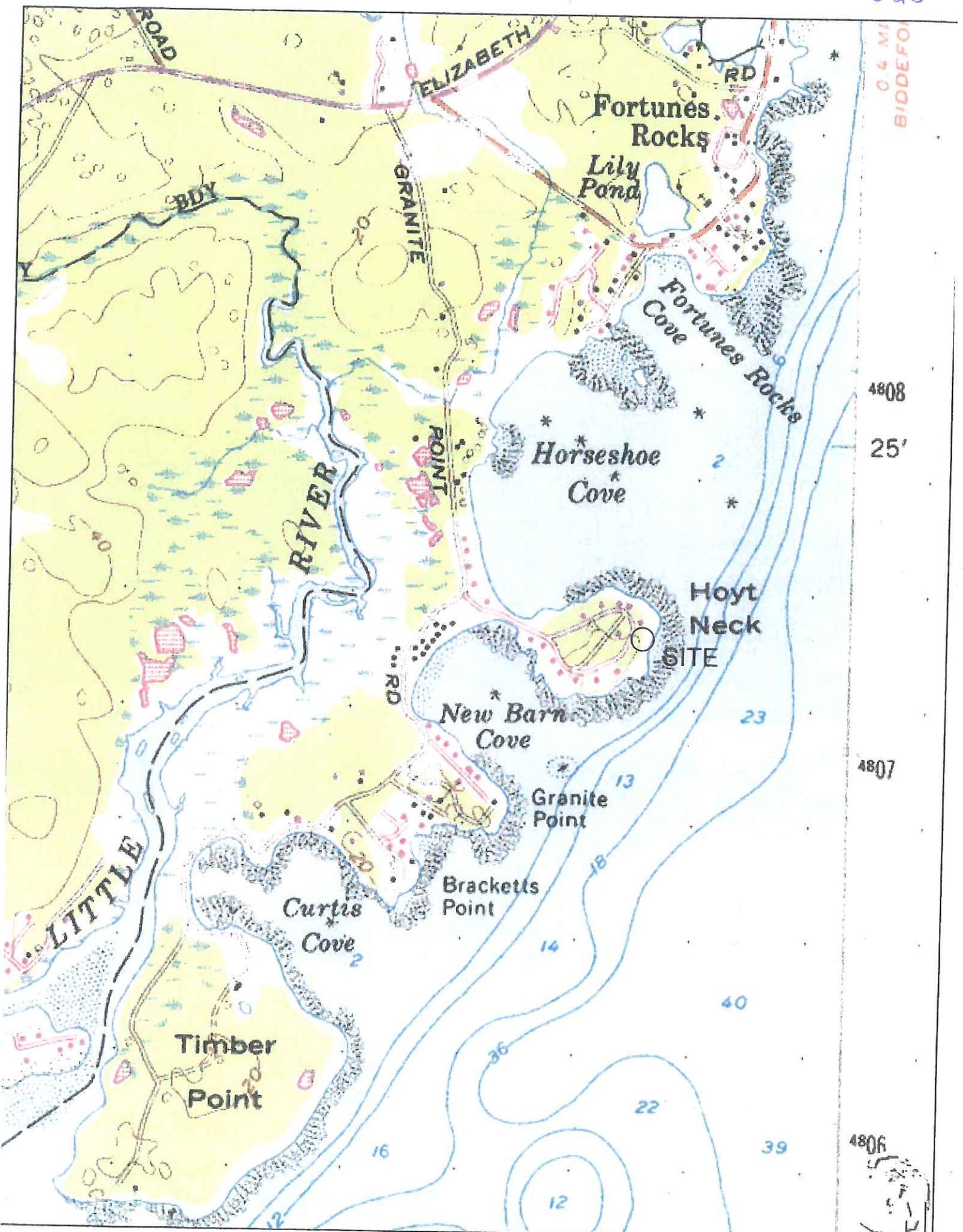
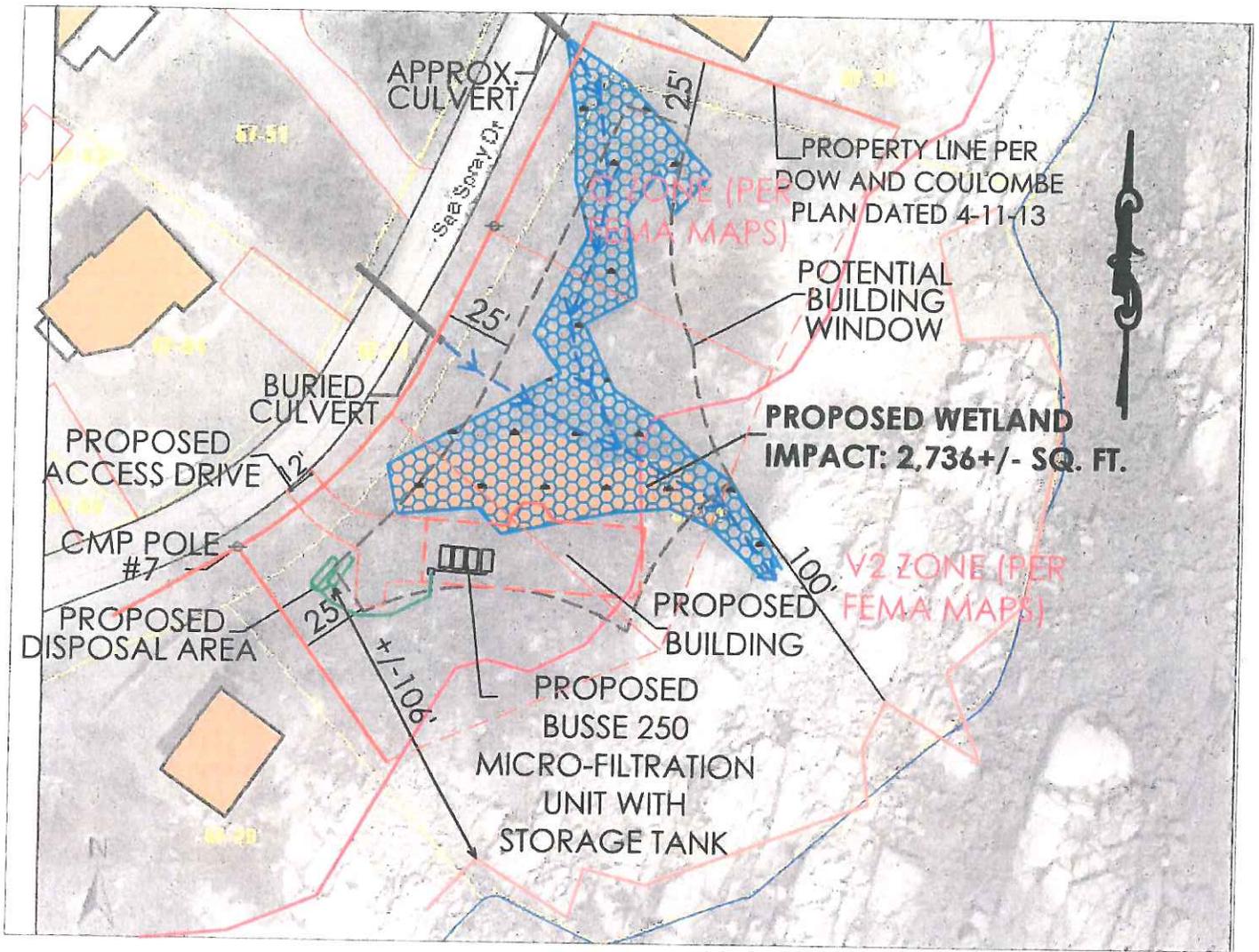


**PROJECT LOCATION MAP**  
**PROJECT PLANS**

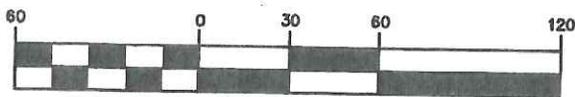




524



**GRAPHIC SCALE**



( IN FEET )

1 inch = 60 ft.

THIS MAP IS A COMPOSITE OF CITY OF BIDDEFORD TAX MAP & AERIAL PHOTOGRAPHY, FEMA FLOOD ZONE MAPS AND ALBERT FRICK ASSOCIATES, INC. SUBMETER GPS.

**LEGEND:**

-  EDGE OF SPRING HIGH TIDE WETLAND AREA
-  SURFACE DRAINAGE
-  PROPOSED IMPACT
-  FLOOD ZONE OVERLAY V-ZONE (100 YEAR) TO BE FIELD VERIFIED BY LAND SURVEYOR PRIOR TO CONSTRUCTION AND FEMA INSURANCE PERMIT

**SITE PLAN**  
 PREPARED FOR ZAGOREN/GILPATRICK  
 (ANUSZEWSKI)  
 20 SEA SPRAY DRIVE  
 (MAP 67, LOT 30, CR ZONE)  
 BIDDEFORD, MAINE



**Albert Frick Associates, Inc.**  
 Soil Scientists & Site Evaluators  
 Gorham, Maine 04038

Date:	Revision Description	Drawn By: B.O./B.J.	Checked By: A.F.
4/22/10	ACCESS DRIVE DETAILS ADDED	Date: 8/18/09	Scale: 1" = 60'
12/3/10	PER RUSSELL MARTIN P.E. RECOMMENDATIONS		
4/19/13	PROPOSED DISPOSAL AREA UPDATED		



**ORDER UNDER APPEAL**



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

DEPARTMENT ORDER

IN THE MATTER OF

BETH ZAGOREN AND ROBERT GILPATRIC	)	NATURAL RESOURCES PROTECTION ACT
Biddeford, York County	)	FRESHWATER WETLAND ALTERATION
HOUSE LOT DEVELOPMENT	)	WATER QUALITY CERTIFICATION
L-24923-TA-B-N (approval)	)	FINDINGS OF FACT AND ORDER

Project Description: In Department Order #L-24923-TA-A-N, dated May 13, 2010, the Department approved the alteration of 2,736 square feet of a freshwater, scrub-shrub wetland that is defined as a wetland of special significance because the wetland is located within 250 feet of a coastal wetland. The Department previously determined the activity was eligible for Tier 1 review. The permit approval expired because the applicants were unable to obtain state approval for the septic system design but have since redesigned the septic system to meet State of Maine requirements. The applicants are seeking re-approval to alter 2,736 square feet of freshwater, scrub-shrub wetlands of special significance. The applicants propose to construct a single-family residential house as shown on a plan titled, "Site Plan," prepared by Albert Frick Associates, Inc., and dated, by revision, April 19, 2013. The wetland alteration is a result of grading associated with the construction of the house and for a 25-foot fill envelope around the perimeter of the house. The wetland is primarily located within the center and northerly portion of the lot, and the applicants located the house and associated development in the southerly portion of the lot to avoid and minimize wetland impacts to the greatest extent practicable while meeting local setback requirements. According to the Department's Geographic Information System (GIS), there are no mapped significant wildlife habitats associated with the project site. The proposed project is located at 20 Sea Spray Drive in the City of Biddeford.

<b>Permit for:</b>	<input checked="" type="checkbox"/>	Tier 1
<b>DEP Decision:</b>	<input checked="" type="checkbox"/>	Approved <input type="checkbox"/> Denied (see attached letter)
<b>CORPS Action:</b>	<input checked="" type="checkbox"/>	The Corps has been notified of your application. The following are subject to Federal screening: (1) projects with previously authorized or unauthorized work, in combination with a Tier 1 permit for a single and complete project, which total more than 15,000 square feet of altered area; (2) projects with multiple state permits and/or state exemptions which apply to a single and complete project that total more than 15,000 square feet of altered area; and (3) projects that may impact a vernal pool, as determined by the State of Maine or the Corps. If your activity is listed above, <i>Corps approval is required for your project.</i> For information regarding the status of your application contact the Corps' Maine Project Office at 623-8367.

Standard Conditions:

- 1) If construction or operation of the activity is not begun within four (4) years from the date signed, this permit shall lapse and the applicant shall reapply to the Department for a new permit. This permit is transferable only with prior approval from the Department. If the activity is associated with a larger project, starting any aspect of that project constitutes start of construction.

L-24923-TA-B-N

2 of 5

- 2) The project shall be completed according to the plans in the application. Any change in the project plans must be reviewed and approved by the Department.
- 3) Properly installed erosion control measures shall be installed prior to beginning the project, and all disturbed soil should be stabilized immediately upon project completion.
- 4) A copy of this approval will be sent to the City of Biddeford. Department approval of your activity does not supersede or substitute the need for any necessary local approvals.

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.

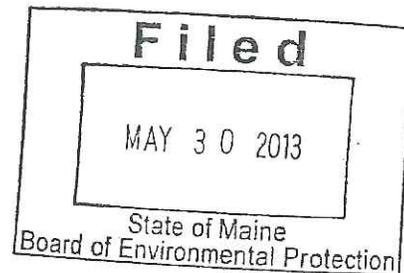
DONE AND DATED IN AUGUSTA, MAINE, THIS 29<sup>th</sup> DAY OF May, 2013.

DEPARTMENT OF ENVIRONMENTAL PROTECTION

BY:



For: Patricia W. Aho, Commissioner



PLEASE NOTE THE ATTACHED SHEET FOR GUIDANCE ON APPEAL PROCEDURES...

LV/L#24923BN/ATS#76080



## Natural Resources Protection Act (NRPA) Standard Conditions

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THE FOLLOWING STANDARD CONDITIONS SHALL APPLY TO ALL PERMITS GRANTED UNDER THE NATURAL RESOURCE PROTECTION ACT, TITLE 38, M.R.S.A. SECTION 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.

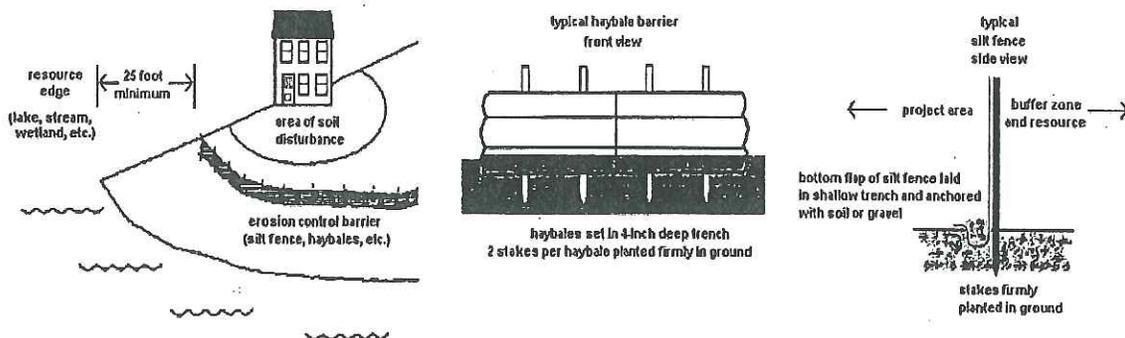


STATE OF MAINE  
DEPARTMENT OF ENVIRONMENTAL PROTECTION  
17 STATE HOUSE STATION, AUGUSTA, MAINE 04333

Erosion Control for Homeowners

Before Construction

1. If you have hired a contractor, make sure you discuss your permit with them. Talk about what measures they plan to take to control erosion. Everybody involved should understand what the resource is, and where it is located. Most people can identify the edge of a lake or river. However, the edges of wetlands are often not so obvious. Your contractor may be the person actually pushing dirt around, but you are both responsible for complying with the permit.
2. Call around to find where erosion control materials are available. Chances are your contractor has these materials already on hand. You probably will need silt fence, hay bales, wooden stakes, grass seed (or conservation mix), and perhaps filter fabric. Places to check for these items include farm & feed supply stores, garden & lawn suppliers, and landscaping companies. It is not always easy to find hay or straw during late winter and early spring. It also may be more expensive during those times of year. Plan ahead -- buy a supply early and keep it under a tarp.
3. Before any soil is disturbed, make sure an erosion control barrier has been installed. The barrier can be either a silt fence, a row of staked hay bales, or both. Use the drawings below as a guide for correct installation and placement. The barrier should be placed as close as possible to the soil-disturbance activity.
4. If a contractor is installing the erosion control barrier, double check it as a precaution. Erosion control barriers should be installed "on the contour", meaning at the same level or elevation across the land slope, whenever possible. This keeps stormwater from flowing to the lowest point along the barrier where it can build up and overflow or destroy the barrier.



