



PAUL R. LEPAGE
GOVERNOR

STATE OF MAINE
DEPARTMENT OF AGRICULTURE, CONSERVATION & FORESTRY
LAND USE PLANNING COMMISSION
106 HOGAN ROAD, SUITE 7
BANGOR, MAINE 04401

WALTER E. WHITCOMB
COMMISSIONER

NICHOLAS D. LIVESAY
EXECUTIVE DIRECTOR

PERMIT

**AMENDMENT A TO
WETLAND ALTERATION PERMIT WL 0062
(ENFORCEMENT CASE EC-13-17)**

The staff of the Maine Land Use Planning Commission, after reviewing the application and supporting documents submitted by Lassell Island, LLC for Amendment A to Wetland Alteration Permit WL 0062, finds the following facts:

1. Applicant: Lassell Island, LLC
Attn: Mr. Christopher I. Page
10048 Aurora-Hudson Road
Streetsboro, Ohio 44241
2. Agent: Gartley & Dorsky Engineering & Surveying, Inc.
Attn: Mr. William B. Gartley, PE
P.O. Box 1031
Camden, Maine 04843
3. Date of Completed Application: November 19, 2013
4. Location of Proposal: Lassell Island, Knox County, Maine
Maine Revenue Service Map WO077; Plan 01; Lot 331
Waldo County Registry of Deeds: Book 2037; Page 194-196
5. Zoning: (P-SL) Shoreland Protection Subdistrict
(P-WL) Wetland Protection Subdistrict
(M-GN) General Management Subdistrict
6. Lot Size: 62.25[±] acres (owned)
7. Development: Existing Farmhouse (28 ft. by 55 ft.)
Existing Garage (30 ft. by 32 ft.)
Existing Shed (14 ft. by 24 ft.)
Existing Boat Storage Shed (18 ft. by 58 ft.)
Existing Permanent Pier (210 feet total length)
Existing Seasonal Camp (40 ft. by 30 ft.) with
Existing Deck (40 ft. by 12 ft.)
Existing Pond (100 ft. by 150 ft.)

18 ELKINS LANE, HARLOW BUILDING

PHONE: 207-287-2631

www.maine.gov/acf

FAX: 207-287-7439

- Existing Post-1971 Storage Building for Pier (20 ft. by 30 ft.)
- Existing Unauthorized Breakwater (approximately 45 ft. by 190 ft.; 5,133 square feet of unauthorized fill)
- Existing Unauthorized Stone Retaining Wall #1 (125 ft. long)
- Existing Unauthorized Stone Retaining Wall #2 (150 ft. long)

Administrative History and Existing Conditions

8. Historically, the island lot was developed with a 28 foot by 55 foot farmhouse, a 30 foot by 32 foot garage, a 14 foot by 24 foot shed, an 18 foot by 40 foot boat storage shed, a 160 foot pier, and a 30 foot by 40 foot seasonal camp. All of the above described structures were developed prior to the adoption of the Commission's Rules and Regulations. The island lot has approximately 7,323 feet of water frontage on the Atlantic Ocean. The seasonal camp was destroyed by fire in 2002.
9. Wetlands Alteration Permit WL 0062 by Special Exception and Water Quality Certification, issued by the Commission at a meeting held March 12, 2003 to Lassell Island, LLC, authorized a 50-foot extension to the existing 160 foot pier (for a total of length of 210 feet) and dredging of 63,200 square feet of ocean bottom within Half-Gallon Cove.
10. Building Permit BP 12277, issued to Christopher I. Page on March 29, 2004, authorized the construction of a 40 foot by 30 foot seasonal camp with a 12 foot by 40 foot deck and a combined sewage disposal system. The seasonal camp, including the deck, was conditioned to be setback 75 feet from the mean high water level of the Atlantic Ocean and 15 feet from other property boundary lines.
11. Sometime after March 29, 2004, the applicant:
 - A. Constructed a 20 foot by 30 foot accessory storage building north of the pier. The storage building provides storage, water and power for the pier and is set back 83.4 feet from the mean high water level of the Atlantic Ocean. The storage building is a detached accessory to a pre-Commission residence which complies with Section 10.11,C,5 of the Commission's Land Use Districts and Standards (the "Commission's Standards") and which meets all the applicable dimensional requirements and, as such, does not require a permit from the Commission.
 - B. Reconstructed and expanded the existing pre-Commission boat storage shed, and constructed a 100 foot by 150 foot pond within a (P-SL) Shoreland Protection Subdistrict without the required permits from the Commission. Amendment A to Building Permit BP 12277, issued to Lassell Island, LLC on June 30, 2012, granted after-the-fact approval of the reconstruction and expansion of the boat storage shed, to 18 feet by 58 feet, and the 100 foot by 150 foot pond as constructed. The boat storage shed was conditioned to be setback above (landward of) the mean high water level of the Atlantic Ocean.
 - C. Constructed a 125 foot long section of stone retaining wall (Non-Conforming Stone Retaining Wall #1) south of the boat storage shed without the required permit from the Commission. The retaining wall starts at the foundation of the boat storage shed and ends at a significant ledge outcrop; the retaining wall ranges from 4 feet to 9 feet in height. The retaining wall is set back 0 feet from the mean high water mark of the Atlantic Ocean and also extends seaward of the mean high water level of the Atlantic Ocean (reference, Enforcement Case EC-13-17, active).
 - D. Constructed an approximately 150 foot long retaining wall (Existing Non-Conforming Stone Retaining Wall #2) on the western edge of the pier access road without the required permit from the Commission. The retaining wall starts at the pier, follows the access road and ties into the breakwater described

