier. Concrete must be pre-cast or poured into forms and cured at least one week before the forms are removed. No washing of tools, forms, or other items used to place the concrete may occur in or adjacent to a waterbody or wetland.

The waters at the proposed dredge site are currently classified in 38 M.R.S. § 469(3) as Class SC. The standards for Class SC waters require that the waters be suitable for recreation, fishing, aquaculture, propagation and restricted harvesting of shellfish, industrial process and cooling water supply, hydroelectric power generation, navigation, and as a habitat for fish and other estuarine and marine life. Discharges to Class SC waters may cause some changes to estuarine and marine life provided that the receiving waters are of sufficient quality to support all species of fish indigenous to the receiving waters and maintain the structure and function of the resident biological community.

The interested persons expressed concerns about the impact of the proposed project on water quality due to the proposed dredge, potential fuel spills, and potential discharges of sewage, graywater, and bilge water from large vessels using the marina. One interested

person commented that the dredge material placed in the gravel pit will pose a threat to groundwater quality and ultimately the water quality of the St. George River.

In its response, the applicant stated that it does not propose to store any fuel on site. The applicant stated that the risk of sewage, graywater, and contaminated bilge water discharges will be reduced while vessels are berthed at the facility, because the berthed vessels will have access to reliable power and pump-out facilities, and will be able to discharge wastewater into the public sewer system. The applicant also stated that many large vessels have on-board graywater recycling systems, as well as bilge pump systems designed to capture and remove oil from bilge water before it is discharged. Further, large vessels are operated by professional crews, often with full-time engineers, that maintain equipment and account for all solid waste and waste oil leaving the vessel. These vessels are subject to federal laws and regulations that govern the discharge of sewage, solid waste, and oil.

The Department acknowledges that the dredge will result in a temporary increase in turbidity at the project site. However, as discussed in Finding 3, the applicant proposes to deploy a turbidity curtain around the area of active dredging to contain suspended solids, minimizing the impact to water quality.

The applicant proposes to dispose of dredged material in a gravel pit located 12 miles from the project site in the Town of Cushing, in accordance with a beneficial use permit, Department Order #S-22546-W3-A-N, dated May 12, 2021, issued by the Bureau of Remediation and Waste Management's Division of Materials Management (DMM) pursuant to the *Maine Hazardous Waste, Septage, and Solid Waste Management Act*, 38 M.R.S. §§ 1301–1319-Y. The dewatered dredge material will be placed as subgrade fill to contour the excavated area of the gravel pit, and then covered and seeded. The proposed beneficial use will not occur in, on, over or adjacent to a protected natural resource. DMM reviewed the sediment sampling analysis and proposed risk management measures and determined that the proposed beneficial use will not pollute any waters of the State.

The waters affected by the proposed project are used by fish, mussels, marine worms, and other estuarine and marine life, and as habitat for such populations. They are also used for recreation. As discussed in Finding 2, the proposed project will not unreasonably interfere with existing recreational uses of the resource. As discussed in Finding 4, based on DMR's review, the proposed project will not unreasonably harm shellfish, diadromous fish species, commercial fisheries, or other marine life.

Based on the proposed dredging techniques, construction methods and timing, and the above review of the evidence in the record, the Department finds that the proposed project will maintain existing uses and the level of water quality necessary to protect those existing uses; will protect the existing water quality of affected waters; will not significantly impair the viability of the existing populations of fish, mussels, and other estuarine and marine life; and will not result in a significant degradation of existing recreation, fishing, and commercial harvesting of such estuarine and marine species;

provided that treated lumber and concrete are cured and tools used to place concrete are not washed in or adjacent to a waterbody or wetland, as described above.

6. WETLANDS AND WATERBODIES PROTECTION RULES:

The applicant proposes to directly alter 138,000 square feet of subtidal coastal wetland as a result of dredging activity. The applicant proposes to directly alter 119 square feet of the coastal wetland as a result of piling installation and indirectly alter 24,738 square feet of coastal wetland as a result of shading over the resource from the proposed floats. Coastal wetlands are considered wetlands of special significance.