During Construction

1. Use lots of hay or straw mulch on disturbed soil. The idea behind mulch is to prevent rain from striking the soil directly. It is the force of raindrops hitting the bare ground that makes the soil begin to move downslope with the runoff water, and cause erosion. More than 90% of erosion is prevented by keeping the soil covered.
2. Inspect your erosion control barriers frequently. This is especially important after a rainfall. If there is muddy water leaving the project site, then your erosion controls are not working as intended. You or your contractor then need to figure out what can be done to prevent more soil from getting past the barrier.

3. Keep your erosion control barrier up and maintained until you get a good and healthy growth of grass and the area is permanently stabilized.

#### **After Construction**

1. After your project is finished, seed the area. Note that all ground covers are not equal. For example, a mix of creeping red fescue and Kentucky bluegrass is a good choice for lawns and other high-maintenance areas. But this same seed mix is a poor selection for stabilizing a road shoulder or a cut bank that you don't intend to mow. Your contractor may have experience with different seed mixes, or you might contact a seed supplier for advice.
2. Do not spread grass seed after September 15. There is the likelihood that germinating seedlings could be killed by a frost before they have a chance to become established. Instead, mulch the area with a thick layer of hay or straw. In the spring, rake off the mulch and then seed the area. Don't forget to mulch again to hold in moisture and prevent the seed from washing away or being eaten by birds or other animals.
3. Keep your erosion control barrier up and maintained until you get a good and healthy growth of grass and the area is permanently stabilized.

#### **Why Control Erosion?**

##### **To Protect Water Quality**

When soil erodes into protected resources such as streams, rivers, wetlands, and lakes, it has many bad effects. Eroding soil particles carry phosphorus to the water. An excess of phosphorus can lead to explosions of algae growth in lakes and ponds called blooms. The water will look green and can have green slime in it. If you are near a lake or pond, this is not pleasant for swimming, and when the soil settles out on the bottom, it smothers fish eggs and small animals eaten by fish. There many other effects as well, which are all bad.

##### **To Protect the Soil**

It has taken thousands of years for our soil to develop. Its usefulness is evident all around us, from sustaining forests and growing our garden vegetables, to even treating our septic wastewater! We cannot afford to waste this valuable resource.

##### **To Save Money (\$\$)**

Replacing topsoil or gravel washed off your property can be expensive. You end up paying twice because State and local governments wind up spending your tax dollars to dig out ditches and storm drains that have become choked with sediment from soil erosion.

**APPEAL DOCUMENTS**


**PIERCE ATWOOD**
**WILLIAM E. TAYLOR**

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254 Commercial Street  
Portland, ME 04101

**PH** 207.791.1213  
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wtaylor@pierceatwood.com  
pierceatwood.com

*Admitted in:* MA ME NH

Sent via Fax and U.S. Mail

June 28, 2013

Mr. Robert A. Foley, Chair  
c/o Board of Environmental Protection  
17 State House Station  
Augusta, ME 04333-0017

RE: Notice of Appeal of Russell LaPorte and Sea Spray Homeowners Group, Biddeford, York County, House Lot Development L-24923-TA-B-N (approval)

Dear Mr. Foley:

Enclosed please find a Notice of Appeal on behalf of Russell LaPorte and the Sea Spray Homeowners Group in the above-captioned matter for your review.

Sincerely,



William E. Taylor

WET:aah

Enclosure

cc: Patricia Aho, Esq.  
Robert Anuszewski  
Beth Zagoren  
Robert Gilpatric

cc (via email): Russell & Rosemary LaPorte  
Bradley Googins  
Robert LaPorte  
Joseph & Lisa Lyons  
Ed & Sue Sklanka

**STATE OF MAINE  
BOARD OF ENVIRONMENTAL PROTECTION**

<b>IN RE:</b>	)	
<b>BETH ZAGOREN AND ROBERT GILPATRIC</b>	)	NOTICE OF APPEAL OF
Biddeford, York County	)	RUSSELL LAPORTE AND
HOUSE LOT DEVELOPMENT	)	SEA SPRAY HOMEOWNERS
L-24923-TA-B-N (approval)	)	GROUP

Appellants, the Sea Spray Homeowners Group,<sup>1</sup> respectfully submit this Notice of Appeal concerning the Department of Environmental Protection's ("Department" or "DEP") issuance of a Natural Resources Protection Act ("NRPA") permit for a house lot development project in a wetland of special significance.

**BACKGROUND**

This appeal relates to the Department's approval of an alteration of a freshwater wetland of special significance at 20 Sea Spray Drive in the City of Biddeford. The Department previously approved a separate application on May 13, 2010. The permit approval expired "because the applicants were unable to obtain state approval for the septic system design." See May 29, 2013, Department Order, Project Description. The applicants sought approval to alter the same wetland because they have since "redesigned the septic system to meet state of Maine requirements." See May 29, 2013, Department Order, Project Description.

**FINDINGS AND CONCLUSIONS OBJECTED TO OR IN ERROR**

For the reasons outlined below, the Sea Spray Homeowners Group asks the Board to reverse the Department's approval and deny the Zagoren and Gilpatric permit application:

1. because the project impacts wetlands of special significance, the applicable rule considers practical alternatives to exist and deems the impacts unreasonable and therefore

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<sup>1</sup> The Sea Spray Homeowners Group is comprised of Russell LaPorte, Rosemary LaPorte, Bradley Googins, Robert LaPorte, Joseph Lyons, Lisa Lyons, Ed Sklanka and Sue Sklanka.  
{W3755406.3}

impermissible, and in fact there are practical alternatives that would avoid unreasonable impact to the protected natural resource;

2. the permit application should have been processed under NRPA Tier 3 permit review process;
3. the applicant has not avoided or minimized alterations to a wetland of special significance to the extent feasible and to the minimum amount necessary; and
4. the proposed permitted activity would unreasonably cause or increase flooding of the alteration area and adjacent properties.

In addition, the Department's approval appears to be based, at least in part, on the applicants' representation that they meet the State of Maine septic system design requirements, and this is in fact not the case.

#### **BASIS OF OBJECTIONS AND CHALLENGE**

1. **The Department's Rules Presume an Alternative Exists and, In Fact, There are Practical Alternatives that Would Avoid Unreasonable Impacts to the Wetland of Special Significance.**

The applicants' own site plan reveals several other practicable building options that could be used to either avoid or significantly minimize freshwater wetland impacts. Department rules provide that for an activity in a wetland of special significance, "a practical alternative less damaging to the environment is considered to exist and the impact is unreasonable" unless the activity falls within a specified type of project. (This project does not fall within that exemption.) DEP Reg. 310.5(A). Neither the applicant nor the Department addresses or considers this important permitting presumption. The application contains nothing more than a two-sentence statement regarding local building setbacks. There is no discussion concerning

size or orientation of the house within the depicted building envelope. See application materials dated April 24, 2013

The rules create a very rigorous standard for any work in a wetland of special significance. Because the project impacts wetlands of special significance, the applicable rule considers practical alternatives to exist and deems the impacts unreasonable and therefore impermissible.

**2. The Permit Application Should Have been Processed Under NRPA Tier 3 Permit Review Procedures.**

As noted in the application and the Department Order, the wetland to be impacted is a wetland of special significance because it is a wetland located within 250 feet of a coastal wetland. In fact, this wetland is located about 90 feet from a coastal wetland. Under NRPA requirements, projects seeking to fill wetlands of special significance are not typically processed under Tier I application procedures. 38 MRSA § 480-X(4) provides that an application for activities in wetlands of special significance are not eligible for Tier 1 or Tier 2 review unless the Department determines that the activity will not negatively affect the freshwater wetlands and other protected natural resources present.

This standard is not met because the activity *will* negatively affect the wetland and other natural resources. “In making this determination, the department is to consider a range of factors such as the size of the alteration, functions of the impacted area, existing development or character of the area in and around the alteration site, and elevation differences and hydrological connections to surface water or other protected natural resources, among other things.” DEP Reg. 310.4(B).

While the Department made such a determination based on a finding that the wetland impact resulted only in 2,736 square feet of freshwater wetland impacts, the evidence shows that

{W3755406 3}

the proposed fill activity in fact will have a significant adverse effect on the wetland, wetland functions and adjacent upland areas. As indicated in the attached letter from Robert Gerber, an expert in coastal flooding (see Exhibit 1) this wetland is not only a wetland of special significance because of its proximity to a coastal area, but also because of its proximity to flooding (100-year flood maps) and because of the maps that have just been made available to the public.

~~The Department did not have this information available when it issued its decision on this application under the Tier 3 process.~~ The freshwater wetland at 20 Sea Spray Drive serves a very important flood control function. Even a small fill in this freshwater wetland would significantly impact not only the wetland but adjacent properties. In addition, because of increased runoff from the house and surrounding impervious areas, there is potential for more frequent and more serious flooding.

Because the Department did not require a Tier 3 permit application in this case, no wetland delineation was provided. Nor did the applicant provide a wetland functional assessment. Both of these reports would have greatly assisted the Department in determining the extent of negative impact and ultimately whether applicable NRPA standards had been met.

**3. The Applicant Has Not Avoided or Minimized Wetlands Alteration to the Extent Feasible or to the Minimum Amount Necessary.**

NRPA requires that the applicant avoid and minimize wetland impacts prior to receiving authorization to fill a freshwater wetland area, particularly a wetland of special significance. Under 38 MRSA § 480-X(3)(A), wetland alteration “must be avoided to the extent feasible considering cost, existing technology and logistics based on the overall purpose of the project.” In addition, the area of freshwater wetland to be altered “must be limited to the minimum amount

necessary to complete the project.” Applying these two statutory requirements to the facts in this permit proceeding indicates a failure to avoid or minimize wetland impact.

The proposed building envelope and setbacks depicted in the application, and the house planned within that building envelope, show that there is no justification for any wetland impact on this site. A house could be built within the building envelope and outside of any freshwater wetland area. In fact, most of the wetland alteration proposed appears to be a bump out from the house footprint, for which there has been no explanation or discussion, and no attempt to justify the size or design of the house based on consideration of cost, technology, or logistics.

Further, there is no discussion of why a 25-foot filled area around the proposed house site is required. The filled area around the house on the wetland side could be reduced substantially to entirely avoid or minimize wetland fill. This standard must be viewed in the context of the wetland to be impacted -- which is a wetland of special significance -- and therefore avoidance and minimization efforts should be undertaken and documented with greater care and reviewed by the Department with increased scrutiny.

#### **4. The Permitted Activity Would Unreasonably Cause or Increase Flooding.**

The Natural Resources Protection Act requires that an application must also be reviewed to determine whether the activity will “unreasonably cause or increase the flooding of the alteration area or adjacent properties.” 38 MRSA § 480-D(6). With a fill activity in a wetland within 90 feet of the ocean high tide line, it is imperative that DEP conduct a thorough review of potential impacts associated with coastal flooding. The Order, however, does not address coastal flooding in any detail, even though the application notes the presence of a V zone immediately adjacent to the proposed building envelope.

~~\_\_\_\_\_~~  
~~\_\_\_\_\_~~  
~~\_\_\_\_\_~~

A permit structure with associated driveways and other impervious area located within this V zone will result in a measurable increase in flooding both within the alteration area and on adjacent properties. The fact that the building could be built to entirely avoid the freshwater wetland of special significance makes it evident that the proposal is unreasonable and that the flooding standard has not been met.

**AGGRIEVED STATUS**

The Sea Spray Homeowners Group (or "Appellants") are owners of lots adjacent to, or in close proximity to, the proposed wetland alteration site. The proposed activity will impact the ability of the wetland to naturally contain and control stormwater and coastal flood waters. The proposed wetland fill activity will also disturb or eliminate wildlife habitat. These impacts directly and substantially affect the Appellants' use and enjoyment of their properties, and they will therefore suffer particularized injury as a result of the DEP permit. Appellants are "aggrieved persons" as defined in the Board's rules, DEP Reg. 2.1.

**SUPPLEMENTAL EVIDENCE**

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(W3755406.3)

[REDACTED]  
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 received with [REDACTED] on 07/2012. The [REDACTED] [REDACTED] [REDACTED]  
 this [REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED]  
 [REDACTED].

For the foregoing [REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED]  
 [REDACTED]

I, [REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED]  
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 t [REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED]



Exhibit 1: Proposed Supplemental Evidence - Not Admitted to the Record

Exhibit 2: Proposed Supplemental Evidence – Not Admitted to the Record

APPLICANTS' RESPONSE TO APPEAL

STATE OF MAINE  
BOARD OF ENVIRONMENTAL PROTECTION

APPEAL IN THE MATTER OF:

<b>BETH ZAGOREN AND ROBERT</b>	)	
<b>GILPATRIC</b>	)	<b>RESPONSE BY BETH ZAGOREN</b>
Biddeford, York County	)	<b>AND ROBERT GILPATRIC TO</b>
HOUSE LOT DEVELOPMENT	)	<b>THE MERITS OF THE APPEAL</b>
L-24923-TA-B-N (approval)	)	

Applicants/Respondents<sup>1</sup> Beth Zagoren and Robert Gilpatric respond to the merits of the above-entitled appeal as follows:

**I. FACTS CONTAINED IN THE ADMINISTRATIVE RECORD**

Respondents own a vacant parcel of land located at 20 Sea Spray Drive in Biddeford, Maine (hereafter the "Property"). The Property is approximately .65 acres in size.

Under the City of Biddeford Land Use Ordinance, the Property is subject to a 100' setback from the edge of the coastal wetland, plus 25' setbacks from each side lot line and the right-of-way of Sea Spray Drive. As a result, the building envelope on the Property is severely constrained. Most of the building envelope is consumed by a freshwater, shrub-scrub wetland (hereafter the "Wetland"). Only a small area of upland on the southerly edge of the building envelope is capable of supporting a reasonably-sized house and a septic system.

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<sup>1</sup> In the interest of brevity, Ms. Zagoren and Mr. Gilpatric will be referenced in this memorandum simply as "Respondents" rather than as "Applicants/Respondents."

In 2010, Respondents applied to the DEP for a wetlands alteration permit and water quality certification under the Natural Resources Protection Act and DEP Rules Chapter 310 (hereafter the “2010 Application”). Respondents sought authorization to fill approximately 2,736 sq. ft. of the Wetland in order to build a 2,078 sq. ft. residence and septic system on the Property (hereafter the “Project”).

Wetlands alterations of up to 15,000 sq. ft. in area are eligible for review under Tier 1 procedures. 38 M.R.S.A. § 480-X(2)(A).<sup>2</sup> Because Respondents proposed to fill only 2,736 sq. ft. of the Wetland the Project easily qualified for Tier 1 review based on area alone. However, the Wetland is located within 250’ of a coastal wetland. Under 38 M.R.S.A. § 480-X(4)(A)(1), the Wetland is therefore classified as a “wetland of special significance.”

Ordinarily, an application to alter a wetland of special significance cannot be processed under Tier 1 procedures. 38 M.R.S.A. § 480-X(4)(A)(1); DEP Rules Chapter 310, § 4(A)(3). Notwithstanding that general prohibition, however, the DEP may allow Tier 1 review of proposed alterations to wetlands of special significance if “the department determines that the activity will not negatively affect the freshwater wetlands and other protected natural resources present.” 38 M.R.S.A. § 480-X(4).