below. The retaining wall is set back less than 75 feet from the mean high water mark of the Atlantic Ocean (reference, Enforcement Case EC-13-17, active).

- E. Covered an approximately 5,133 square foot area with quarry stone placed below the mean high water level of the Atlantic Ocean to create a 45 foot by 190 foot breakwater (the subject of this permit).

Proposal

12. The applicant now requests after-the-fact permit approval for having covered an approximately 5,133 square foot area with quarry stone below the mean high water level of the Atlantic Ocean to create an approximately 45 foot by 190 foot breakwater. Further, since storms continue to damage the now existing breakwater, the applicant requests permit approval to complete upgrades to improve the stability of the breakwater by replacing smaller existing stone with larger, 3 foot to 4 foot diameter stone.
13. The applicant states that, during north, northwest severe storm events, waves overtopping an existing ledge outcrop were causing severe damage to the sand beach area, the road leading from the pier to the dwelling unit, and the pier and pier abutments. In some instances this damage rendered the pier completely unusable. After each major storm event, repairs were made by replacing the road, resetting the original authorized retaining wall adjacent to the pier, and resetting the granite base of the pier. In response to this repetitive damage, the applicant placed approximately 5,133 square feet of quarry stone below the mean high water level of the Atlantic Ocean to create a breakwater. The breakwater is comprised of 2 foot to 3 foot angular stone which was used to raise the elevation of the existing rocky ledge outcrop to prevent overtopping. The breakwater effectively closed an opening between the existing ledge and the beach area, access road, and pier area. Work was completed by June 1, 2010. The applicant maintains that the breakwater is required to protect the pier area from reoccurring storm washout damage.
14. Although the applicant states that since the placement of the breakwater, the pier has not been damaged, movement of smaller stone on the breakwater is an ongoing concern. Therefore, the applicant proposes to complete minor upgrades to improve stability of the breakwater by replacing some of the smaller stones on the side slopes and top with larger angular stone of 3 to 4 foot diameter. All new stone would be placed on the existing breakwater and would not impact any new (P-WL1) Wetland of Special Significance; the footprint of the breakwater would remain the same.
15. *Description of Breakwater Area.* A representation of the area for assessment purposes was assembled by relying on the existing conditions in the immediate area adjacent to the now existing breakwater and descriptions from the landowner's consultant(s). Adjacent to the pier and along the shore to the beginning of the breakwater the substrate was/is beach sands. It appears that the supratidal breakwater area was/is ledge with little or no vegetation and the intertidal breakwater area was/is ledge, flat stone and boulders with rockweed cover. It is expected that the beach area changed seasonally with storms and natural disturbance. It is also understood that prior to the construction of the breakwater, north, northwest storm events would funnel waves down the shoreline, increasing their energy and height; these waves would then break in a focused area over the ledge, flat stones and boulders (the area where the breakwater was constructed) onto the beach, access road and pier area.
16. *Functions and Values.* An assessment of the impacted wetland's functions and values was completed following the Highway Methodology as outlined by the US Army Corps of Engineers. The applicant's consultant identified one function, fish and shellfish habitat, of "minor importance". The consultant rated the function as a minor function base on:
 - A. The majority of the fill area has been placed on existing ledge outcrops and on the upper limits of the marine intertidal rocky shore;

- B. There are no potential spawning opportunities; and
- C. There is little or no food for fish due to the lack of vegetation and cover for insects.