The *Wetlands and Waterbodies Protection Rules*, 06-096 C.M.R. ch. 310 (last amended November 11, 2018), interpret and elaborate on the NRPA criteria for obtaining a permit. The rules guide the Department in its determination of whether a project's impacts would be unreasonable. A proposed project would generally be found to be unreasonable if it would cause a loss in wetland area, functions and values and there is a practicable alternative to the project that would be less damaging to the environment. Each application for a NRPA permit that involves a coastal wetland alteration must provide an analysis of alternatives in order to demonstrate that a practicable alternative does not exist.

A. Avoidance. An applicant must submit an analysis of whether there is a practicable alternative to the project that would be less damaging to the environment and this analysis is considered by the Department in its assessment of the reasonableness of any impacts. Additionally, for activities proposed in, on, or over wetlands of special significance the activity must be among the types listed in Chapter 310, § 5(A) or a practicable alternative less damaging to the environment is considered to exist and the impact is unreasonable. A marina is a water dependent use and its proposed construction is among the activities specifically provided for in Chapter 310, § 5(A)(1)(c).

The applicant submitted an alternatives analysis for the proposed project completed by Landmark Corporation Surveyors and Engineers and dated July 2, 2021. The applicant stated that the purpose of the proposed project is to expand the applicant's business and to provide additional transient dockage in Rockland Harbor for small and large vessels, in accordance with a Boating Infrastructure Grant awarded to the applicant in 2017 by the US Fish and Wildlife Service and the Maine Department of Transportation. The proposed project is also intended to provide marina customers with access to amenities and a park-like upland setting, which the applicant stated are lacking or limited at the other existing dockage facilities in Rockland.

The interested persons contended that there are feasible alternatives to the proposed project. The suggested alternatives included taking no action and continuing to anchor or moor vessels in the outer harbor; creating a new system of moorings in the harbor to alleviate existing navigation and congestion issues; or purchasing and improving other sites in the harbor, specifically the North End Shipyard/Steel Pro/Schooner Wharf parcel

(North End parcel) at the north end of the harbor and the Dragon Cement pier located east of Sandy Beach.

The applicant stated that taking no action would fail to address the lack of transient dockage in the harbor, resulting in many vessels remaining at moorings or at anchor, without access to shore utilities and amenities, and causing continued overcrowding of dinghies and tender boats travelling to and from vessels in the harbor. The no-action alternative would also result in the loss of grant funding. The applicant considered alternate locations in the harbor for additional dockage, including the North End parcel. The applicant stated that the purchase price of \$13.9 million was cost-prohibitive, and that the site lacks infrastructure and amenities suitable to transient boaters. Further, the development of an entirely new pier, marina float system, and dredge at this site would result in greater environmental impact than the proposed expansion at the existing marina. The applicant stated that the Dragon Cement property is not currently offered for sale, and similarly lacks the infrastructure, amenities, and setting required to meet the project purpose. The applicant stated that its existing facility is well-suited to the proposed project purpose based on its location outside the commercial fishing district, proximity to local businesses, existing amenities on site, and the existing park setting on its own property, which includes a gazebo, green space, and walking path. The applicant further determined that an expansion of the existing marina would be more economically feasible than the development of a new facility.

The Department agrees with the applicant's assessment that the no-action alternative would not accomplish the project purpose, and that utilizing and expanding one or more other sites are both not practicable and would not result in a project less damaging to the environment. The Department understands that the reorganization of the mooring field is not within the applicant's control. Based on comments from the Harbormaster, the City has contemplated a wider reorganization of moorings but does not have an approved plan or definite timeline this activity.

The applicant considered multiple layouts for the proposed project and reduced the scope of the proposed project following public comment. For the dredging portion of the proposed project, the applicant determined the required draft for the various sized vessels that will utilize each dock and determined the necessary dredge areas and depths required to complete the proposed project. The selected layout alternative results in a smaller dredge footprint than the original proposal.

The Department concurs with the applicant's assessment of alternative sites and the conclusion that there is no practicable alternative to the proposed project that would meet the project purpose and avoid direct impacts to the resource.

**B. Minimal Alteration.** In support of an application and to address the analysis of the reasonableness of any impacts of a proposed project, an applicant must demonstrate that the amount of coastal wetland to be altered will be kept to the minimum amount necessary for meeting the overall purpose of the project.