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<sup>2</sup> In contrast, Tier 2 review applies to activities that alter between 15,000 sq. ft. and one acre of freshwater wetlands. Tier 3 applies to freshwater wetland alterations of one acre or more. 38 M.R.S.A. §§ 480-X(2)(A), (B).

Respondents requested the DEP to process the 2010 Application under Tier 1 procedures. Pursuant to 38 M.R.S.A. § 480-X(4), the DEP was allowed 45 days in which to evaluate Respondents' request:

The department shall inform the applicant in writing within the review period specified in subsection 6<sup>3</sup> or 7<sup>4</sup> if the proposed project does not qualify for Tier 1 or Tier 2 review processing and shall explain permitting options if the applicant wishes to pursue the project. ...Unless the applicant knowingly or willfully provided incomplete or false information to the department, if the department does not notify the applicant that the proposed project does not qualify for Tier 1 or Tier 2 review, the project is deemed to be qualified for Tier 1 or Tier 2 review, as applicable.

The DEP Project Manager concluded that the Project would not negatively affect the Wetland or any other protected natural resources on the Property. For that reason, she determined to grant the 2010 Application Tier 1 review.

In reaching that conclusion, the Project Manager had the benefit of a detailed site plan prepared by Albert Frick, a State-licensed site evaluator and soil scientist (hereafter the "Site Plan").<sup>5</sup> The Site Plan shows, among other things:

- the small building envelope on the Property,

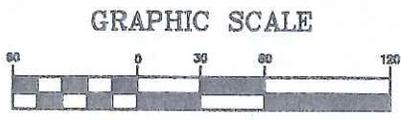
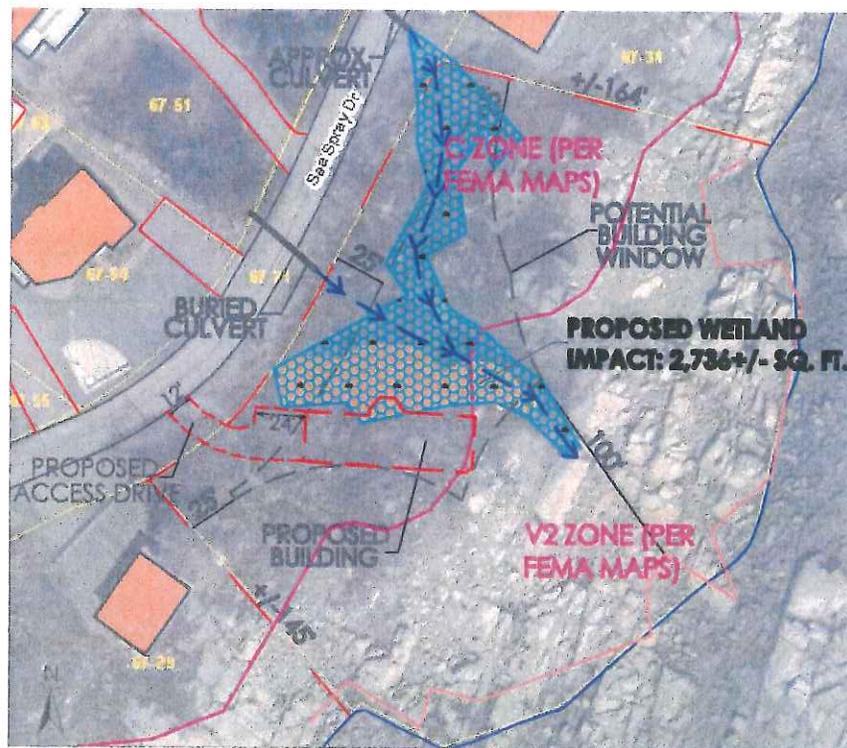
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<sup>3</sup> 38 M.R.S.A. § 480-X(4)(6) governs the process for applying for Tier I review. Under that subsection, no later than 45 days after receiving a complete application for Tier I review, the DEP must notify the applicant whether the proposed freshwater wetland alteration complies with applicable statutory and regulatory standards. If the DEP does not, within that 45-day period, notify the applicant whether the proposed wetlands alteration complies with the pertinent review standards, "a permit is deemed to be *granted*." 38 M.R.S.A. § 480-X(4)(6)(B) (emphasis added) Accordingly, the time in which the DEP must notify the applicant whether a proposed alteration of a wetland of special significance "will not negatively affect the freshwater wetlands and other protected natural resources present" is also limited to 45 days.

<sup>4</sup> Subsection 7 of 38 M.R.S.A. § 480-X(4) applies to applications for Tier II review. Because Respondents sought only Tier I review, subsection 7 is irrelevant to this appeal.

<sup>5</sup> A copy of the Site Plan, which is contained within the existing record, is attached to this memorandum as Exhibit 1.

- how the Wetland occupies most of that building envelope,
- the footprint of the proposed residence,
- the modest portion of the Wetland that Respondents needed to fill in order to complete the Project,
- two culverts beneath Sea Spray Drive that conduct into the Wetland surface water from parcels on the opposite side of that road;
- perhaps most importantly, that neither the Respondents' proposed residence nor the fill needed to grade around the front of it would materially disturb existing drainage channels through the Wetland:



THIS MAP IS A COMPOSITE OF CITY OF BIDDEFORD TAX MAP & AERIAL PHOTOGRAPHY, FEMA FLOOD ZONE MAPS AND ALBERT FRICK ASSOCIATES, INC. SUBMETER GPS.



The DEP Project Manager did not reach her conclusion in blind reliance on Respondents' application, however. Rather, on August 25, 2009, the Project Manager personally visited the Property to confer with the Respondents' technical advisors and to inspect the entire Property, including the Wetland and the proposed Project site.

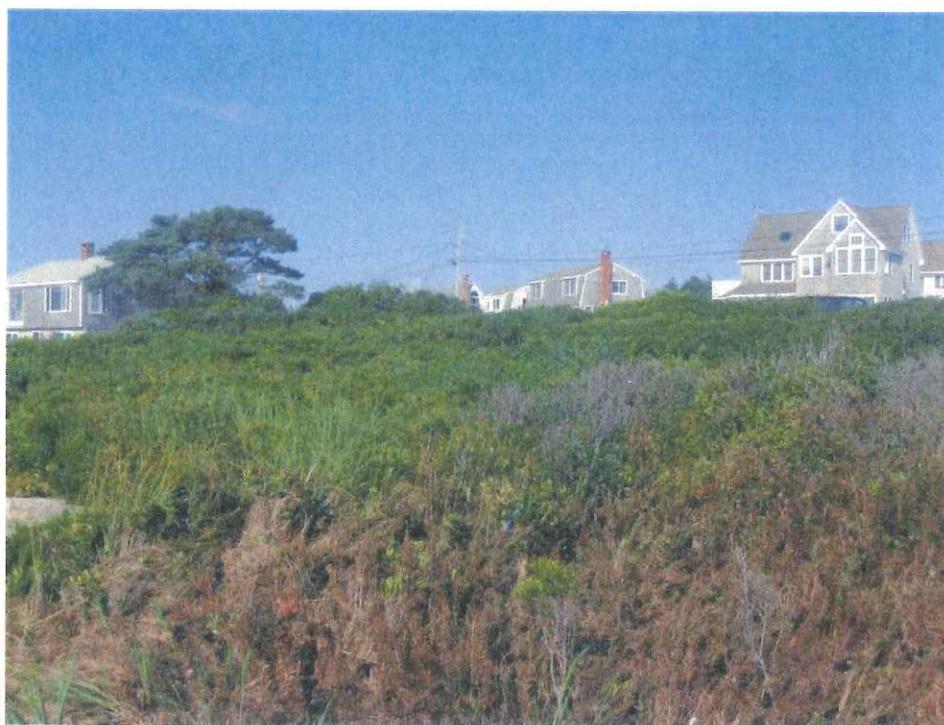
The administrative record contains several photographs the Project Manager took to document what she saw during that site visit. Among other things, those photographs vividly demonstrate how a diagram such as the Site Plan is incapable of portraying a parcel's actual appearance. Although the blue coloring on the Site Plan might create the impression that the Wetland consists of open water, the Project Manager's photographs show that the entire Property, including the Wetland, is covered by dense vegetation:



(A copy of this photograph is attached to this memorandum as Exhibit 2)



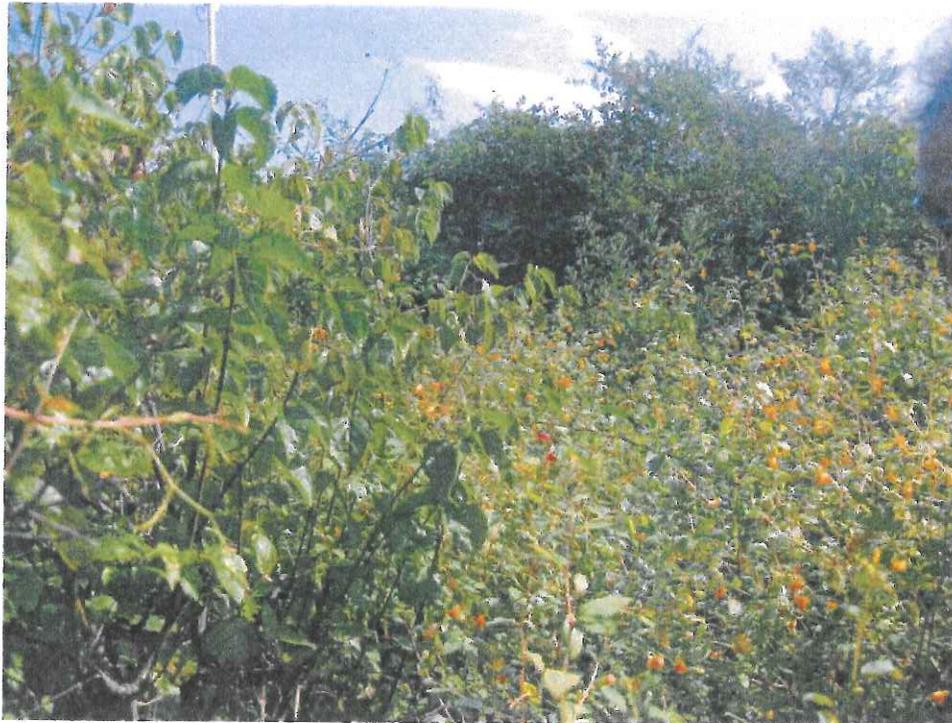
(A copy of this photograph is attached to this memorandum as Exhibit 3)



(A copy of this photograph is attached to this memorandum as Exhibit 4)



(A copy of this photograph is attached to this memorandum as Exhibit 5)



(A copy of this photograph is attached to this memorandum as Exhibit 6)



(A copy of this photograph is attached to this memorandum as Exhibit 7)

On May 13, 2010, the DEP Commissioner granted the Project NRPA Wetlands Alteration Permit and Water Quality Certification #L-24923-TA-A-N (hereafter the “2010 Approval”). In the 2010 Approval, the DEP expressly found that the Project qualified for Tier 1 review and that “applicants have sited the house in a location that avoids and minimizes impacts to the wetland to the greatest extent practicable while meeting local building setbacks.” No one appealed from, or even objected to, the 2010 Approval.

Standard Condition E attached to the 2010 Approval provided as follows:

**Initiation of Activity Within Two Years.** If construction or operation of the activity is not begun within two 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.

Respondents were unable to commence construction of the Project within two years after the 2010 Approval because they could not, during that time, obtain from the Local Plumbing Inspector a permit for a suitable septic system. The 2010 Approval therefore lapsed; and as a result, Respondents were required to apply for and obtain a new NRPA approval for the Project.

On April 29, 2013, Respondents filed with the DEP an application for re-approval of the Project (hereafter the "2013 Application"). Mr. Frick updated his Site Plan to show a septic system that would meet the requirements of the State Subsurface Wastewater Disposal Rules. The same Project Manager who had reviewed the 2010 Application was assigned to the 2013 Application. Because she had already determined in 2010 that the Project was eligible for Tier 1 review, the Project Manager processed Respondents' 2013 Application under Tier 1 procedures as well.

On April 23, 2013, Appellant Russell LaPorte's then-attorney, Jeffrey Zdunczyk, Esq., had copied the Project Manager on a letter to the Biddeford Code Enforcement Officer requesting notification if the City received notice that Respondents had filed an application for re-approval of the Project. On May 7, 2013, the Project Manager sent Attorney Zdunczyk an e-mail notifying him that she had received the 2013 Application. Attorney Zdunczyk replied that Mr. LaPorte wished to review the DEP's file concerning the 2013 Application. Three days later, Mr. LaPorte in fact reviewed that file. Thereafter, however, neither Mr. LaPorte nor any of the other Appellants commented upon, objected to, or

submitted any evidence concerning, the 2013 Application as was permitted by DEP Rules Chapter 2, § 16. Neither did Appellants avail themselves of the opportunity to review the DEP's draft decision on the 2013 Application as allowed by DEP Rules Chapter 2, § 18(A).

On May 19, 2013 -- nearly three weeks after Mr. LaPorte had reviewed the DEP's file -- the DEP Commissioner issued a re-approval of the Project under Order #L-24923-TA-B-N (hereafter the "2013 Approval").

Appellants timely appealed the 2013 Approval to the BEP. Included in their appeal was a request for permission to introduce supplementary evidence into the administrative record. By letter dated September 5, 2013 the BEP's Presiding Officer, Susan M. Lessard, denied Appellants' request to supplement the record.

## **II. THE BEP SHOULD DENY APPELLANTS' APPEAL**

### **A. The DEP Reasonably Exercised its Discretion in Determining that Respondents' 2013 Application Qualified for Tier I Review.**

#### **1. By statute, Respondents' 2013 Application is conclusively deemed qualified for Tier I review.**

Under 38 M.R.S.A. § 480-X(4),

Unless the applicant knowingly or willfully provided incomplete or false information to the department, if the department does not notify the applicant that the proposed project does not qualify for Tier 1 or Tier 2 review, the project is deemed to be qualified for Tier 1 or Tier 2 review, as applicable.

38 M.R.S.A. § 480-X(4) does not expressly indicate whether its provisions apply to the BEP as well as the DEP. However, given the fact that, under the statute, an applicant can lose his or her entitlement to Tier 1 review only in the extreme

circumstance where he or she knowingly or willfully submitted false or incomplete information to the DEP, it would be illogical to suppose that the drafters of that provision intended to grant the BEP authority to overturn the DEP's decision on eligibility for Tier 1 review absent the same showing of culpability by the applicant.

Appellants have not alleged, and could not truthfully aver, that Respondents "knowingly or willfully provided incomplete or false information to the department" during its review of the 2013 Application. The DEP never told Respondents that the Project failed to qualify for Tier I review; indeed, it informed them to the contrary. Under the above-cited language of 38 M.R.S.A. § 480-X(4), the BEP lacks authority to negate the statutory guarantee that Respondents' 2013 Application must be deemed eligible for Tier 1 review.

**2. Evidence in the administrative record supports the DEP's decision to grant Respondents' 2013 Application Tier 1 review.**

Even if, notwithstanding 38 M.R.S.A. § 480-X(4), the BEP had discretion to reconsider whether the 2013 Application qualified for Tier 1 review, the record confirms that the DEP's determination in this case was correct.

In deciding whether a proposed project will negatively affect a freshwater wetland of special significance,

the department considers such factors as the size of the alteration, functions of the impacted area, existing development or character of the area in and around the alteration site, elevation differences and hydrological connection to surface water or other protected natural resources, among other things.

DEP Rules Chapter 310, § 4(B).