The consultant further states that since construction, rock weed has been established on the windward side and *Spartina patens* has been established on the leeward side of the breakwater.

17. *Alternative Analysis*. The applicant states that there was no practical alternative to the existing breakwater, nor was there was an alternative site which would accomplish the desired goal of protecting the cove from erosion and damage to the pier. The applicant states that “no action” was not a reasonable alternative as the pier and shoreline needed to be protected from ongoing erosion. The use of less stone would have created a smaller impact area but would have created an insufficient sized breakwater and, although more stone was considered at the time, the existing design was deemed adequate to protect the beach area, access road and pier area. The footprint of the fill area was minimized to the smallest possible footprint to adequately protect the pier area and complete the project. Further, the applicant states that given the energy that funnels through the breakwater area during significant storm events, a floating breakwater would have bottomed out during each tidal cycle and been similarly damaged or destroyed. Lastly, the pier itself is stable and well-constructed and strengthening or reinforcing the existing pier would not have negated the need to protect the access road and beach area with a breakwater.
18. The applicant states that the singular, breakwater construction activity impact is reasonable in relation to the direct and cumulative impacts on the Atlantic Ocean. The applicant further states that there are no threatened or endangered species in the area of impact nor does the breakwater alter wetland hydrology or water quality.
19. The current application does not seek after-the-fact permit approval of the two existing unauthorized retaining walls described in finding of fact #11,C and #11,D above. Therefore, this permit action by the Commission staff does not make any determinations or conclusions regarding the compliance or noncompliance of the retaining walls with respect to the Commission’s standards or permit requirements beyond acknowledging that they require permit approval and are unauthorized; and the two unauthorized retaining walls are not part of this decision. The two unauthorized retaining walls are being addressed independently of this application as part of an ongoing investigation into Enforcement Case EC 13-17 (active).

Agency Review Comments

20. The Department of Marine Resources reviewed the application and comments (*summarized*):

The Department understands that the applicant has placed approximately 400 cubic yards of 2 foot to 3 foot quarry stone to raise the elevation of what is purported to be ledge by several feet as protection for shoreline and an existing pier from northwesterly storms. This has resulted in the covering of 5,133 square feet of intertidal below the Highest Annual Tide (HAT). The project site is at the northwest extreme of an approximately 450 foot by 700 foot cove on the west side of Lasell Island. The cove has ledge outcropping on either side of its opening to the southwest. Upland of the proposed project site, the applicant owns 62 acres of the island. The supratidal is ledge. The intertidal is ledge, boulder and cobble with moderate rockweed cover. The applicant’s pier is located to the SE of the breakwater.

This project has resulted in the loss of approximately 5,133 square feet of rocky intertidal habitat that would typically provide attachment site for marine vegetation, which in turn provides shelter and food for a variety of marine invertebrates, juvenile fish and shorebirds. Compensation should be provided for this loss.

21. The Maine Department of Environmental Protection reviewed the application and comments (*summarized*):

The Department agrees with the Department of Marine Resource's assessment that compensation should be required due to 5,133 square feet of intertidal habitat loss without comparable reconstruction of habitat. It is very likely that rockweed as well as minor coverage from other macro algal species and associated invertebrates were smothered by the fill placement. Along with the loss of individuals and hard substrate was the loss of the function of the intertidal habitat. There has been a loss of three-dimensional space likely providing refuge for invertebrates that is essential to the intertidal community in exposed environments. The addition of quarry fill reduced the amount of intertidal area and essentially created supratidal area where none existed before. Further, the creation of the breakwater with some large material but also some amount of smaller substrate does not appear to have and may not in the future provide sufficient attachment points for macroalgae. The Department also questions if future strong west winds and storm surge would cause erosion of the small fill material on top of the breakwater and cause it to migrate into the intertidal to the east. Further, the Department questions if the beach to the east of the pier is nourished and if there is eelgrass present on the eastern shore of the cove. (After further site review of the project, the Department stated that it is no longer concerned that the small fill material on top of the breakwater will migrate into the intertidal area to the east due to the size of the material on the breakwater and the shape of the beach and because it appears that the intertidal and shallow subtidal shoreline is composed of large substrate and is already a high energy environment.)