During a three- to four-year planning phase, the applicant considered alternate layouts for the proposed expansion, including a more extensive float system, an 11-acre dredge area, on-site fuel storage, an additional timber wave fence, and a vehicle and crane access platform. In response to public feedback, the applicant reduced the size of the proposed float systems and dredge area and eliminated the proposed fuel storage, wave fence, and vehicle access platform. As revised, the proposed project does not include any new impacts to the intertidal zone except over existing riprap. The proposed project is designed with piling supports which will result in minimal additional fill. During the review, the applicant further reduced the number of proposed pilings, lowering the proposed direct fill from 235 to 119 square feet and reduced the dredge footprint from 11 acres to 3.2 acres. The applicant stated that the project, as proposed, minimizes impacts to the coastal wetland to the greatest extent practical while still meeting the project purpose.

Based on the iterative design process and reduced scope of the proposed project, the Department concurs with the applicant that the selected alternative represents the minimum amount of resource impacts necessary for meeting the overall purpose of the project.

C. Compensation. In accordance with Chapter 310, § 5(C)(1), compensation may be required to achieve the goal of no net loss of coastal wetland functions and values. The applicant submitted a functional assessment (Attachment 12 of the NRPA application) prepared by Eco-Analysts, Inc. and dated July 2, 2021, based on surveys of the coastal wetland at the project site. The assessment identified the principal functions of the wetland to be fish and shellfish habitat, production export, and recreation. The assessment noted that the proposed in-water work will take place outside of sensitive periods for migratory fish and that the marina contributes to the recreational value of the resource. As discussed in Finding 4, the applicant also submitted a site conditions report, which characterized the substrates, vegetation, and fauna at the project site. The report concluded that pilings provide artificial habitat for kelp and seaweed, and that dredged areas will quickly recolonize following this disturbance.

1. Public Comment. One interested person challenged the findings of the functional assessment, noting that the assessment does not include a full list of wildlife species that use the project site; that visual quality was not identified as a primary function; and that the assessment does not elaborate on the recreation value of the surrounding area. The interested person also expressed concern that the proposed wave-attenuating floats will increase sediment retention.

The site condition report and functional assessment were completed by a qualified professional using standard methods, and an accepted evaluation form which provides the rationale for determining whether a wetland function or value is present or not present, and once identified, whether it is a principal function or value of the subject wetland. A functional assessment is a qualitative exercise and different observers may come to different conclusions. No comments were received that offered

conflicting technical information prepared by a qualified professional to support the commenter's assertion.

2. Department Consideration. Although the applicant did not provide a full inventory of wildlife that potentially use the project site, the Department reviewed the proposed project's impact to wildlife and marine habitat. As discussed in Finding 4, the Department determined that the proposed project is not expected to unreasonably harm any significant wildlife habitat. This determination was supplemented by review comments from DMR and other materials on file, as well as a site visit by Department staff. Based on the design of the proposed wave-attenuating floats, the Department finds it credible that these floats will reduce the energy and impact of incoming waves, and therefore not result in unreasonable changes to sediment cycles within the resource. The Department agrees with the interested person that visual quality can be considered a principal value of the wetland. As discussed in Finding 2, the Department examined the evidence in the record and determined that the proposed project will not unreasonably interfere with existing scenic and aesthetic uses of the resource.

The Department concurs with the applicant's overall characterization of the wetlands within the project boundary. Based on the temporary nature of the impacts from the proposed dredge activity, the minor amount of proposed fill due to pilings, and the indirect nature of shading impacts due to floats, the Department has determined that wetland functions and values will not be lost or degraded as a result of the proposed project. Further, as determined by DMR, the proposed project is not expected to have an adverse impact on marine resources or wildlife habitat. For these reasons, the Department determined that compensation is not required.

The Department finds that the applicant has avoided and minimized coastal wetland impacts to the greatest extent practicable, and that the proposed project represents the least environmentally damaging alternative that meets the overall purpose of the project.

7. GEOLOGICAL CONSIDERATIONS:

For any activity that involves dredging, dredge spoils disposal or transporting dredge spoils by water, the NRPA requires the applicant to demonstrate that the disposal site is geologically suitable pursuant to 38 M.R.S. § 480-D(9).