Both the 2010 and 2013 Applications sought DEP approval to alter the Wetland, to exactly the same extent, in order to complete exactly the same Project. Appellants have not challenged the Project Manager's technical qualifications to determine whether the proposed fill would negatively affect the Wetland. Neither have they claimed that the Project Manager was neglectful in her investigation of the Property or that the record contains no evidence supporting her determination. All they claim is that the Project Manager should have had the opportunity to consider a letter from Engineer Robert Gerber dated June 27, 2013 before deciding whether the Project qualified for Tier 1 review. **(Appeal at pages 3-4)** However, because the BEP's Presiding Officer has expressly excluded Mr. Gerber's letter from the administrative record, Appellants' argument is moot.

Although on this appeal the BEP is not bound by the DEP's findings of fact or conclusions of law, any modification of those findings and conclusions must be based on the existing administrative record. 38 M.R.S.A. § 341-D(4)(A). Respondents respectfully submit that the record provides no rational basis for the BEP to overturn the Project Manager's determination that the Project would not negatively affect the Wetland or any other protected natural resource on the Property.

Accordingly, based on the administrative record, the BEP should affirm the DEP's decision to grant the 2013 Application Tier 1 review.

## B. Respondents Have Complied With the NRPA Minimization and Avoidance Standards

A Tier 1 wetlands alteration project must satisfy the following standards:

1. Alteration of freshwater wetland areas on the property must be avoided to the extent feasible considering cost, existing technology and logistics based on the overall purpose of the project.
2. The area of the freshwater wetland to be altered must be limited to the minimum amount necessary to complete the project.<sup>6</sup>

38 M.R.S.A § 480-X(3)(A). Respondents submitted with their Application the information required for a Tier 1 project. With regard to the issues of avoidance and mitigation of wetland impacts, the DEP's mandatory "Application for a Natural Resources Protection Act Permit" requires an applicant for Tier 1 review to submit only a "Statement of Avoidance and Minimization."<sup>7</sup>

Respondents' 2013 Application, which was signed by the Respondents' agent, contained a separate page entitled, "Statement of Avoidance and Minimization." It recited as follows:

Applicant proposes to construct a 2,078 square foot single-family dwelling on an existing lot of record at 20 Sea Spray Drive in Biddeford, Maine (Map 67, Lot 30). The property at 20 Sea Spray Drive is .65 ± acres in size, and consists primarily of exposed bedrock outcroppings, freshwater shrub scrub wetlands and is bordered to the east by the Atlantic Ocean. In order to comply with local building setbacks (including a 100' setback to the Atlantic Ocean), the proposed dwelling must be sited in such a way that 2,736 ± sq. ft. of freshwater, shrub scrub wetlands will be impacted. Due to

---

<sup>6</sup> Under 38 M.R.S.A § 480-X(3)(A)(C), an applicant for Tier 1 review must also comply with erosion control and water quality standards. However, Appellants do not contend that the Project would violate those regulations.

<sup>7</sup> According to that same application form, only if the applicant is applying for a Tier II or higher review must the applicant submit an "Alternatives Analysis ... including descriptions of how wetland impacts were Avoided/Minimized."

the small size of the parcel, proximity to the Atlantic Ocean and the presence of freshwater shrub scrub wetlands, the proposed dwelling and attendant fill envelope have been sited as to minimize wetland impacts and not adversely affect drainage runs which exist on the property.

On an earlier page in the 2013 Application entitled "Narrative Project Description," Mr. Frick explained that the "25' fill envelope around the perimeter of the proposed dwelling is proposed in order to assure proper grading."

Appellants contend that the Respondents could have further avoided or minimized impacts on the Wetland. (**Appeal at page 5**) However, as was recounted in Section I of this memorandum, at no time during the DEP's review of the 2013 Application did Appellants raise any objections to the Project. Because Mr. LaPorte reviewed the Project Manager's file 19 days before the DEP issued the 2013 Approval, the Appellants cannot reasonably complain that they had insufficient time to file comments or submit rebuttal evidence. Such a complaint would ring particularly hollow in this case because, having declined to engage a qualified expert in a timely fashion, Appellants' objections are based solely on their opinions as laypersons. It would have cost Appellants nothing but a few minutes of their time to explain to the Project Manager why, in their view, the Respondents could feasibly have avoided and minimized wetland impacts more than they did. The first time Appellants raised *any* arguments against the 2013 Application was when, after the DEP had already issued the 2013 Approval, they hired a new attorney and filed this appeal on June 28, 2013.

5/22

Moreover, in their Appeal, the only information on which Appellants rely in making their argument is Respondents' Site Plan. As discussed above, however, the Site Plan was not the only evidence the Project Manager reviewed in determining whether Respondents satisfied the avoidance and minimization requirements; she also relied on the information she acquired during her site visit. In Section I of this memorandum, Respondents presented photographs showing the conditions on the Property (for example, its slope and thick vegetation) that are cannot be seen on the Site Plan. Therefore, it would be unreasonable for the BEP to decide, based on the Site Plan alone, either that (a) it would be feasible for Respondents to avoid the Wetland further "considering cost, existing technology and logistics based on the overall purpose of the project," or (b) Respondents have not limited the proposed fill to the "minimum amount necessary to complete the project."

Finally, Appellants complain that "there is no discussion of why a 25-foot filled area around the proposed house site is required." Because the 2013 Application *did* explain that the 25' fill envelope was necessary for proper grading around the proposed residence, Appellants presumably must be criticizing the text of the DEP's 2013 Approval rather than the 2013 Application. However, it would be unusual for the DEP to draft a lengthy order on a Project of such modest scope -- especially when it had already approved the same Project three years earlier. In 2010, the Project Manager had already investigated and evaluated Respondents'

assertion that the fill was necessary for proper grading around the proposed residence.

Thus, when Appellants' lay opinions are weighed against those of (a) a licensed soils scientist and site evaluator and (b) a highly qualified DEP Project Manager who has reviewed many similar applications, the record provides no reasonable basis on which the BEP could overturn the DEP's conclusion that Respondents have met the NRPA minimization and avoidance standards.

**C. Appellants' Contention that Respondents Failed to Comply with DEP Rules Chapter 310, § 5(A) is Irrelevant**

Appellants assert that, under DEP Rules Chapter 310, § 5(A), because the Wetland is one of special significance, "a practical alternative less damaging to the environment is considered to exist and the impact is unreasonable." (**Appeal at page 2**) However, neither § 5(A) nor any other provision of § 5 applies to applications that are subject to Tier I review. Consequently, Appellants' argument is irrelevant to this appeal.

Section 5 of the Wetland Rules begins with the introduction, "The following standards apply to all projects *as described in Section 2.*" (emphasis added) Section 2(A) provides as follows:

This rule applies to the alteration of a coastal wetland, great pond, freshwater wetland, river, stream, or brook, as defined in 38 M.R.S.A. Sec. 480-B of the Natural Resources Protection Act (NRPA), *that requires an individual permit or is eligible for Tier 2 or Tier 3 review.* In addition, *Sections 3 and 4* apply to the alteration of a freshwater wetland eligible for *Tier 1* review.

(emphasis added). Thus, the only portions of Chapter 310 that apply to freshwater wetland alterations that are eligible for *Tier I review* are §§ 3 and 4. Section 3 merely contains definitions of terms used in Chapter 310. Section 4 establishes regulations pertaining to wetlands of special significance. However, subsection B of DEP Rules Chapter 310, §4 incorporates the statutory grant of discretion set forth in 38 M.R.S.A. § 480-X(4):

Alterations of wetlands of special significance usually require an individual permit. However, some alterations of freshwater wetlands of special significance may be eligible for Tier 1 or 2 review if the department determines, at the applicant's request, that the activity will not negatively affect the freshwater wetlands or other protected natural resources present.

DEP Rules Chapter 310, §4(B). Where, as here, the DEP determines that a proposed alteration of a wetland of special significance “will not negatively affect the freshwater wetlands or other protected natural resources present” and therefore qualifies for Tier I review, Section 5(A) is inapplicable.

In this respect, the Wetland Rules merely track 38 M.R.S.A § 480-X.

According to 38 M.R.S.A § 480-X(2),

The standards of section 480-D do not apply to projects that qualify for Tier 1 review, except that habitat standards under section 480-D, subsection 3 and water quality standards under section 480-D, subsection 5 apply to those projects.

Appellants do not argue that the Project would violate the habitat standards of 38 M.R.S.A. §480-D(3) or the water quality standards contained in 38 M.R.S.A. §480-D(5).

Indeed, 38 M.R.S.A § 480-X(2) goes on to create a presumption that is exactly the opposite of the one Appellants advocate:

Projects that meet the eligibility requirements for Tier 1 review, and that satisfy the permitting requirements set forth in subsection 3 and 6<sup>8</sup>, as applicable, are presumed *not* to have significant environmental impact.

(emphasis added).

Because DEP Rule Chapter 310, § 5(A) does not apply to the Project, Appellants' contention that Respondents have not complied with that rule is irrelevant.

**D. Appellants' Assertion that the Project Will Increase the Risk of Flooding Is Irrelevant**

The NRPA standards concerning flood risks are contained in subsection 6 of 38 M.R.S.A. §480-D. However, as discussed above, because Respondents' 2013 Application qualified for Tier I review, the only portions of 38 M.R.S.A. §480-D that are applicable to the Project are subsections 3 (no unreasonable harm to significant wildlife habitat) and 5 (no violation of water quality laws). 38 M.R.S.A. §480-X(2). The DEP had no jurisdiction to apply the standards of 38 M.R.S.A. §480-D(6) to Respondents' application. Therefore, Appellants' contention that the Project will contribute to the risk of flooding in the area is irrelevant.<sup>9</sup>

<sup>8</sup> 38 M.R.S.A. § 480-X(6) establishes the submission requirements for Tier 1 review, the deadline by which the DEP must reach a decision on the application, and the application fee.

<sup>9</sup> Even if 38 M.R.S.A. §480-D(6) were applicable to the Project, the only evidence on which Appellants relied in support of their argument about flood risks was ordered excluded from the record.

**E. Appellant's Argument that Respondents' Septic System Design Does Not Comply with the State Subsurface Wastewater Disposal Rules is Irrelevant**

Under NRPA, the DEP does not regulate septic systems. 38 M.R.S.A.

§ 480-Q(15-A) provides as follows:

A permit is not required for the following activities if the activity takes place solely in the area specified below:...

**15-A. Subsurface wastewater disposal systems.** Installation, removal or repair of a subsurface wastewater disposal system, as long as the system complies with all requirements of the subsurface wastewater disposal rules adopted by the Department of Health and Human Services under Title 22, section 42, subsection 3. This subsection takes effect on March 1, 1995.

The only State agency having jurisdiction to review whether a septic system design complies with the State Subsurface Wastewater Disposal Rules is the Maine Department of Human Services, Division of Health Engineering. Respondents accurately reported in the 2013 Application that the DEH had approved Respondents' proposed septic system. Because neither the DEP nor the BEP has jurisdiction to review the sufficiency of Respondents' septic system design, Appellants' arguments on that subject are irrelevant.<sup>10</sup>

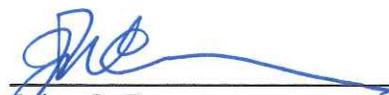
**CONCLUSION**

For all the foregoing reasons, Applicants/Respondents Beth Zagoren and Robert Gilpatric respectfully request that the BEP deny Appellants' Appeal and affirm the 2013 Approval.

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<sup>10</sup> The BEP's Presiding Officer reached the same legal conclusion in her letter of September 5, 2013 denying Appellants' request to submit supplemental evidence in the record.

Date: September 25, 2013.



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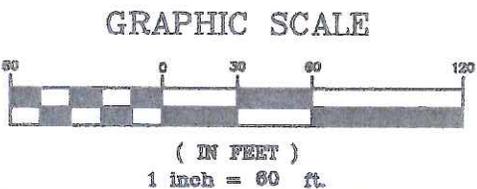
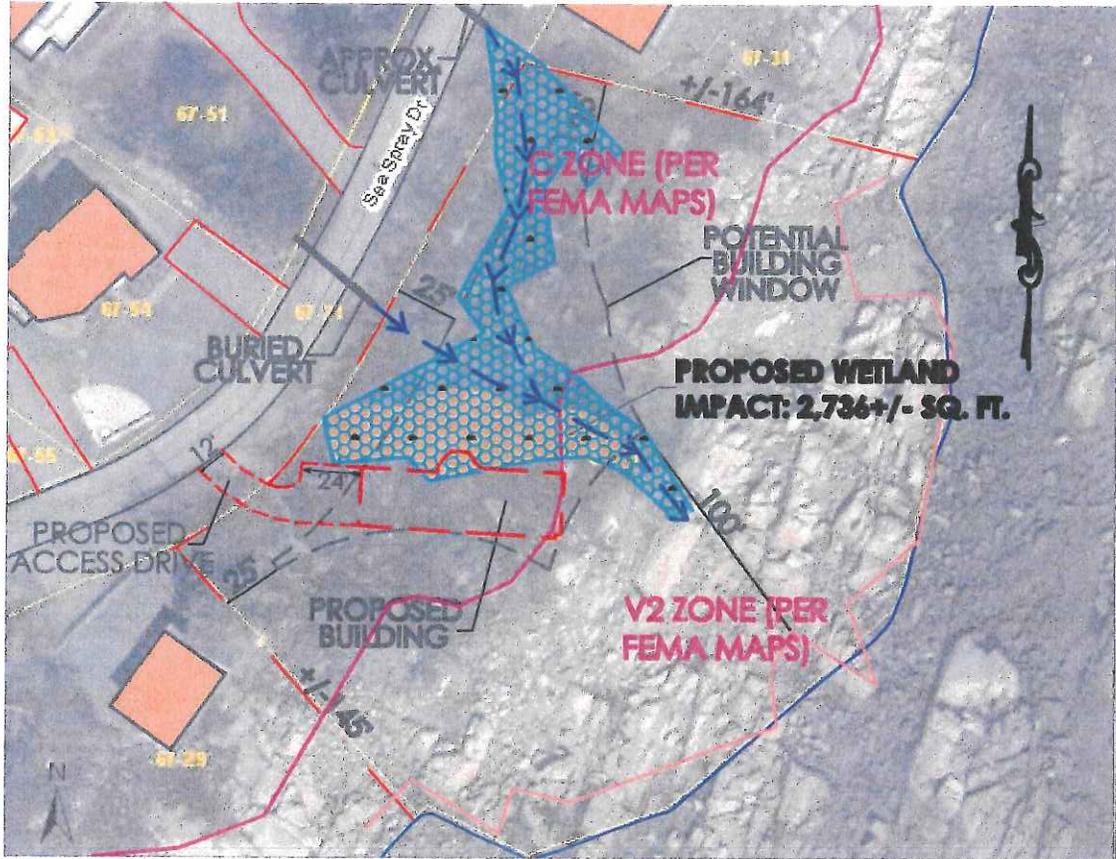
John C. Bannon  
Maine Bar No. 2312  
Attorney for Applicants/Respondents  
Beth Zagoren and Robert Gilpatric

MURRAY, PLUMB & MURRAY  
75 Pearl St., P.O. Box 9785  
Portland, ME 04104-5085  
(207) 773-5651

# EXHIBIT 1

SITE PLAN INCLUDED WITH 2010 APPLICATION

*Document is contained in existing DEP record*



THIS MAP IS A COMPOSITE OF CITY OF BIDDEFORD TAX MAP & AERIAL PHOTOGRAPHY, FEMA FLOOD ZONE MAPS AND ALBERT FRICK ASSOCIATES, INC. SUBMETER GPS.