The Department comments that removal of the breakwater or even the smaller material on top of the breakwater doesn't seem feasible and perhaps reestablishment along the intertidal portion of the sides of the breakwater should be allowed to continue.

22. The Maine Geologic Survey reviewed the application in reference to the Survey's standards, programs and responsibilities and comments (*summarized*):

The Survey investigated this after-the-fact project that created a breakwater of loosely-placed rock over a bedrock-supported intertidal ledge. The Survey examined the geological setting, wave approaches, and historical photographs available. The Survey did not conduct a site visit but was familiar with the location because of a review of a dredging permit application completed several years ago for the adjacent cove.

The application materials indicated that wave overtopping of the pre-project ledge led to damage of the pier in the adjacent cove. Given the wave forces necessary to damage the pier, we suspect wave forces impacting the new breakwater will be significant and likely to redistribute some of the fill in a southeasterly direction toward the intertidal zone of cove. If the breakwater rock is shifted by storms, it seems likely that additional intertidal area could be impacted in the future. There also could be a need to add additional fill to maintain the current breakwater elevation. The intertidal zone can be dynamic, especially in cobble beach and dune locations. The process of storm wave overtopping and landward transport into lower coastal wetlands is a natural one. However, in the Lassell Island location it does not seem that there was a prior cobble beach where the breakwater was built or evidence of wash over deposition on the cove side.

23. The U.S. Army Corps of Engineers (hereinafter the "Corps") issued after-the-fact Corps Permit # NAE-200103135 ATF on May 23, 2012 to Christopher I. Page to retain and maintain the 5,133 square foot area of stone fill below the High Tide Line of Half Gallon Cove on the west side of Lassell Island in Penobscot Bay, Knox County, Maine. The purpose of the placed fill was for the creation of a seawall to protect an existing pier, ramp and float and to prevent shoreline erosion. The Corps determined that the project would have only minimal individual and cumulative impacts on waters and wetlands of the United States. The Corps did not require compensation for the project.

24. The US Fish and Wildlife Service received a copy of the application and stated that they would not be providing comments on the project.
25. The Maine Department of Inland Fisheries and Wildlife reviewed the application and stated that that the Department has no fisheries related concerns.
26. The Maine Historic Preservation Commission reviewed the application and commented that based on the information submitted, the Commission has concluded that there will be no historic properties affected by the proposed undertaking, as defined by Section 106 of the National Historic Preservation Act. Consequently, pursuant to 36 CFR 800.4(d)(1), no further Section 106 consultation is required unless additional resources are discovered during project implementation pursuant to 36 CFR 800.13.

Commission Review Criteria

27. According to Section 10.23,L,3,c,(7) of the Commission's Standards, filling and grading which is not in conformance with the standards in Section 10.27,F of the Commission's Standards may be allowed within (P-SL) Shoreland Protection Subdistrict upon issuance of a permit from the Commission pursuant to 12 M.R.S.A. §685-B, and subject to the applicable requirements set forth in Sub-Chapter III.
28. According to Section 10.23,L,3,c,(16) of the Commission's Standards, shoreland alterations, including reconstruction of permanent docking structure, and permanent on-shore structure used to secure docks may be allowed within (P-SL) Shoreland Protection Subdistrict upon issuance of a permit from the Commission pursuant to 12 M.R.S.A. §685-B, and subject to the applicable requirements set forth in Sub-Chapter III.
29. According to Section 10.23,N,3,c,(6) of the Commission's Standards, filling and grading may be allowed within (P-WL) Wetland Protection Subdistrict upon issuance of a permit from the Commission pursuant to 12 M.R.S.A. §685-B and subject to the applicable requirements set forth in Sub-Chapter III.
30. According to Section 10.23,N,3,c,(11) of the Commission's Standards, shoreland alterations, including reconstruction of permanent docking structures may be allowed within (P-WL) Wetland Protection Subdistrict upon issuance of a permit from the Commission pursuant to 12 M.R.S.A. §685-B and subject to the applicable requirements set forth in Sub-Chapter III.
31. According to Section 10.23,N,2,a,(1),(b) of the Commission's Standards, coastal wetlands, together with areas below the high water mark of tidal waters and extending seaward to the limits of the State's jurisdiction are designated as (P-WL1) Wetlands of Special Significance.
32. According to Sub-Chapter III, Section 10.25,P,1,c,(3) of the Commission's Standards, Tier 3 reviews are for projects altering any area of P-WL1 wetlands.
33. According to Sub-Chapter III, Section 10.25,P,1,b,(2) of the Commission's Standards, if a proposed activity requires a permit and will alter 500 or more square feet of a P-WL1 wetland, the Commission may require, as a condition of approval, mitigation, including compensation, in conformance with the provisions of Section 10.25,P,2 of the Commission's Standards.
34. According to the General Land Use Standards, Sub-Chapter III, Section 10.25,P,2 of the Commission's Standards, projects requiring Tier 3 review must:

- *Avoidance.* Not cause a loss in wetland area, functions and values if there is a practicable alternative to the project that would be less damaging to the environment. Each Tier 3 application must provide an analysis of alternatives in order to demonstrate that a practicable alternative does not exist;
- *Minimal Alteration.* Limit the amount of wetland to be altered to the minimum amount necessary to complete the project;
- *Water Quality.* Comply with applicable water quality standards;
- *Compensation.* Provide off-setting of a lost wetland function with a function of equal or greater value. The goal of compensation is to achieve no net loss of wetland functions and values. The Commission may waive the requirement for a functional assessment, compensation, or both. The Commission may waive the requirement for a functional assessment if it already possesses the information necessary to determine the functions of the area proposed to be altered. The Commission may waive the requirement for compensation if it determines that any impact to wetland functions and values from the activity will be insignificant; and
- *No Unreasonable Impact.* Have no unreasonable impact on the wetland.

35. According to Sub-Chapter III, Section 10.27,F of the Commission’s Standards, filling and grading activities not in conformance with the standards of this section may be allowed upon issuance of a permit from the Commission provided that such types of activities are allowed in the subdistrict involved. An applicant for such permit shall show by a preponderance of the evidence that the proposed activity, which is not in conformance with the standards of this section, shall be conducted in a manner which produces no undue adverse impact upon the resources and uses in the area.

36. According to Sub-Chapter III, Section 10.27,F,1 of the Commission’s Standards, within 250 feet of water bodies and wetland, the maximum size of a filled or graded area, on any single lot or parcel shall be 5,000 square feet. This shall include all areas of mineral soil disturbed by the filling or grading activity.

37. According to Sub-Chapter III, Section 10.27,F,5 of the Commission’s Standards, where filled or graded areas are in the vicinity of water bodies or wetlands such filled or graded areas shall not extend closer to the normal high water mark of a flowing water, a body of standing water, tidal water, or upland edge of wetlands identified as P-WL1 subdistrict than the distance indicated in Table 10.27,F-1.

Average Slope of Land Between Exposed Mineral Soil and Normal High Water Mark or Upland Edge (Percent)	Width of Strip Between Exposed Mineral Soil and Normal High Water Mark or Upland Edge (Feet Along Surface of the Ground)
10 or less	100
20	130
30	170
40	210
50	250
60	290
70	330

Table 10.27,F-1. Unscarified filter strip width requirements for exposed mineral soil created by filling and grading.

38. The facts are otherwise as represented in: Wetland Alteration Permit WL 0062 and subsequent amendments and supporting documents; Building Permit BP 12277 and subsequent amendments and supporting documents; and Enforcement Case EC 13-17 and supporting documents.

