



STATE OF MAINE
DEPARTMENT OF ENVIRONMENTAL PROTECTION

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PAUL R. LEPAGE
GOVERNOR

PATRICIA W. AHO
COMMISSIONER

MEMORANDUM

TO: The Board of Environmental Protection

FROM: Maria Eggett, Project Manager and Mark Bergeron, Division Director, Division of Land Resource Regulation, Bureau of Land & Water Quality

RE: Appeal filed by Richard and Margery Read of Natural Resources Protection Act Permit Denial #L-25839-4P-A-N/L-25839-TW-B-N/L-25839-FS-C-N, Residential Pier

DATE: June 13, 2013

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Statutory and Regulatory References: The applicable statutory and regulatory framework for the issues raised in this appeal are the Natural Resources Protection Act (NRPA), 38 M.R.S.A. §§ 480-A to 480-HH, the Wetlands and Waterbodies Protection Rules (Chapter 310), and the Significant Wildlife Habitat Rules (Chapter 335). The law and rules contain standards for preventing unreasonable impacts to protected natural resources. Procedures for appeals before the Board are outlined in the Department's Rules Concerning the Processing of Applications, Chapter 2 § 24.

Location: The proposed residential pier is located on Hatch Cove on Moore Farm Road in the Town of Castine.

Procedural History and Project Description: On November 16, 2012, Richard Read and Margery Read filed an application for a permit under the NRPA for the construction of a pier in and over a coastal wetland and Significant Wildlife Habitat. The permit application requested approval to construct a 100-foot long by 3-foot wide residential pier. The proposed project also included a 30-foot long by 3-foot wide seasonal ramp, a 16-foot long by 3-foot wide seasonal ramp, and six 16-foot long by 4-foot wide seasonal floats. The proposed pier and float structure would extend approximately 239 feet into Hatch Cove. The proposed structure would replace an approximately 133-foot long seasonal pier structure. In Department Order #L-25839-4P-A-N/L-25839-TW-B-N/L-25839-FS-C-N, dated February 19, 2013, the Department denied the NRPA application for the permit.

A timely appeal to the Board was filed on March 19, 2013 by the appellants listed above.

Environmental Issues and Discussion:

1. **SIGNIFICANT WILDLIFE HABITAT IMPACTS:**

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The department's denial of this permit application was based on the nature of the habitat affected, the seriousness of the impacts of the proposal, and the existence of alternatives that would be less damaging to the environment.

Two types of habitat that qualify under the NRPA as "Significant Wildlife Habitat" would be adversely impacted by this proposal and both types are rated high value by the Department of Inland Fisheries and Wildlife (MDIF&W). MDIF&W staff visited the project site to assist in their assessment of this application and they confirmed the high value of the habitat. Hatch Cove contains the only mapped Significant Shorebird Habitat in Castine and over much of the same area is a large Tidal Waterfowl and Wading Bird Habitat that is so far not terribly affected by fragmentation. The appellants do not challenge the extent or nature of the habitat as it has been described by the Department and MDIF&W.

The appellants contend the proposed structure will not impact winter waterfowl as the floats would be removed from the cove during winter months. However, the permanent portion of the proposed project would extend approximately 100 feet from the shore into the tidal feeding area that constitutes the Tidal Waterfowl and Wading bird Habitat. The appellants currently use a seasonal structure consisting of six floats, two ramps, and a wooden post platform with an approximate total length of 133 feet. The appellants contend that the proposed project would have fewer impacts than the current system of seasonal structures but the Department does not have jurisdiction over the impacts from such seasonal structures and must simply assess the impacts of the proposal before it. But the fact is that the seasonal structures must be removed from the resource for at least five months of each year and thus are not causing any impacts during those months.

The appellants cite the Department of Marine Resources' comments in support of their argument that the proposed project would have fewer impacts on the resources of the cove overall, due to the elevation of the foot traffic above the coastal wetland and the repositioning of the floats into deeper water. The Department agrees that pile supported pier would lessen the impacts to the marine vegetation, however, the Department concluded that the improvements from the marine vegetation perspective that would be gained from the use of a raised permanent pier do not outweigh the serious impacts to the two types of SWH. Moreover, a larger number of floats would rest on the mudflats at low tide as part of the proposed project.