- LEGEND:**
-  EDGE OF SPRING HIGH TIDE WETLAND AREA
  -  SURFACE DRAINAGE
  -  PROPOSED IMPACT
  -  FLOOD ZONE OVERLAY V-ZONE (100 YEAR) TO BE FIELD VERIFIED BY LAND SURVEYOR PRIOR TO CONSTRUCTION AND FEMA INSURANCE PERMIT

**EXHIBIT 2**

Photograph of Property Taken by DEP Project Manager Lisa Vickers on  
August 25, 2009

*Document is contained in existing DEP record, identified as "Robert Anuszewski  
001.jpg"*



**EXHIBIT 3**

Photograph of Property Taken by DEP Project Manager Lisa Vickers on  
August 25, 2009

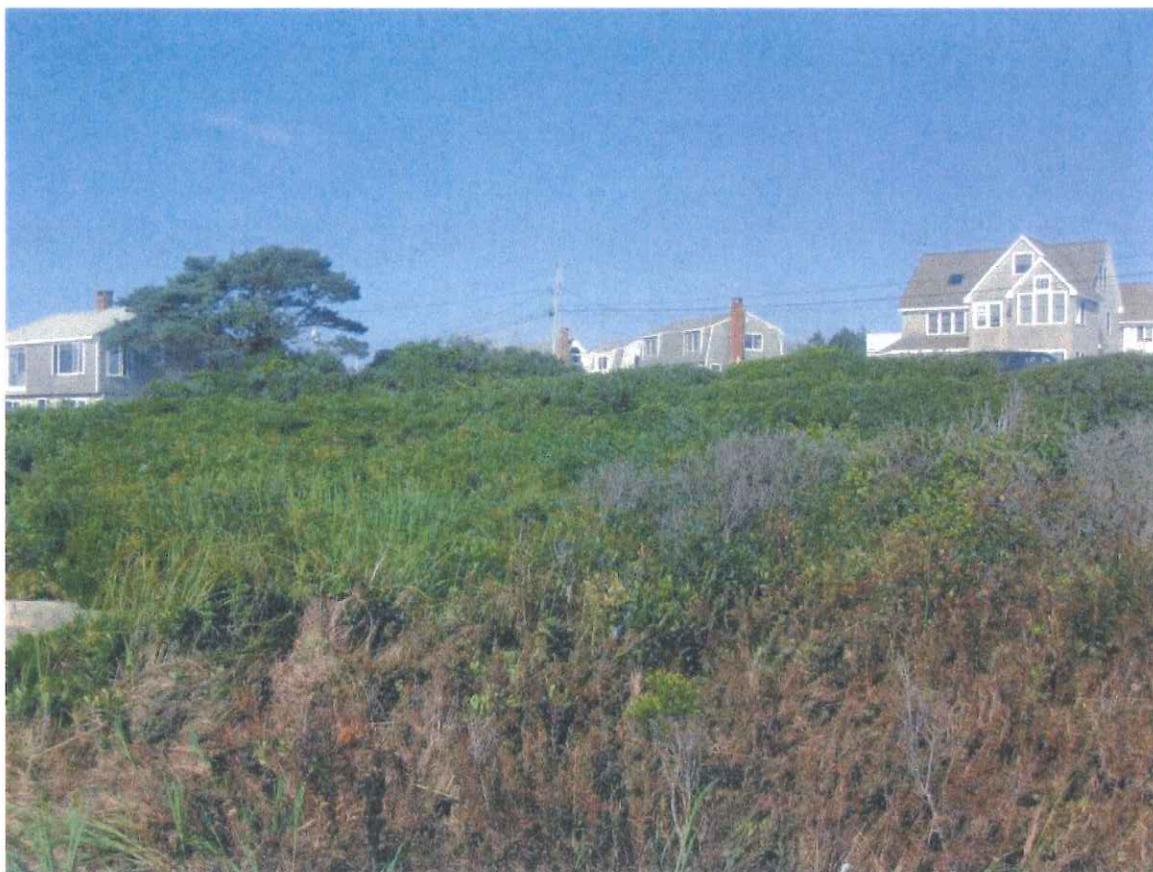
*Document is contained in existing DEP record, identified as "Robert Anuszewski  
002.jpg"*



**EXHIBIT 4**

Photograph of Property Taken by DEP Project Manager Lisa Vickers on  
August 25, 2009

*Document is contained in existing DEP record, identified as "Robert Anuszewski  
004.jpg"*



**EXHIBIT 5**

Photograph of Property Taken by DEP Project Manager Lisa Vickers on  
August 25, 2009

*Document is contained in existing DEP record, identified as "Robert Anuszewski  
005.jpg"*



**EXHIBIT 6**

Photograph of Property Taken by DEP Project Manager Lisa Vickers on  
August 25, 2009

*Document is contained in existing DEP record, identified as "Robert Anuszewski  
006.jpg"*



**EXHIBIT 7**

Photograph of Property Taken by DEP Project Manager Lisa Vickers on  
August 25, 2009

*Document is contained in existing DEP record, identified as "Robert Anuszewski  
007.jpg"*



**ADDITIONAL RELEVANT MATERIAL  
FROM THE DEPARTMENT RECORD**

576

**Vickers, Lisa**

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**From:** Albert Frick <albert@albertfrick.com>  
**Sent:** Tuesday, May 21, 2013 7:35 AM  
**To:** Vickers, Lisa  
**Cc:** Robert Anuszewski  
**Subject:** RE: Zagoren/Gilpatric. Sea Spray Drive, Biddeford  
**Attachments:** Biddeford, Zargoran Sea Spray Drive DHE Comments.pdf

Dear Lisa:

The Applicant was unable to obtain a building permit because the status of the proposed septic system (i.e. BUSSE) was a work in progress at the time and had not received final state approval.

The BUSSE system is a very innovative, state of the art septic system that successfully treats wastewater to 'rainwater quality'. This technology has been successfully treating hundreds of residential and commercial wastewater since 1999 throughout the World but had not been utilized in the USA.

We got the very first system in the USA permitted in Harpswell, Maine and have since gone on to add many more BUSSE units in Maine. We have been monitoring these systems and the DEH staff has since seen in the unit performance to find them quiet, odorless, clean, and clear (0 fecal coliform. The technology was featured on THIS OLD HOUSE in February and March and you can link to the episode through our web site, if you are interested and so inclined;

[www.Bussemaine.com](http://www.Bussemaine.com)

We now have a feasible on-site septic system for the Zagoren proposal at this time. (The septic permit was the missing element to allow construction to begin the last time around on the permitting.)

Yes we are intending to proceed with the septic system application once the DEP NRPA TIER 1 Permit Application has been determined.

Please contact me if you have any questions or matters for additional discussion.

Respectfully;

**Albert Frick**

Certified Soil Scientist #66  
Licensed Site Evaluator #163

**Albert Frick Associates, Inc**  
**Environmental Consultants**  
95A County Road  
Gorham, ME 04038  
(207) 839-5563  
f (207) 839-5564  
[www.albertfrick.com](http://www.albertfrick.com)

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Note: PDF files, if attached, will be slightly off-scale when printed. However, by requesting a mailed paper copy can assure perfectly scaled plans, if that is important.

**From:** Vickers, Lisa [mailto:Lisa.Vickers@maine.gov]  
**Sent:** Monday, May 20, 2013 2:59 PM

**To:** 'Albert Frick'  
**Subject:** RE: Zagoren/Gilpatric. Sea Spray Drive, Biddeford

Al,  
I was reviewing the Department's standard conditions for the NRPA. When a permit has been issued and the approval has lapsed, it states that the applicant should state why they will be able to begin the activity within two years, if approval is granted. Can you please provide this statement? Also, Roby Fecteau from the City said he has not received a septic application... I know this is exempt but I believe that is what held up the construction the last time. Are you planning on submitting plans to the town soon?

Thanks,  
Lisa

Environmental Specialist  
Division of Land Resource Regulation  
Department of Environmental Protection  
312 Canco Road  
Portland, ME 04103  
(207) 615 - 3236  
[lisa.vickers@maine.gov](mailto:lisa.vickers@maine.gov)

**From:** Albert Frick [<mailto:albert@albertfrick.com>]  
**Sent:** Monday, May 13, 2013 11:28 AM  
**To:** Vickers, Lisa  
**Cc:** Robert Anuszewski  
**Subject:** RE: Zagoren/Gilpatric. Sea Spray Drive, Biddeford

Dear Lisa:

I was out of town when you sent me the note that the City of Biddeford needs a copy. That is going off in today's mail. Also a copy is being sent to US Army Corp as directed.

Thanks

Respectfully;

**Albert Frick**

Certified Soil Scientist #66  
Licensed Site Evaluator #163

**Albert Frick Associates, Inc**  
**Environmental Consultants**  
95A County Road  
Gorham, ME 04038  
(207) 839-5563  
f (207) 839-5564  
[www.albertfrick.com](http://www.albertfrick.com)

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Note: PDF files, if attached, will be slightly off-scale when printed. However, by requesting a mailed paper copy can assure perfectly scaled plans, if that is important.

**From:** Vickers, Lisa [<mailto:Lisa.Vickers@maine.gov>]  
**Sent:** Friday, May 10, 2013 11:41 AM

578

**To:** 'Albert Frick' ([albert@albertfrick.com](mailto:albert@albertfrick.com))

**Subject:** Zagoren/Gilpatric

Al,

The Town doesn't have a copy of the Tier application for Zagoren and Gilpatric. Even though a Tier 1 doesn't require public notice, if you refer to the attachment checklist for Tier permit applications, a copy of the application and all attachments should be sent to the municipality. Please be sure to submit a copy as soon as possible/

Lisa

Environmental Specialist  
Division of Land Resource Regulation  
Department of Environmental Protection  
312 Canco Road  
Portland, ME 04103  
(207) 615 - 3236  
[lisa.vickers@maine.gov](mailto:lisa.vickers@maine.gov)

**Albert Frick**

---

**From:** Braley, David <David.Braley@maine.gov>  
**Sent:** Tuesday, April 30, 2013 10:19 AM  
**To:** Albert Frick  
**Subject:** BUSSE PROJECTS  
**Attachments:** BusseProprietaryDisposalArea.pdf

Dear Al:

Thanks for forwarding us the proposal you've drafted for a BUSSE system to serve the Zagoren property on Sea Spray Drive in Biddeford. We have reviewed the design and concluded it does not require any State approvals or variances. Please see the attached letter from Jim Jacobsen dated March 9, 2012 which grants Department approval for the design you've submitted. Your design appears to meet all of the criteria of Jim's product approval. The design is ready for local review.

We also reviewed your draft application for the DeTuede project in Lamoine. The property owners wish to develop a one acre parcel with a new structure. You listed two potential options for waste disposal:

- 1) Continuing to utilize the existing stone bed disposal area to serve the two existing structures on the main lot and adding the discharge from a BUSSE system to serve a new structure on a to-be-developed parcel to the existing disposal area, or
- 2) Installing a larger BUSSE system to treat all of the wastewater generated by all three structures.

Option one doesn't work without an expansion because the existing disposal area is properly designed for 5 bedrooms as currently configured, the main structure (3 bedrooms) and a second detached structure (which requires a minimum design flow for 2 bedrooms) for a total design flow of five bedrooms, so it's maxed-out. You could design an expansion of the existing disposal area to handle the discharge generated by the new structure with a sizing decrease as permitted for BUSSE systems, but the existing disposal area by design and the code has no additional capacity. The expansion does not have to be more stone bed, you could use the same chamber system used in prior BUSSE designs, like the one above in Biddeford.

Option two, treating the effluent from all three structures, appears to meet the requirements of the Rules as the existing disposal area should have excess capacity given the strength of effluent it would receive.

Unless your final design requires a State variance, no State approvals appear to be required for either an expansion to handle the new structure or treating all of the wastewater with a BUSSE system prior to discharging to the existing stone bed.

Please let me know if you have any questions or concerns. We're always happy to discuss proposals and available options.

Thanks/ David

**Vickers, Lisa**

---

**From:** Richardson, Marybeth  
**Sent:** Monday, August 17, 2009 8:20 AM  
**To:** 'Albert Frick'  
**Cc:** Vickers, Lisa  
**Subject:** RE: Robert Anuszewski, 20 Salt Spray Drive, Biddeford

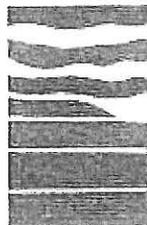
Hi Albert:

Sorry for the delay in responding - I've been away. Lisa Vickers of this office will be contacting you to arrange a meeting.

**Marybeth Richardson**  
 Maine DEP  
 Bureau of Land and Water Quality  
 312 Canco Rd.  
 Portland, ME 04103  
 Ph 822.6335 Fax 822.6303  
 email: [marybeth.richardson@maine.gov](mailto:marybeth.richardson@maine.gov)

---

**From:** Albert Frick [<mailto:afa@maine.rr.com>]  
**Sent:** Thursday, August 06, 2009 2:09 PM  
**To:** Richardson, Marybeth  
**Cc:** Robert Anuszewski  
**Subject:** Robert Anuszewski, 20 Salt Spray Drive, Biddeford



**Albert Frick Associates**  
 Soil Scientists & Site Evaluators  
 95A County Road Gorham, ME 04038  
 (207) 839-5563 FAX (207) 839-5564

Albert Frick, SS, SE  
 James Logan, SS, SE  
 Matthew Logan, SE  
 Brady Frick, SE  
 Eryan Jordan, SE  
 William O'Connor, SE  
 Noel Dunn, Office Manager

Dear MaryBeth:

I understand that you have temporarily taken over Linda Kokomueller's responsibility in the Land Bureau for assigning Project Managers.

I am trying to get a pre-application meeting with a Project Manager for a DEP NRPA permit Soil Adjacency Permit and/or a minor wetland fill (i.e. less than 4,300 sq.ft.) in a Shoreland Zone area to be considered eligible for a Tier 1 or 2 application for Robert Anuszewski, 20 Salt Spray Drive, Biddeford.

Would you please let me know who I should contact to set-up a pre-application meeting.

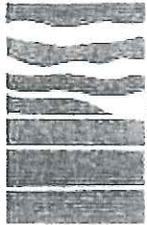
Respectfully;

**Albert Frick**  
 Albert Frick Associates  
 95A County Road  
 Gorham, ME 04038  
 phone: 839-5563

**Vickers, Lisa**

---

**From:** Albert Frick <afa@maine.rr.com>  
**Sent:** Tuesday, August 18, 2009 10:31 AM  
**To:** Vickers, Lisa  
**Cc:** Robert Anuszewski  
**Subject:** RE: Robert Anuszewski, 20 Seat Spray Drive, Biddeford  
**Attachments:** biddefordanuszewskiseaspraylane-8x11.pdf



**Albert Frick Associates**

Soil Scientists & Site Evaluators  
95A County Road Gorham, ME 04038  
(207) 839-5563 FAX (207) 839-5564

Albert Frick, SS, SE  
James Logan, SS, SE  
Matthew Logan, SE  
Brady Frick, SE  
Eryan Jordan, SE  
William O'Connor, SE  
Noel Dunn, Office Manager

Dear Lisa:

This confirms our meeting on Tuesday, August 25 at 9:00A.M. on --site at 20 Sea Spray Drive.

A link to the MAP Quest Driving Directions to the site is attached. Left off Pool Road Route 9 onto Granite Point Road. Left onto Sea Spray Drive, Property is undeveloped lot on Right. <http://www.mapquest.com/mq/2-Prbe>

Also attached is draft preliminary Site Plan.

I look forward to meeting with you to discuss this pre-application.