Based upon the above Findings, the staff Concludes that:

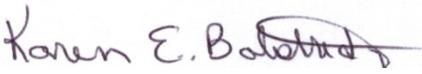
1. The proposal meets and Section 10.27,F and the General Land Use Standards, Sub-Chapter III, Section 10.25,P,2 of the Commission's Standards. Specifically:
 - A. The applicant provided an alternatives analysis demonstrating that there was no practicable alternative to the project that would be less damaging to the environment. The applicant showed that taking no action, placing a smaller breakwater, placing a floating breakwater, and strengthening or reinforcing the existing pier would not have protected the sand beach area, the road leading from the pier to the dwelling unit, and the pier and pier abutments;
 - B. The applicant limited the amount of (P-WL1) Wetland of Special Significance altered to the minimum amount necessary by constructing the smallest breakwater possible which would also protect the sand beach area, the road leading from the pier to the dwelling unit, and the pier and pier abutments;
 - C. The applicant's consultant provided a functional assessment of the area altered which identifies one function, fish and shellfish habitat, of minor importance. The Department of Marine Resources and the Department of Environmental Protection point out that the area disturbed would typically provide three-dimensional habitat which likely provided refuge for intertidal community invertebrates and attachment site for macroalgae, which in turn provided refuge and food for a variety of marine invertebrates, juvenile fish and shorebirds. However, based on the information provided by applicant's consultant, it appears that comparable post-construction intertidal habitat is re-establishing along the new breakwater. Further, the U.S. Army Corps of Engineers determined that the project has only minimal individual and cumulative impacts on waters and wetlands of the United States and granted a Corps permit without requiring compensation. While intertidal habitat function has been altered and lost, that habitat is being re-established and it is expected that in the long term, net wetland loss and impact to the wetland functions and values will be minimal. Consequently, it is not expected that the breakwater has/will have an undue adverse impact upon the resources and uses in the area. Therefore, the Commission waives the requirement of compensation because the impact to wetland functions and values from the activity appears to be insignificant.
 - D. The breakwater will have no unreasonable impact on the Atlantic Ocean. Specifically:
 - a) the breakwater will not unreasonably interfere with existing scenic, aesthetic, recreational or navigational uses;
 - b) while there is a small potential for soil erosion from the top of the breakwater, this issue is being addressed by replacing the small material with larger material which will not significantly shift or erode during future storms events, subsequently, the breakwater will not cause unreasonable sediment erosion;
 - c) the project will not unreasonably harm any significant wildlife habitat, threatened or endangered plant habitat, or marine fisheries;
 - d) the breakwater will not unreasonably interfere with the natural flow of water, increase the flooding potential, or interfere with a sand dune system.
2. If carried out in compliance with the Conditions below, the proposal will meet the Criteria for Approval, section 685-B(4) of the Commission's Statutes, 12 M.R.S.A.

Therefore, the staff approves the After-the-Fact amendment application of Lassell Island, LLC for the existing breakwater with improvements, with the following Conditions:

1. Construction activities authorized in this permit must be substantially started within 2 years of the effective date of this permit and substantially completed within 5 years of the effective date of this permit. If such construction activities are not started and completed within this time limitation, this permit shall lapse and no activities shall then occur unless and until a new permit has been granted by the Commission.
2. The permittee shall secure and comply with all other applicable licenses, permits, and authorizations of all federal, state and local agencies including, but not limited to, the U.S. Army Corps of Engineers, the Maine Department of Environmental Protection, the Department of Marine Resources, and the United States Fish and Wildlife Service.
3. All new stone placed to improve the stability of the breakwater must: be at least 3 feet to 4 feet in diameter so as not to significantly shift or erode during future storms events; not impact any new (P-WL1) Wetland of Special Significance; and be placed within the footprint of the existing breakwater.
4. All Conditions of Wetlands Alteration Permit WL 0062 shall remain in effect.
5. Nothing in this permit shall be construed to release the permittee from any liability or responsibility arising from any violations at the property, including those related to Enforcement Case EC 13-17, or to be considered a waiver of the authority of the Commission or the State of Maine to fully pursue or prosecute such violations.

This permit is approved upon the proposal as set forth in the application and supporting documents, except as modified in the above stated Conditions, and remains valid only if the permittee complies with all of these conditions. Any variation from the application or the conditions of approval is subject to prior Commission review and approval. Any variation undertaken without Commission approval constitutes a violation of Land Use Planning Commission law. In addition, any person aggrieved by this decision of the staff may, within 30 days, request that the Commission review the decision.

DONE AND DATED AT BANGOR, MAINE, THIS 25TH DAY OF FEBRUARY, 2014.

By: 
_____ *for* Nicholas D. Livesay, Executive Director