The appellants contend that the proposed structure will not bisect the Significant Wildlife Habitat and conclude that the Department's denial was based on the impacts caused by the addition of the five floats at the end of the proposed permanent pier. The proposed pier is approximately 239-feet long and the approximate width of the SWH, seaward of the highest annual tide line in this location, is approximately 430-feet. This length of pier will effectively bisect the habitat, especially for shorebirds.

On the basis of its analysis and the input from the MDIF&W, the Department found that the proposed project would have an unreasonable impact on the Significant Wildlife Habitats.

2. PRACTICAL ALTERNATIVE LESS DAMAGING TO THE ENVIRONMENT:

In their permit application, the appellants considered the continued use of the seasonal pier structure and the use of a public or private launch facility as alternatives to the proposed project. The appellants stated in their permit application that the proposed structure was for their 12-foot skiff which draws one foot of water, however in their appeal they contend that all-tide access is necessary for their 16-foot sailboat. During the processing of the application, the Department suggested that environmental impacts could be considerably lessened by amending their proposal to be a 100-foot long permanent pier plus one 16-foot long float. The appellants responded that the expense to construct a permanent pier with one float was not acceptable to meet the project need.

The Department generally finds that all-tide access is not a necessity for recreational boaters. Compared to commercial fishermen, recreational boaters have more flexibility in boating schedules and can often use a dinghy to access a moored vessel, requiring less depth at a float. The appellant did not present any information to demonstrate that all-tide access is required in this situation.

Based on the evidence and facts the Department found that the appellants' proposed recreational pier would result in a loss of functions and values of the coastal wetland, would degrade the wildlife habitat, and would affect the continued use of the habitat by the wildlife. When those impacts are balanced with the existence of practical alternatives which would be less damaging to the environment, the Department concluded that the harm to the Significant Wildlife Habitats would be unreasonable.

Department Recommendation: The Department recommends that the Board deny the appellants' appeal and affirm the Department's decision to deny the proposed residential pier in Department Order # L-25839-4P-A-N/L-25839-TW-B-N/L-25839-FS-C-N.

Estimated Time of Presentation: 1 hour



STATE OF MAINE
DEPARTMENT OF ENVIRONMENTAL PROTECTION
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DRAFT BOARD ORDER

IN THE MATTER OF

RICHARD AND MARGERY READ) NATURAL RESOURCES PROTECTION
Castine, Hancock County) COASTAL WETLAND ALTERATION
RECREATIONAL PIER)
L-25839-4P-D-Z (DENIED)) APPEAL
L-25839-TW-E-Z (DENIED))
L-25839-FS-F-Z (DENIED)) FINDINGS OF FACT AND ORDER

Pursuant to the provisions of 38 M.R.S.A. Sections 344 and 341-D (4) and Chapter 2, Section 24 of the Department of Environmental Protection's regulations, the Board of Environmental Protection has considered the appeal of RICHARD AND MARGERY READ, its supportive data, and other related materials on file and FINDS THE FOLLOWING FACTS:

1. PROCEDURAL HISTORY:

On November 16, 2012, Richard and Margery Read filed a Natural Resources Protection Act (NRPA) application for a permit to construct a recreational pier in the Town of Castine. The project site is located on Hatch Cove, on Moore Farm Road. The Department denied the application in Department Order #L-25839-4P-A-N/L-25839-TW-B-N/L-25839-FS-C-N, dated February 19, 2013.

On March 19, 2013, Richard and Margery Read (the appellants) filed a timely appeal of the Department's decision to the Board. The appellants requested that the Board reverse the Department denial and approve the NRPA permit application.

2. PROJECT DESCRIPTION:

The appellants propose to construct a four-foot wide by 100-foot long pile-supported residential pier, with a 3-foot wide by 30-foot long ramp, a 3-foot wide by 16-foot long ramp, and six 4-foot wide by 16-foot long seasonal floats. The proposed pier and float structure would extend approximately 239 feet into Hatch Cove and would replace a seasonal structure. The appellants have historically used an approximately 133-foot long seasonal pier structure consisting of two ramps, six floats, and a wood post platform.

3. STANDING:

The appellants are the applicants for the project and their application includes evidence that they are the owners of the subject property. The Board finds that the appellants have demonstrated they are aggrieved persons for the purpose of this appeal, as defined in Chapter 2 § 1(B) of the Department's Rules Concerning the Processing of Applications and Other Administrative Matters.