As discussed in Finding 5, dredged material will be transported approximately one mile over water to the Prock Marine Company yard in Rockland. It will then be transported approximately 12 miles over land to a gravel pit in Cushing. The dredged material will be applied to upland locations within the gravel pit as authorized by DMM in Department Order #S-22546-W3-A-N.

The Department finds that the applicant has demonstrated that the disposal site is geologically suitable.

8. DREDGE MATERIAL TRANSPORTATION CONSIDERATIONS:

For any activity that involves dredging, dredge spoils disposal or transporting dredge spoils by water, the NRPA requires the applicant to demonstrate that the transportation route minimizes adverse impacts on the fishing industry pursuant to 38 M.R.S. § 480-D(9).

DMR reviewed the proposed project and commented that there are no commercial fishery resources or eelgrass at the dredge site. Except for the timing window discussed in Finding 4, DMR did not identify any concerns with the proposed project.

In accordance with Section 480-D(9), one week prior to commencing the dredging operation the applicant must:

- a. Clearly mark or designate the dredging area, the spoils disposal route, and the transportation route.
- b. Publish the transportation route in a local newspaper of general circulation.
- c. Publish in a local newspaper of general circulation the procedure that the applicant will use to respond to inquiries regarding the loss of fishing gear during the dredging operation.

Provided the applicant marks the transportation route and publishes notices as described above, the Department finds that the transportation route for dredge material minimizes adverse impacts to the fishing industry.

9. OTHER CONSIDERATIONS:

The Department finds, based on the design, proposed construction methods, and location, the proposed project will not inhibit the natural transfer of soil from the terrestrial to the marine environment, will not interfere with the natural flow of any surface or subsurface waters, and will not cause or increase flooding. The proposed project is not located in a coastal sand dune system and is not a crossing of an outstanding river segment.

BASED on the above findings of fact, and subject to the conditions listed below, the Department makes the following conclusions pursuant to 38 M.R.S. §§ 480-A–480-JJ and Section 401 of the Clean Water Act (33 U.S.C. § 1341):

- A. The proposed activity will not unreasonably interfere with existing scenic, aesthetic, recreational, or navigational uses.
- B. The proposed activity will not cause unreasonable erosion of soil or sediment provided that the applicant's contractor installs a turbidity curtain around the dredge area as described in Finding 3 and the corresponding condition below.

- C. The proposed activity will not unreasonably inhibit the natural transfer of soil from the terrestrial to the marine or freshwater environment.
- D. 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 provided that dredging is conducted between November 8 and April 8 as described in Finding 4 and the corresponding condition below.
- E. The proposed activity will not unreasonably interfere with the natural flow of any surface or subsurface waters.
- F. The proposed activity will not violate any state water quality law including those governing the classifications of the State's waters provided that the applicant complies with the requirements in Finding 5 and the corresponding conditions below.
- G. The proposed activity will not unreasonably cause or increase the flooding of the alteration area or adjacent properties.
- H. The proposed activity is not on or adjacent to a sand dune.
- I. The proposed activity is not on an outstanding river segment as noted in 38 M.R.S. § 480-P.
- J. The proposed transportation route for transporting dredge spoils by water minimizes impacts on the fishing industry and the spoil disposal site is geologically suitable provided the applicant complies with the requirements in Finding 8 and the corresponding conditions below.

THEREFORE, the Department APPROVES the above noted application of SHM ROCKLAND, LLC to expand an existing marina with additional floats, pilings, and a pier expansion, and to dredge 3.2 acres of the subtidal coastal wetland, all as described in Finding 1, SUBJECT TO THE ATTACHED CONDITIONS, and all applicable standards and regulations:

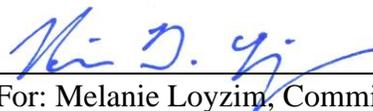
1. Standard Conditions of Approval, a copy attached.
2. The applicant shall take all necessary measures to ensure that its activities or those of its agents do not result in measurable erosion of soil on the site during the construction of the project covered by this approval.
3. Severability. The invalidity 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.