Respectfully;

**Albert Frick**

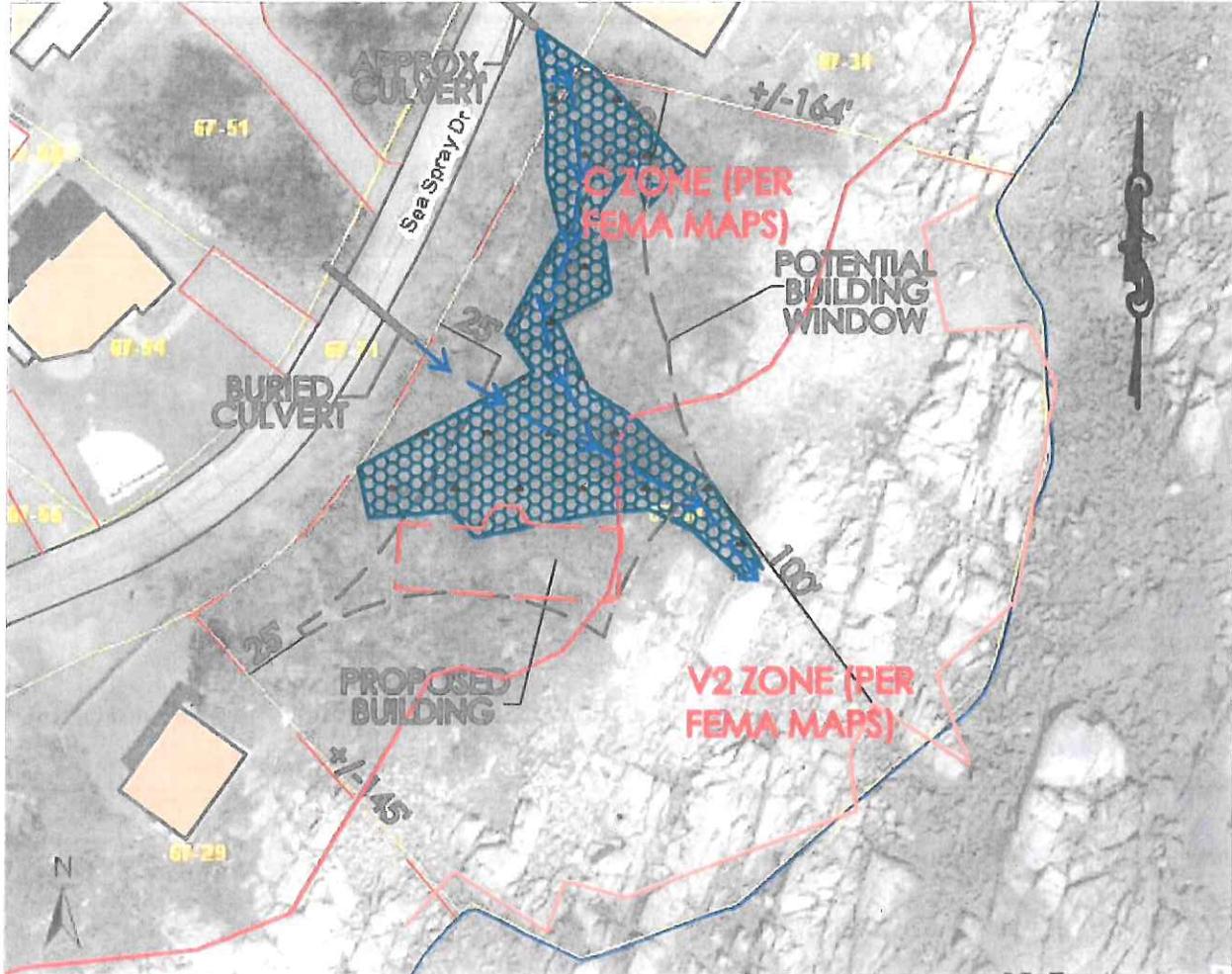
Albert Frick Associates  
95A County Road  
Gorham, ME 04038  
phone: 839-5563  
fax: 839-5564  
[www.albertfrick.com](http://www.albertfrick.com)  
[afa@maine.rr.com](mailto:afa@maine.rr.com)

**From:** Vickers, Lisa [<mailto:Lisa.Vickers@maine.gov>]  
**Sent:** Tuesday, August 18, 2009 9:48 AM  
**To:** [afa@maine.rr.com](mailto:afa@maine.rr.com)  
**Subject:** Robert Anuszewski, 20 Salt Spray Drive, Biddeford

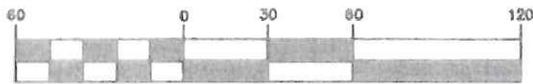
Hi Al,

I'm writing in regards to a pre-application meeting for Robert Anuszewski. I have availability next Tuesday and Wednesday (25<sup>th</sup> and 26<sup>th</sup>). If that doesn't work for your schedule, I have availability August 31<sup>st</sup>, September 2<sup>nd</sup> or September 3<sup>rd</sup>. All of those days are wide open, time wise. Let me know what works for you.

Thanks,



GRAPHIC SCALE



( IN FEET )

1 inch = 60 ft.

THIS MAP IS A COMPOSITE OF CITY OF BIDDEFORD TAX MAP & AERIAL PHOTOGRAPHY, FEMA FLOOD ZONE MAPS AND ALBERT FRICK ASSOCIATES, INC. SUBMETER GPS.

LEGEND:

-  EDGE OF SPRING HIGH TIDE
-  WETLAND AREA
-  SURFACE DRAINAGE
-  FLOOD ZONE OVERLAY V-ZONE (100 YEAR)

**SITE PLAN**  
 PREPARED FOR  
**ROBERT ANUSZEWSKI**  
 20 SEA SPRAY DRIVE  
 (MAP 67, LOT 30, CR ZONE)  
 BIDDEFORD, MAINE



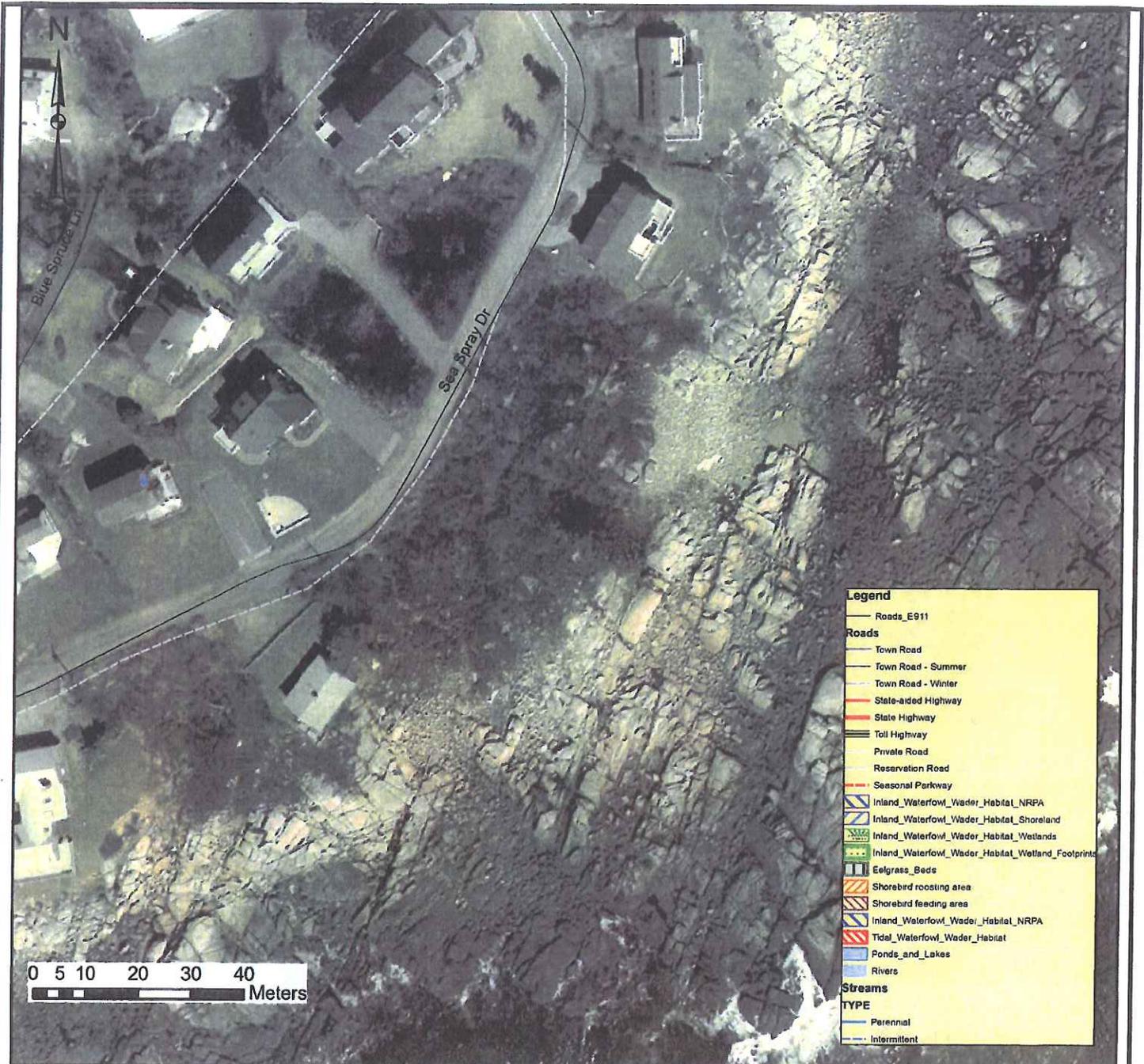
**Albert Frick Associates, Inc.**  
 Soil Scientists & Site Evaluators  
 Gorham, Maine 04038

*x37-5523*

Date:	Revision Description

Drawn By:	<b>B.O.</b>
Date:	<b>8/18/09</b>

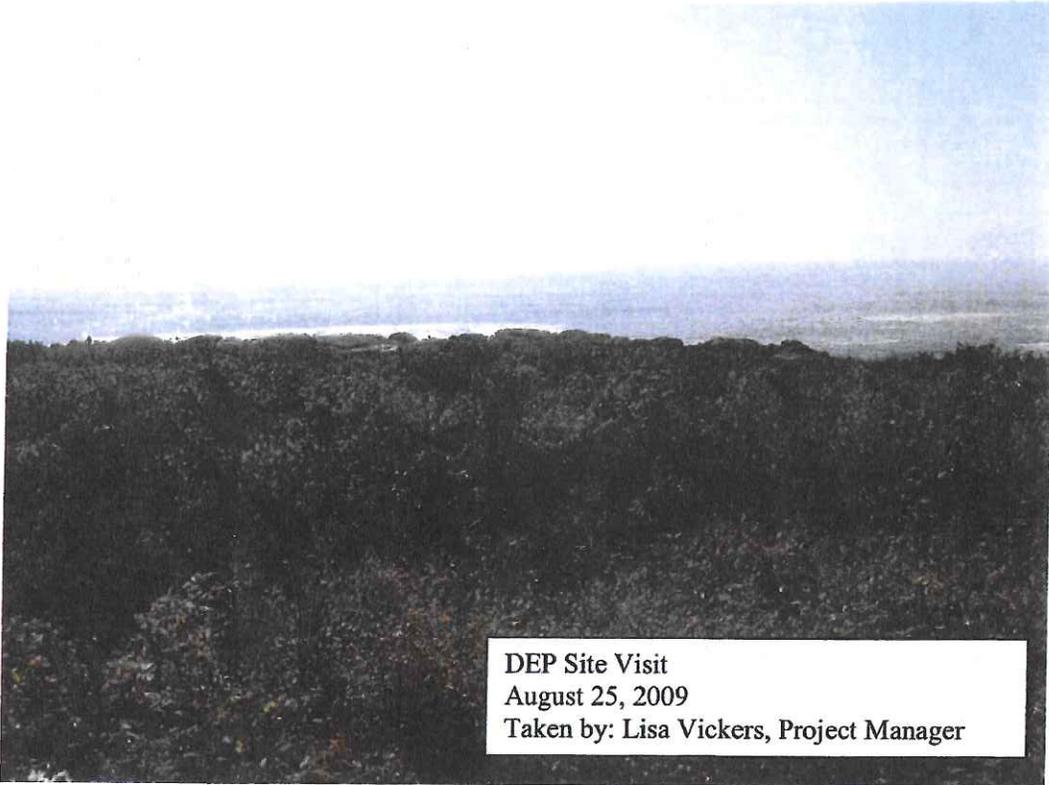
Checked By:	<b>A.F./J.L.</b>
Scale:	<b>1" = 60'</b>