4. BASIS FOR APPEAL:

The appellants' objections are to the following Department findings and conclusions:

- A. The Department found and concluded that there is a practical alternative which would be less damaging to the environment, and
- B. The Department found and concluded that there would be an unreasonable impact to Significant Wildlife Habitat.

Based on the objections to the finding and conclusions listed above, the appellants assert that the Department erred in its findings that a practicable alternative exists, and that the project would unreasonably harm two Significant Wildlife Habitats.

5. REMEDY REQUESTED:

The appellants request that the Board reverse the February 19, 2013 Department decision denying the recreational pier in the Town of Castine, and approve the NRPA permit for the proposed pier.

6. DISCUSSION AND FINDINGS:

A. PRACTICAL ALTERNATIVE LESS DAMAGING TO ENVIRONMENT:

Under provisions of the Department's Chapter 310 Wetlands and Waterbodies Protection Rules of the (NRPA), the intertidal and near subtidal coastal wetlands located at the project site meet the definition of wetlands of special significance. Pursuant to Chapter 310 Section 5(A) of the Wetland Rules, in an evaluation of whether a project in a wetland would result in an unreasonable impact under each of the criteria listed in the NRPA, the Department and the Board consider the extent of the impacts in terms of loss of wetland area, functions, or values and balance that with the availability of practicable alternatives to the activity that would be less damaging to the environment. A proposed project may be found to result in an unreasonable impact if the activity will cause a loss in a wetland's area, or the functions and values it provides, such as wildlife habitat, and a practicable, less damaging alternative exists. The Department's Significant Wildlife Habitat Rules, in Ch. 335 §3(A), similarly provide that a proposed activity "that would degrade the significant wildlife habitat, disturb the subject wildlife, or affect the continued use of the significant wildlife habitat by the subject wildlife...as a result of the activity, will be considered to have an unreasonable impact if there is a practicable alternative to the

project that would be less damaging to the environment.” A balancing test of the impacts to the resource at issue and the availability of alternatives is conducted. The Significant Wildlife Rules also require, in Ch. 335 §3(B), that an applicant must demonstrate that the alteration of the habitat and the disturbance of the wildlife has been kept to the minimum amount necessary by means such as “minimizing the size of the alteration, the duration of the activity, and its proximity to the wildlife habitat and the subject wildlife.”

In the original application and in response to the Department’s requests during the processing of the application, the appellants provided an analysis of alternatives completed by Lawrence Billings and dated November 2012 to demonstrate that a practical alternative for the proposed pier does not exist. Alternatives considered by the appellants for this project include the continued use of a seasonal structure and the use of a public or private launch facility. During the processing of the application, the Department suggested an additional alternative which would minimize impacts. The Department suggested that environmental impacts of the project could be considerably lessened if a 100-foot long permanent pier plus one 16-foot long float was substituted for the proposed pier. The appellants responded that the expense to construct a permanent pier with one float was not acceptable given the minimal extension in length it would provide from the system they currently use.

In their permit application, in response to the question about the type of boat they have, the appellants stated that they have a 12-foot skiff which draws one foot of water, and they stated that they want to have access for a longer period of time. However in their appeal, the appellants contend that all-tide access is necessary for the applicants’ 16-foot sailboat because “it has become increasingly difficult to schedule time to use the sailboat on a limited tide timetable, high and low tides are becoming greater, global warming issues, applicant is employed daily during the summer that makes having an all tide access necessary to get a reasonable enjoyment of the boating experience.”

The Board generally finds all-tide access is not a necessity for piers related to recreational boating. In a cove that has an extensive tidal area and large mud flats, all-tide access may result in extensive environmental impacts. As distinguished from commercial fishermen, recreational boaters have more flexibility in boating schedules. In addition, a dinghy can be used to access a moored vessel, requiring less depth at a float. The record reflects that other landowners on Hatch Cove use only seasonal structures for boating access. The evidence in the record does not establish that the appellants require all-tide access, especially when balanced with the presence of two types of Significant Wildlife Habitat in this cove.