4. Prior to dredging, the applicant’s contractor shall deploy a turbidity curtain around the work area to contain suspended solids.
5. The dredging operations shall be conducted between the period of November 8 and April 8.
6. All CCA- or ACQ- treated lumber shall be cured on dry land in a manner that exposes all surfaces to the air for 21 days prior to the start of construction.
7. No uncured concrete shall be applied directly in the water. All concrete shall be pre-cast or placed in forms and cured at least one week before the forms are removed. No washing of tools, forms, or other items used to place the concrete shall occur in or adjacent to a waterbody or wetland.
8. In accordance with the provisions of 38 M.R.S.A 480-9(D), the applicant shall:
  - a. Clearly mark or designate the dredging area, the spoils disposal route, and the transportation route.
  - b. Publish the transportation route in a local newspaper of general circulation.
  - c. Publish in a local newspaper of general circulation the procedure that the applicant will use to respond to inquiries regarding the loss of fishing gear during the dredging operation.

THIS APPROVAL DOES NOT CONSTITUTE OR SUBSTITUTE FOR ANY OTHER REQUIRED STATE, FEDERAL OR LOCAL APPROVALS NOR DOES IT VERIFY COMPLIANCE WITH ANY APPLICABLE SHORELAND ZONING ORDINANCES.

DONE AND DATED IN AUGUSTA, MAINE, THIS 7<sup>TH</sup> DAY OF DECEMBER, 2021.

DEPARTMENT OF ENVIRONMENTAL PROTECTION

BY:   
For: Melanie Loyzim, Commissioner

<p><b>FILED</b>          December 8<sup>th</sup>, 2021          State of Maine          Board of Environmental Protection</p>
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PLEASE NOTE THE ATTACHED SHEET FOR GUIDANCE ON APPEAL PROCEDURES.

JEM/L20386PNQN/ATS#87842, 88638



## Natural Resources Protection Act (NRPA) Standard Conditions

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THE FOLLOWING STANDARD CONDITIONS SHALL APPLY TO ALL PERMITS GRANTED UNDER THE NATURAL RESOURCES PROTECTION ACT, 38 M.R.S. §§ 480-A ET SEQ., UNLESS OTHERWISE SPECIFICALLY STATED IN THE PERMIT.

- A. Approval of Variations From Plans. The granting of this permit is dependent upon and limited to the proposals and plans contained in the application and supporting documents submitted and affirmed to by the applicant. Any variation from these plans, proposals, and supporting documents is subject to review and approval prior to implementation.
- B. Compliance With All Applicable Laws. The applicant shall secure and comply with all applicable federal, state, and local licenses, permits, authorizations, conditions, agreements, and orders prior to or during construction and operation, as appropriate.
- C. Erosion Control. The applicant shall take all necessary measures to ensure that his activities or those of his agents do not result in measurable erosion of soils on the site during the construction and operation of the project covered by this Approval.
- D. Compliance With Conditions. Should the project be found, at any time, not to be in compliance with any of the Conditions of this Approval, or should the applicant construct or operate this development in any way other the specified in the Application or Supporting Documents, as modified by the Conditions of this Approval, then the terms of this Approval shall be considered to have been violated.
- E. Time frame for approvals. If construction or operation of the activity is not begun within four years, this permit shall lapse and the applicant shall reapply to the Board for a new permit. The applicant may not begin construction or operation of the activity until a new permit is granted. Reapplications for permits may include information submitted in the initial application by reference. This approval, if construction is begun within the four-year time frame, is valid for seven years. If construction is not completed within the seven-year time frame, the applicant must reapply for, and receive, approval prior to continuing construction.
- F. No Construction Equipment Below High Water. No construction equipment used in the undertaking of an approved activity is allowed below the mean high water line unless otherwise specified by this permit.
- G. Permit Included In Contract Bids. A copy of this permit must be included in or attached to all contract bid specifications for the approved activity.
- H. Permit Shown To Contractor. Work done by a contractor pursuant to this permit shall not begin before the contractor has been shown by the applicant a copy of this permit.



# DEP INFORMATION SHEET

## Appealing a Department Licensing Decision

**Dated: August 2021**

**Contact: (207) 314-1458**

### **SUMMARY**

This document provides information regarding a person's rights and obligations in filing an administrative or judicial appeal of a licensing decision made by the Department of Environmental Protection's (DEP) Commissioner.