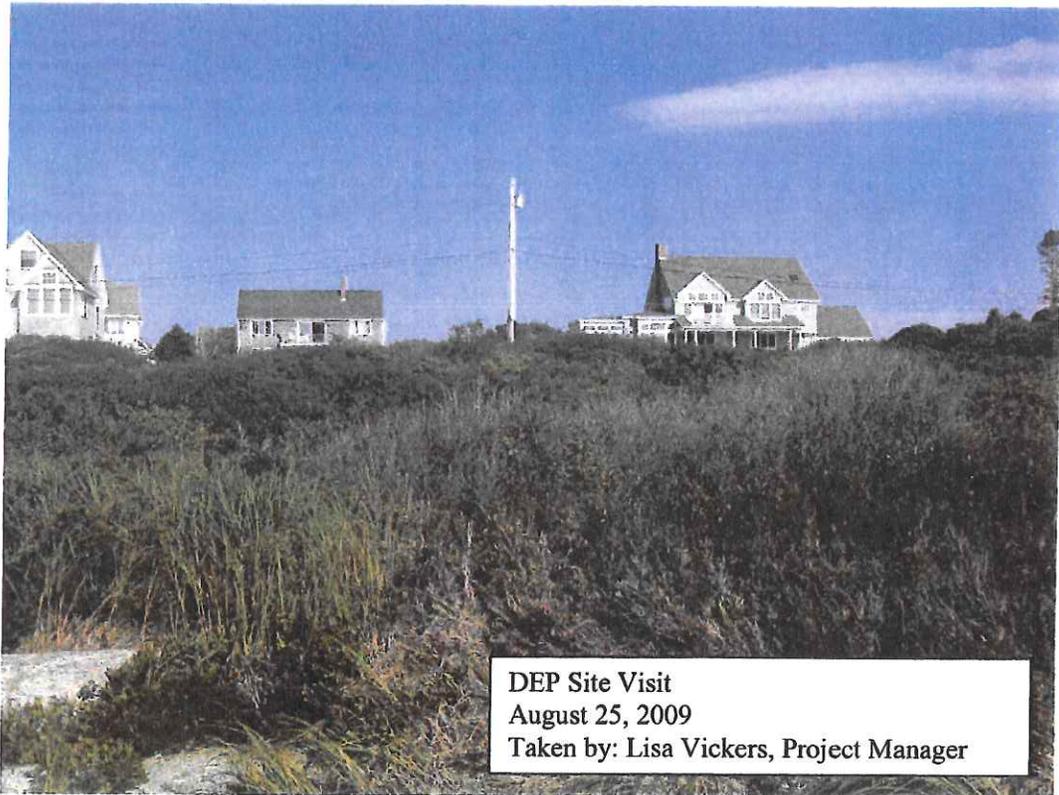
## Robert Anuszewski Biddeford

### Map Notes:

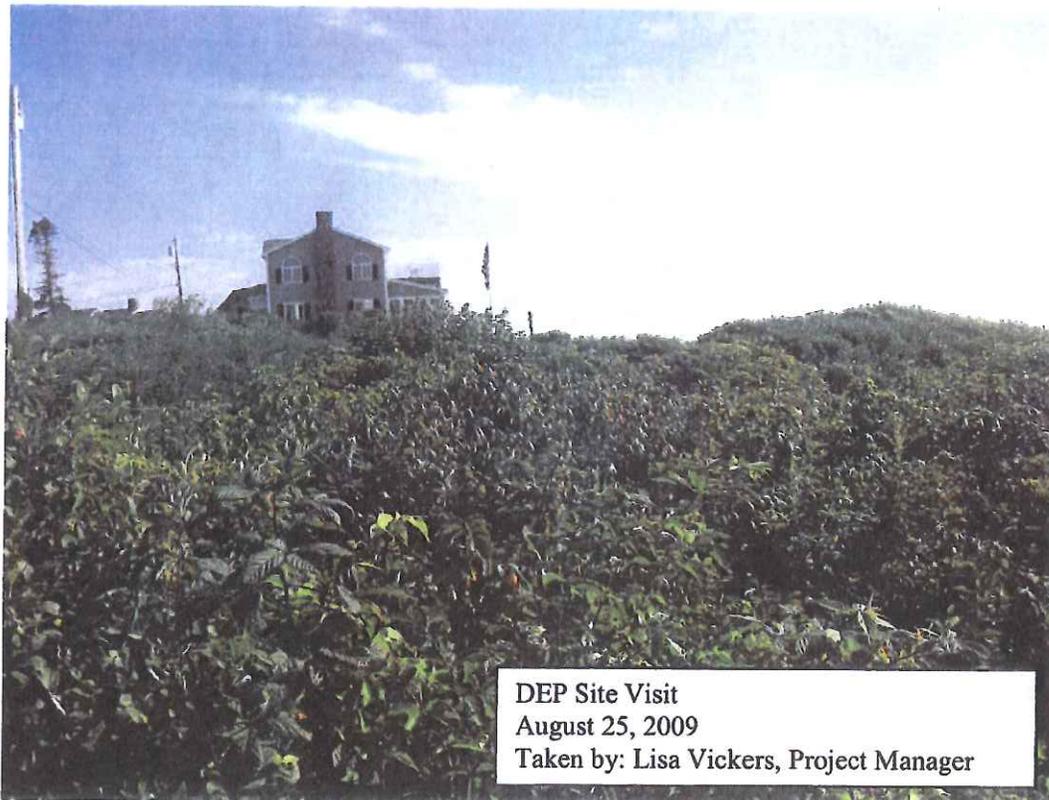
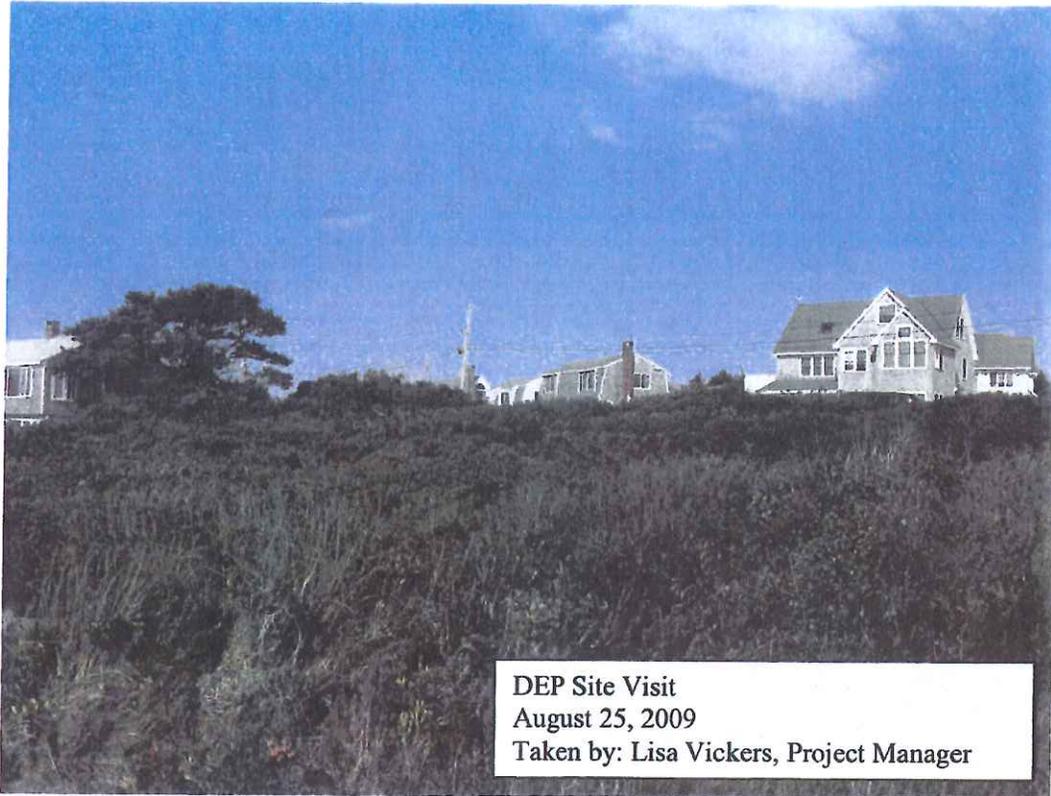
- Land Licensing Sites were either digitized on screen, or collected using a Garmin Etrex GPS Unit. Feature locations have an accuracy of +/- 15 meters.
  - Background hydrologic, topographic and political features are from MEGIS data layers with an accuracy of +/- 40 feet.
  - All spatial data is projected to NAD 1983 UTM Zone 19.
  - All spatial data is specific to Maine DEP Bureau of Land and Water Quality. Data is maintained by the Maine DEP GIS Unit and DLRR. This map is to be used for reference purposes only and does not represent authoritative locations of displayed features.
- Map Prepared By: Lisa Vickers, Maine DEP, BLWQ, Division of Land Resource Regulation  
Prepared on: August 25, 2009

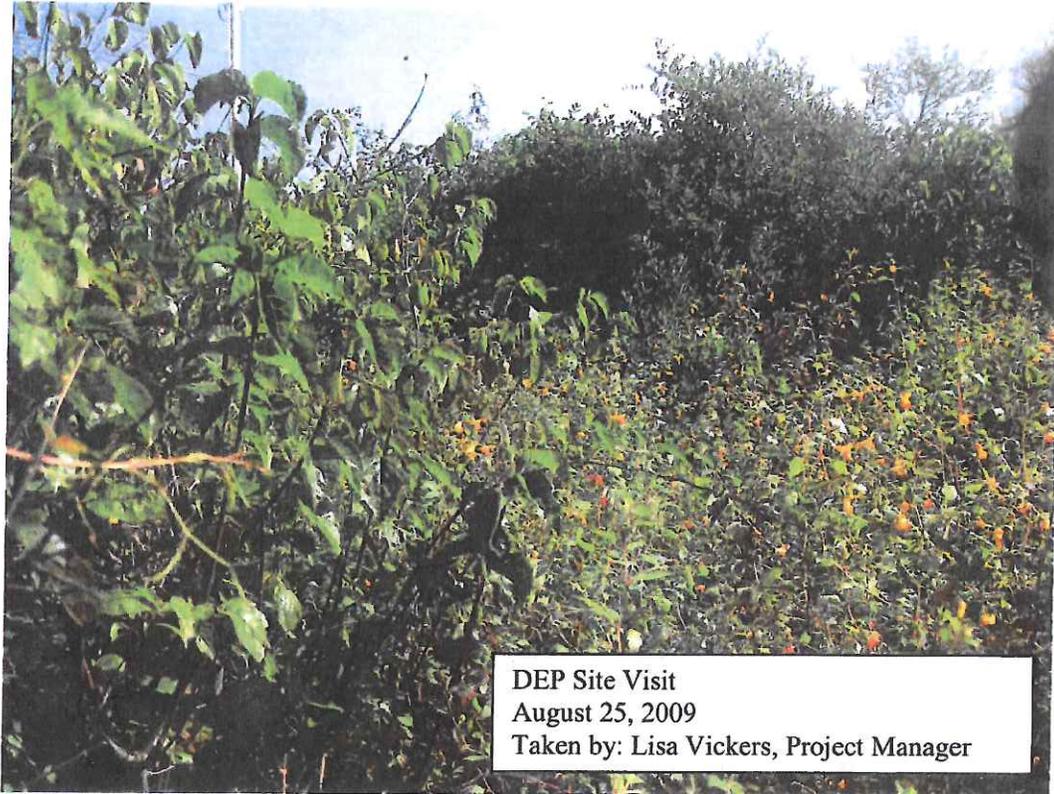


DEP Site Visit  
August 25, 2009  
Taken by: Lisa Vickers, Project Manager

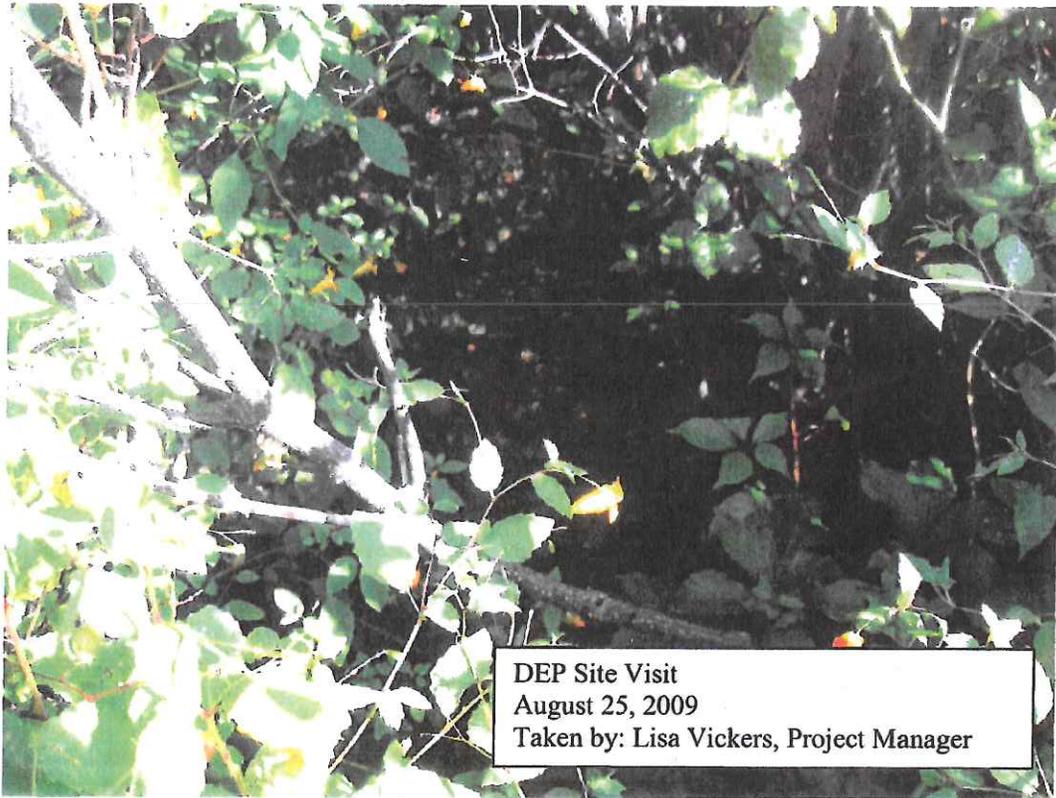


DEP Site Visit  
August 25, 2009  
Taken by: Lisa Vickers, Project Manager

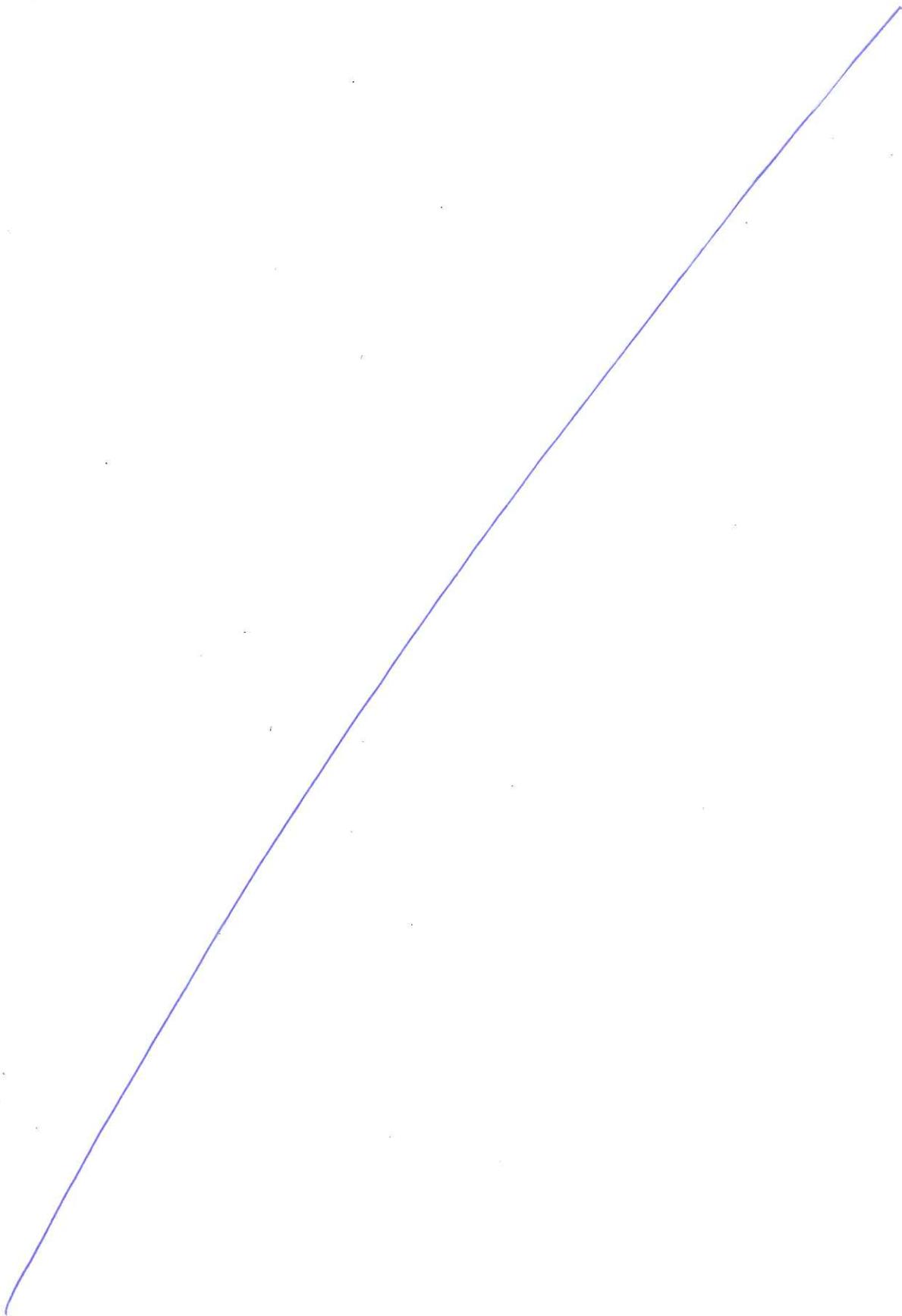




DEP Site Visit  
August 25, 2009  
Taken by: Lisa Vickers, Project Manager



DEP Site Visit  
August 25, 2009  
Taken by: Lisa Vickers, Project Manager



**Vickers, Lisa**

---

**From:** Vickers, Lisa  
**Sent:** Wednesday, September 16, 2009 11:35 AM  
**To:** 'Albert Frick'  
**Subject:** RE: Robert Anuszewski, 20 Salt Spray Drive, Biddeford

Hi Albert,  
 I apologize as I thought I sent the determination after our meeting.

After visiting Robert Anuszewski's property on 20 Salt Spray Drive in Biddeford, I determined the proposed development of the lot qualifies for Tier 1 review under the Natural Resources Protection Act. This determination was based on the preliminary site plan entitled, "Site Plan Prepared for Robert Anuszewski" and dated August 18, 2009 and the site visit. In making this determination the size and location of the alteration was considered in addition to the surface drainage.

If you need additional information, please let me know.