The Board finds that the appellant’s proposed recreational pier would result in a loss of functions and values of the coastal wetland and impacts to two Significant Wildlife Habitats as discussed below, and finds that there are practical alternatives, either the continued use of a seasonal structure and mooring system or a significantly shorter pier with one float, which would be less damaging to the environment.

B. SIGNIFICANT WILDLIFE HABITAT IMPACTS:

The appellants argue that the proposed pier structure would not impact winter waterfowl as the floats would be removed from the cove during winter months. The appellants also question whether the proposed structure would “entirely bisect the Significant Wildlife Habitat,” and they argue that the Department’s denial was exclusively based on the impacts caused by the addition of the five seasonal floats at the end of the fixed pier.

During the pre-application process, the Maine Department of Inland Fisheries and Wildlife (MDIFW) determined that the project site contains two types of Significant Wildlife Habitat. Significant Wildlife Habitats (SWH) are regulated as protected natural resources under the NRPA. The two habitats present in Hatch Cove, Tidal Waterfowl and Wading Bird Habitat (TWWH) and Shorebird Feeding Habitat, are rated as high value by the MDIFW. MDIFW reports that “Hatch Cove supports the only mapped Significant Shorebird habitat in Castine and one of the largest and least fragmented Tidal Waterfowl and Wading Bird Habitats [in Castine].”

In its review of the application, MDIFW noted that the proposed pier would be the first permanent structure to be built in this “very tidal” cove. MDIFW’s assessment is that the proposed project’s impacts would be particularly damaging because the pier would extend into the habitats in a relatively narrow portion of the habitats. Its comments point out that the habitats have already suffered some degree of seasonal fragmentation from the temporary/seasonal structures that are in the same general area of the habitat. MDIFW stated that the proposed structure would extend more than 200 feet across the SWH, bisecting the available intertidal mudflat, the primary shorebird and waterfowl feeding areas at low tide during the boating season, and significantly intruding into the SWH even during the winter months, with just the permanent portion of the pier, when the area is primarily used by wintering waterfowl. MDIFW recommended denial of a permit for this proposed project because it would be in high value SWH where no permanent structures currently exist and because of the length proposed. MDIFW states that its experts have documented avoidance behaviors of several priority species utilizing this type of SWH. MDIFW’s conclusion is that due to its size and location the proposed project would have a strong impact, altering the feeding behavior of the species present and degrading the habitat.

The Board finds that the construction of this proposed pier is likely to result in the shorebirds and waterfowl using this SWH avoiding the use of the habitat around the proposed project. The combination of the proposed permanent pier and the extensive ramps and floats proposed would extend approximately 239 feet and cause significant fragmentation of this habitat, which despite some seasonal fragmentation, has thus far remained high value habitat. The cumulative impacts of this proposal on top of the existing seasonal structures would likely further degrade this habitat and would be an unreasonable impact, especially in consideration of the alternatives available: continued use of seasonal structure and a mooring, or a smaller proposed structure that would intrude less into the habitat. The permanent portion of the proposed structure would

adversely affect a high value SWH, one for which the wintering waterfowl use has been documented as significant by MDIFW since 1983. The Board finds that even while the seasonal floats at the end of the fixed pier are removed, the fixed pier would remain in the SWH, and would impact the wintering waterfowl. On the basis of these impacts, the Board finds that the project would unreasonably harm the Tidal Waterfowl and Wading Bird Habitat and the Shorebird Feeding Habitat in Hatch Cove.

Based on the above findings, the Board concludes that:

1. The appellants filed a timely appeal.
2. The applicant's proposal to construct a four-foot wide by 100-foot long pile-supported residential pier, with a 3-foot wide by 30-foot long ramp, a 3-foot wide by 16-foot long ramp, and six 4-foot wide by 16-foot long seasonal floats would unreasonably harm Significant Wildlife Habitat.

THEREFORE, the Board AFFIRMS Department Order #L-25839-4P-A-N/L-25839-TW-B-N/L-25839-FS-C-N denying the application of RICHARD AND MARGERY READ to construct a recreational pier in Castine, Maine and DENIES the appeal of the RICHARD AND MARGERY READ.

DONE AND DATED AT AUGUSTA, MAINE, THIS _____ DAY OF _____, 2013.

BOARD OF ENVIRONMENTAL PROTECTION

By: _____
Robert A. Foley, Chair