Except as provided below, there are two methods available to an aggrieved person seeking to appeal a licensing decision made by the DEP Commissioner: (1) an administrative process before the Board of Environmental Protection (Board); or (2) a judicial process before Maine's Superior Court. An aggrieved person seeking review of a licensing decision over which the Board had original jurisdiction may seek judicial review in Maine's Superior Court.

A judicial appeal of final action by the Commissioner or the Board regarding an application for an expedited wind energy development ([35-A M.R.S. § 3451\(4\)](#)) or a general permit for an offshore wind energy demonstration project ([38 M.R.S. § 480-HH\(1\)](#)) or a general permit for a tidal energy demonstration project ([38 M.R.S. § 636-A](#)) must be taken to the Supreme Judicial Court sitting as the Law Court.

### **I. ADMINISTRATIVE APPEALS TO THE BOARD**

#### **LEGAL REFERENCES**

A person filing an appeal with the Board should review Organization and Powers, [38 M.R.S. §§ 341-D\(4\)](#) and [346](#); the Maine Administrative Procedure Act, 5 M.R.S. § [11001](#); and the DEP's [Rule Concerning the Processing of Applications and Other Administrative Matters \(Chapter 2\)](#), 06-096 C.M.R. ch. 2.

#### **DEADLINE TO SUBMIT AN APPEAL TO THE BOARD**

Not more than 30 days following the filing of a license decision by the Commissioner with the Board, an aggrieved person may appeal to the Board for review of the Commissioner's decision. The filing of an appeal with the Board, in care of the Board Clerk, is complete when the Board receives the submission by the close of business on the due date (5:00 p.m. on the 30<sup>th</sup> calendar day from which the Commissioner's decision was filed with the Board, as determined by the received time stamp on the document or electronic mail). Appeals filed after 5:00 p.m. on the 30<sup>th</sup> calendar day from which the Commissioner's decision was filed with the Board will be dismissed as untimely, absent a showing of good cause.

#### **HOW TO SUBMIT AN APPEAL TO THE BOARD**

An appeal to the Board may be submitted via postal mail or electronic mail and must contain all signatures and required appeal contents. An electronic filing must contain the scanned original signature of the appellant(s). The appeal documents must be sent to the following address.

Chair, Board of Environmental Protection  
c/o Board Clerk  
17 State House Station  
Augusta, ME 04333-0017  
[ruth.a.burke@maine.gov](mailto:ruth.a.burke@maine.gov)

The DEP may also request the submittal of the original signed paper appeal documents when the appeal is filed electronically. The risk of material not being received in a timely manner is on the sender, regardless of the method used.

At the time an appeal is filed with the Board, the appellant must send a copy of the appeal to: (1) the Commissioner of the DEP (Maine Department of Environmental Protection, 17 State House Station, Augusta, Maine 04333-0017); (2) the licensee; and if a hearing was held on the application, (3) any intervenors in that hearing proceeding. **Please contact the DEP at 207-287-7688 with questions or for contact information regarding a specific licensing decision.**

### **REQUIRED APPEAL CONTENTS**

A complete appeal must contain the following information at the time the appeal is submitted.

1. *Aggrieved status.* The appeal must explain how the appellant has standing to bring the appeal. This requires an explanation of how the appellant may suffer a particularized injury as a result of the Commissioner's decision.
2. *The findings, conclusions, or conditions objected to or believed to be in error.* The appeal must identify the specific findings of fact, conclusions of law, license conditions, or other aspects of the written license decision or of the license review process that the appellant objects to or believes to be in error.
3. *The basis of the objections or challenge.* For the objections identified in Item #2, the appeal must state why the appellant believes that the license decision is incorrect and should be modified or reversed. If possible, the appeal should cite specific evidence in the record or specific licensing criteria that the appellant believes were not properly considered or fully addressed.
4. *The remedy sought.* This can range from reversal of the Commissioner's decision on the license to changes in specific license conditions.
5. *All the matters to be contested.* The Board will limit its consideration to those matters specifically raised in the written notice of appeal.
6. *Request for hearing.* If the appellant wishes the Board to hold a public hearing on the appeal, a request for hearing must be filed as part of the notice of appeal, and it must include an offer of proof regarding the testimony and other evidence that would be presented at the hearing. The offer of proof must consist of a statement of the substance of the evidence, its relevance to the issues on appeal, and whether any witnesses would testify. The Board will hear the arguments in favor of and in opposition to a hearing on the appeal and the presentations on the merits of an appeal at a regularly scheduled meeting. If the Board decides to hold a public hearing on an appeal, that hearing will then be scheduled for a later date.
7. *New or additional evidence to be offered.* If an appellant wants to provide evidence not previously provided to DEP staff during the DEP's review of the application, the request and the proposed supplemental evidence must be submitted with the appeal. The Board may allow new or additional evidence to be considered in an appeal only under limited circumstances. The proposed supplemental evidence must be relevant and material, and (a) the person seeking to add information to the record must show due diligence in bringing the evidence to the DEP's attention at the earliest possible time in the licensing process; or (b) the evidence itself must be newly discovered and therefore unable to have been presented earlier in the process. Requirements for supplemental evidence are set forth in [Chapter 2 § 24](#).

### **OTHER CONSIDERATIONS IN APPEALING A DECISION TO THE BOARD**

1. *Be familiar with all relevant material in the DEP record.* A license application file is public information, subject to any applicable statutory exceptions, and is made accessible by the DEP. Upon request, the DEP will make application materials available to review and photocopy during normal working hours. There may be a charge for copies or copying services.

2. *Be familiar with the regulations and laws under which the application was processed, and the procedural rules governing the appeal.* DEP staff will provide this information upon request and answer general questions regarding the appeal process.
3. *The filing of an appeal does not operate as a stay to any decision.* If a license has been granted and it has been appealed, the license normally remains in effect pending the processing of the appeal. Unless a stay of the decision is requested and granted, a licensee may proceed with a project pending the outcome of an appeal, but the licensee runs the risk of the decision being reversed or modified as a result of the appeal.

## **WHAT TO EXPECT ONCE YOU FILE A TIMELY APPEAL WITH THE BOARD**

The Board will acknowledge receipt of an appeal, and it will provide the name of the DEP project manager assigned to the specific appeal. The notice of appeal, any materials admitted by the Board as supplementary evidence, any materials admitted in response to the appeal, relevant excerpts from the DEP's administrative record for the application, and the DEP staff's recommendation, in the form of a proposed Board Order, will be provided to Board members. The appellant, the licensee, and parties of record are notified in advance of the date set for the Board's consideration of an appeal or request for a hearing. The appellant and the licensee will have an opportunity to address the Board at the Board meeting. The Board will decide whether to hold a hearing on appeal when one is requested before deciding the merits of the appeal. The Board's decision on appeal may be 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. The Board will notify the appellant, the licensee, and parties of record of its decision on appeal.

## **II. JUDICIAL APPEALS**

Maine law generally allows aggrieved persons to appeal final Commissioner or Board licensing decisions to Maine's Superior Court (see [38 M.R.S. § 346\(1\)](#); 06-096 C.M.R. ch. 2; [5 M.R.S. § 11001](#); and M.R. Civ. P. 80C). A party's appeal must be filed with the Superior Court within 30 days of receipt of notice of the Board's or the Commissioner's decision. For any other person, an appeal must be filed within 40 days of the date the decision was rendered. An appeal to court of a license decision regarding an expedited wind energy development, a general permit for an offshore wind energy demonstration project, or a general permit for a tidal energy demonstration project may only be taken directly to the Maine Supreme Judicial Court. See 38 M.R.S. § 346(4).

Maine's Administrative Procedure Act, DEP statutes governing a particular matter, and the Maine Rules of Civil Procedure must be consulted for the substantive and procedural details applicable to judicial appeals.

## **ADDITIONAL INFORMATION**

If you have questions or need additional information on the appeal process, for administrative appeals contact the Board Clerk at 207-287-2811 or the Board Executive Analyst at 207-314-1458 [bill.hinkel@maine.gov](mailto:bill.hinkel@maine.gov), or for judicial appeals contact the court clerk's office in which the appeal will be filed.

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**Note: This information sheet, in conjunction with a review of the statutory and regulatory provisions referred to herein, is provided to help a person to understand their rights and obligations in filing an administrative or judicial appeal. The DEP provides this information sheet for general guidance only; it is not intended for use as a legal reference. Maine law governs an appellant's rights.**

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