Thanks,  
 Lisa

Department of Environmental Protection  
 312 Canco Road  
 Portland, ME 04103  
 (207) 822-6322

**From:** Albert Frick [mailto:[afa@maine.rr.com](mailto:afa@maine.rr.com)]  
**Sent:** Wednesday, September 16, 2009 9:32 AM  
**To:** Vickers, Lisa  
**Subject:** RE: Robert Anuszewski, 20 Salt Spray Drive, Biddeford

  
  
  
  
  
  
**Albert Frick Associates**  
 Soil Scientists & Site Evaluators  
 95A County Road Gorham, ME 04038  
 (207) 839-5563 FAX (207) 839-5564

Albert Frick, SS, SE  
 James Logan, SS, SE  
 Matthew Logan, SE  
 Brady Frick, SE  
 Eryan Jordan, SE  
 William O'Connor, SE  
 Noel Dunn, Office Manager

Dear Lisa:

I have not received a copy of your field determination for your on-site review.  
 Could you please copy me on this. We would like to proceed with the Tier 1 application.

Thanks

Respectfully



**Albert Frick**  
[www.albertfrick.com](http://www.albertfrick.com)  
 Albert Frick Associates



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

DEPARTMENT ORDER  
IN THE MATTER OF

BETH ZAGOREN AND ROBERT GILPATRIC  
Biddeford, York County  
HOUSE LOT DEVELOPMENT  
L-24923-TA-A-N (approval)

) NATURAL RESOURCES PROTECTION ACT  
) FRESHWATER WETLAND ALTERATION  
) WATER QUALITY CERTIFICATION  
) FINDINGS OF FACT AND ORDER

Project Description: The applicants propose to alter 2,736 square feet of freshwater, scrub shrub wetlands that are considered wetlands of special significance because of their location within 250 feet of a coastal wetland. After reviewing the information in the file and conducting a site visit, the Department determined that the activity will not negatively affect the freshwater wetland of special significance or other protected natural resources; therefore, the proposed project is eligible for Tier 1 review. The applicants propose to construct a 2,078 square foot single-family home as shown on a plan entitled, "Site Plan," prepared by Albert Frick Associates, Inc., and dated April 22, 2010, by revision. The applicants have sited the house in a location that avoids and minimizes impacts to the wetland to the greatest extent practicable while meeting local building setbacks. According to the Department's Geographic Information System (GIS), there is no mapped significant wildlife habitats associated with the project site. The proposed project is located off Sea Spray Drive in the Town of Biddeford.

Permit for:	<input checked="" type="checkbox"/> Tier 1
DEP Decision:	<input checked="" type="checkbox"/> Approved <input type="checkbox"/> Denied (see attached letter)
CORPS Action:	<input checked="" type="checkbox"/> The Corps has been notified of your application. The following are subject to Federal screening: (1) projects with previously authorized or unauthorized work, in combination with a Tier 1 permit for a single and complete project, which total more than 15,000 square feet of altered area; (2) projects with multiple state permits and/or state exemptions which apply to a single and complete project that total more than 15,000 square feet of altered area; and (3) projects that may impact a vernal pool, as determined by the State of Maine or the Corps. If your activity is listed above, <i>Corps approval is required for your project.</i> For information regarding the status of your application contact the Corps' Maine Project Office at 623-8367.

Standard Conditions:

- 1) If construction or operation of the activity is not begun within two (2) years from the date signed, this permit shall lapse and the applicant shall reapply to the Department for a new permit. This permit is transferable only with prior approval from the Department. If the activity is associated with a larger project, starting any aspect of that project constitutes start of construction.
- 2) The project shall be completed according to the plans in the application. Any change in the project plans must be reviewed and approved by the Department.
- 3) Properly installed erosion control measures shall be installed prior to beginning the project, and all disturbed soil should be stabilized immediately upon project completion.

- 4) A copy of this approval will be sent to the City of Biddeford. Department approval of your activity does not supersede or substitute the need for any necessary local approvals.

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.

DEPARTMENT OF ENVIRONMENTAL PROTECTION



This permit has been digitally signed by Andrew C. Fisk on behalf of Commissioner David P. Littell. It is digitally signed pursuant to authority under 10 M.R.S.A. § 9418. It has been filed with the Board of Environmental Protection as of the signature date. 2010.05.13 12:02:40 -04'00'

PLEASE NOTE THE ATTACHED SHEET FOR GUIDANCE ON APPEAL PROCEDURES...

lv/ats#71779/#124923taan

DEPLW 0429



**NATURAL RESOURCE PROTECTION ACT (NRPA)  
STANDARD CONDITIONS**

THE FOLLOWING STANDARD CONDITIONS SHALL APPLY TO ALL PERMITS GRANTED UNDER THE NATURAL RESOURCE PROTECTION ACT, TITLE 38, M.R.S.A. SECTION 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. **Initiation of Activity Within Two Years.** If construction or operation of the activity is not begun within two 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 shall state the reasons why the applicant will be able to begin the activity within two years form the granting of a new permit, if so granted. Reapplications for permits may include information submitted in the initial application by reference.
- F. **Reexamination After Five Years.** If the approved activity is not completed within five years from the date of the granting of a permit, the Board may reexamine its permit approval and impose additional terms or conditions to respond to significant changes in circumstances which may have occurred during the five-year period.
- G. **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.
- H. **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.
- I. **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.



**EXCERPTS FROM THE APPLICATION**

# APPLICATION FOR A NATURAL RESOURCES PROTECTION ACT PERMIT

→ PLEASE TYPE OR PRINT IN BLACK INK ONLY

1. Name of Applicant: Beth Z. Zagoren Robert L. Gilpatric		5. Name of Agent: Albert Frick							
2. Applicant's Mailing Address: 142 Chestnut Street Cambridge, MA 02139		6. Agent's Mailing Address: Albert Frick Associates, Inc. 95A County Road Gorham, ME 04038							
3. Applicant's Daytime Phone #: 617-661-2518		7. Agent's Daytime Phone #: 207-839-5563 (office) 207-415-4214 (mobile)							
4. Applicant's Email Address: zzag1234@aol.com License will be sent via e-mail.		8. Agent's E-mail Address: albert@albertfrick.com							
9. Location of Activity: 20 Sea Spray Drive (Nearest Road, Street, Rt.#)		10. Town: Biddeford	11. County: York						
12. Type of Resource: (Check all that apply) <input type="checkbox"/> River, stream or brook <input type="checkbox"/> Great Pond <input type="checkbox"/> Coastal Wetland <input checked="" type="checkbox"/> Freshwater Wetland <input type="checkbox"/> Wetland Special Significance <input type="checkbox"/> Significant Wildlife Habitat <input type="checkbox"/> Fragile Mountain		13. Name of Resource:	14. Amount of Impact: (Sq.Ft.) Fill: 2,736+/- sq. ft. Dredging/Veg Removal/Other:						
15. Type of Wetland: (Check all that apply) <input type="checkbox"/> Forested <input checked="" type="checkbox"/> Scrub Shrub <input type="checkbox"/> Emergent <input type="checkbox"/> Wet Meadow <input type="checkbox"/> Peatland <input type="checkbox"/> Open Water <input type="checkbox"/> Other _____		<p style="text-align: center;"><b>FOR FRESHWATER WETLANDS</b></p> <table style="width: 100%; border-collapse: collapse;"> <tr> <td style="text-align: center; width: 33%;"><i>Tier 1</i></td> <td style="text-align: center; width: 33%;"><i>Tier 2</i></td> <td style="text-align: center; width: 33%;"><i>Tier 3</i></td> </tr> <tr> <td> <input checked="" type="checkbox"/> 0 - 4,999 sq ft.  <input type="checkbox"/> 5,000-9,999 sq ft.  <input type="checkbox"/> 10,000-14,999 sq ft                 </td> <td> <input type="checkbox"/> 15,000 - 43,560 sq. ft.                 </td> <td> <input type="checkbox"/> &gt; 43,560 sq. ft. or smaller than 43,560 sq. ft., not eligible for Tier 1                 </td> </tr> </table>		<i>Tier 1</i>	<i>Tier 2</i>	<i>Tier 3</i>	<input checked="" type="checkbox"/> 0 - 4,999 sq ft. <input type="checkbox"/> 5,000-9,999 sq ft. <input type="checkbox"/> 10,000-14,999 sq ft	<input type="checkbox"/> 15,000 - 43,560 sq. ft.	<input type="checkbox"/> > 43,560 sq. ft. or smaller than 43,560 sq. ft., not eligible for Tier 1
<i>Tier 1</i>	<i>Tier 2</i>	<i>Tier 3</i>							
<input checked="" type="checkbox"/> 0 - 4,999 sq ft. <input type="checkbox"/> 5,000-9,999 sq ft. <input type="checkbox"/> 10,000-14,999 sq ft	<input type="checkbox"/> 15,000 - 43,560 sq. ft.	<input type="checkbox"/> > 43,560 sq. ft. or smaller than 43,560 sq. ft., not eligible for Tier 1							
16. Brief Activity Description: Wetland filling is required to construct a single-family dwelling with access drive on an existing lot of record.									
17. Size of Lot or Parcel & UTM Locations: <input type="checkbox"/> _____ square feet, or <input checked="" type="checkbox"/> 0.65+/- acres		UTM Northing: 43° 24' 43" UTM Easting: 70° 22' 54"							
18. Title, Right or Interest: <input checked="" type="checkbox"/> own <input type="checkbox"/> lease <input type="checkbox"/> purchase option <input type="checkbox"/> written agreement									
19. Deed Reference Numbers: Book#: 5521 Page: 332		20. Map and Lot Numbers: Map #: 67 Lot #: 30							
21. DEP Staff Previously Contacted: Lisa Vickers		22. Part of a larger project: <input type="checkbox"/> Yes <input checked="" type="checkbox"/> No After-the-Fact: <input type="checkbox"/> Yes <input checked="" type="checkbox"/> No							
23. Resubmission of Application? <input checked="" type="checkbox"/> Yes → <input type="checkbox"/> No If yes, previous application #: L-24923-TA-A-N Previous project manager: Lisa Vickers									
24. Written Notice of Violation? <input type="checkbox"/> Yes → <input checked="" type="checkbox"/> No If yes, name of DEP enforcement staff involved:		25. Previous Wetland Alteration: <input type="checkbox"/> Yes <input checked="" type="checkbox"/> No							
26. Detailed Directions to the Project Site: See attached									
27. TIER 1		TIER 2/3 AND INDIVIDUAL PERMITS							
<input checked="" type="checkbox"/> Title, right or interest documentation <input checked="" type="checkbox"/> Topographic Map <input checked="" type="checkbox"/> Narrative Project Description <input checked="" type="checkbox"/> Plan or Drawing (8 1/2" x 11") <input checked="" type="checkbox"/> Photos of Area <input checked="" type="checkbox"/> Statement of Avoidance & Minimization <input checked="" type="checkbox"/> Statement/Copy of cover letter to MHPC		<input type="checkbox"/> Title, right or interest documentation <input type="checkbox"/> Topographic Map <input type="checkbox"/> Copy of Public Notice/Public Information Meeting Documentation <input type="checkbox"/> Wetlands Delineation Report (Attachment 1) that contains the information listed under Site Conditions <input type="checkbox"/> Alternatives Analysis (Attachment 2) including description of how wetland impacts were Avoided/Minimized <input type="checkbox"/> Erosion Control/Construction Plan <input type="checkbox"/> Functional Assessment (Attachment 3), if required <input type="checkbox"/> Compensation Plan (Attachment 4), if required <input type="checkbox"/> Appendix A and others, if required <input type="checkbox"/> Statement/Copy of cover letter to MHPC <input type="checkbox"/> Description of Previously Mined Peatland, if required							
28. FEES Amount Enclosed:									

**CERTIFICATIONS AND SIGNATURES LOCATED ON PAGE 2**

**IMPORTANT:** IF THE SIGNATURE BELOW IS NOT THE APPLICANT'S SIGNATURE, ATTACH LETTER OF AGENT AUTHORIZATION SIGNED BY THE APPLICANT.

By signing below the applicant (or authorized agent), certifies that he or she has read and understood the following :

**DEP SIGNATORY REQUIREMENT**

**PRIVACY ACT STATEMENT**

Authority: 33 USC 401, Section 10; 1413, Section 404. Principal Purpose: These laws require permits authorizing activities in or affecting navigable waters of the United States, the discharge of dredged or fill material into waters of the United States, and the transportation of dredged material for the purpose of dumping it into ocean waters. Disclosure: Disclosure of requested information is voluntary. If information is not provided, however, the permit application cannot be processed nr a permit be issued.

**CORPS SIGNATORY REQUIREMENT**

USC Section 1001 provides that: Whoever, in any manner within the jurisdiction of any department or agency of the United States knowingly and willfully falsifies, conceals, or covers up any trick, scheme, or disguises a material fact or makes any false, fictitious or fraudulent statements or representations or makes or uses any false writing or document knowing same to contain any false, fictitious or fraudulent statements or entry shall be fined not more than \$10,000 or imprisoned not more than five years or both. I authorize the Corps to enter the property that is subject to this application, at reasonable hours, including buildings, structures or conveyances on the property, to determine the accuracy of any information provided herein.

**DEP SIGNATORY REQUIREMENT**

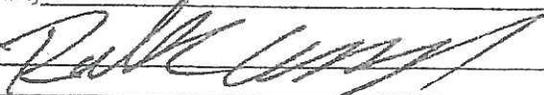
"I certify under penalty of law that I have personally examined the information submitted in this document and all attachments thereto and that, based on my inquiry of those individuals immediately responsible for obtaining the information, I believe the information is true, accurate, and complete. I authorize the Department to enter the property that is the subject of this application, at reasonable hours, including buildings, structures or conveyances on the property, to determine the accuracy of any information provided herein. I am aware that there are significant penalties for submitting false information, including the possibility of fine and imprisonment.

  
SIGNATURE OF AGENT/APPLICANT

Date: 4/25/13

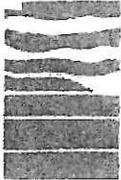
*NOTE: Any changes in activity plans must be submitted to the DEP and the Corps in writing and must be approved by both agencies prior to implementation. Failure to do so may result in enforcement action and/or the removal of the unapproved changes to the activity.*

"I hereby authorize the DEP to send me an electronically signed decision on the license I am applying for with this application by emailing the decision to the address located on the front page of this application (see #4 for the applicant and #9 for the agent. *Do not sign if you elect to "opt out" or receive the decision via regular mail.*

Signed (Applicant) \_\_\_\_\_ Date: \_\_\_\_\_  
and/or  
Signed (Agent)  Date: 4/25/13

(yellow)

596



**Albert Frick Associates, Inc**

**Environmental Consultants**

95A County Road Gorham, Maine 04038  
(207) 839-5563 FAX (207) 839-5564  
www.albertfrick.com info@albertfrick.com

Albert Frick, SS, SE  
James Logan, SS, SE  
Matthew Logan, SE  
Brady Frick, SE  
Bryan Jordan, SE  
William O'Connor, SE  
Noel Dunn, Office Manager

April 24, 2013

Lisa Vickers  
Maine Department of Environmental Protection  
312 Canco Road  
Portland, ME 04103

Re: Zagoren/Gilpatric, 20 Sea Spray Drive (Map 67, Lot 30). Biddeford

Dear Lisa,

Please find enclosed a re-submission of an Application for a *Natural Resources Protection Act* permit submitted on behalf of Beth Z. Zagoren and Robert L. Gilpatric.

Ms. Zagoren and Mr. Gilpatric ask that the Maine Department of Environmental Protection re-approve the Tier I permit they have previously received (#L-24923-TA-A-N) under the *Natural Resources Protection Act*. Ms. Zagoren and Mr. Gilpatric had applied for the above-mentioned Tier I permit to alter wetlands in order to construct one single-family dwelling with attendant access drive. Due to a delay in receiving approval for a subsurface wastewater disposal system, the applicants have not yet been able to begin the construction for which they received the original permit, and the permit inadvertently ran out.

Please contact me if you have any questions or additional matters for discussion regarding the proposed application and current conditions.

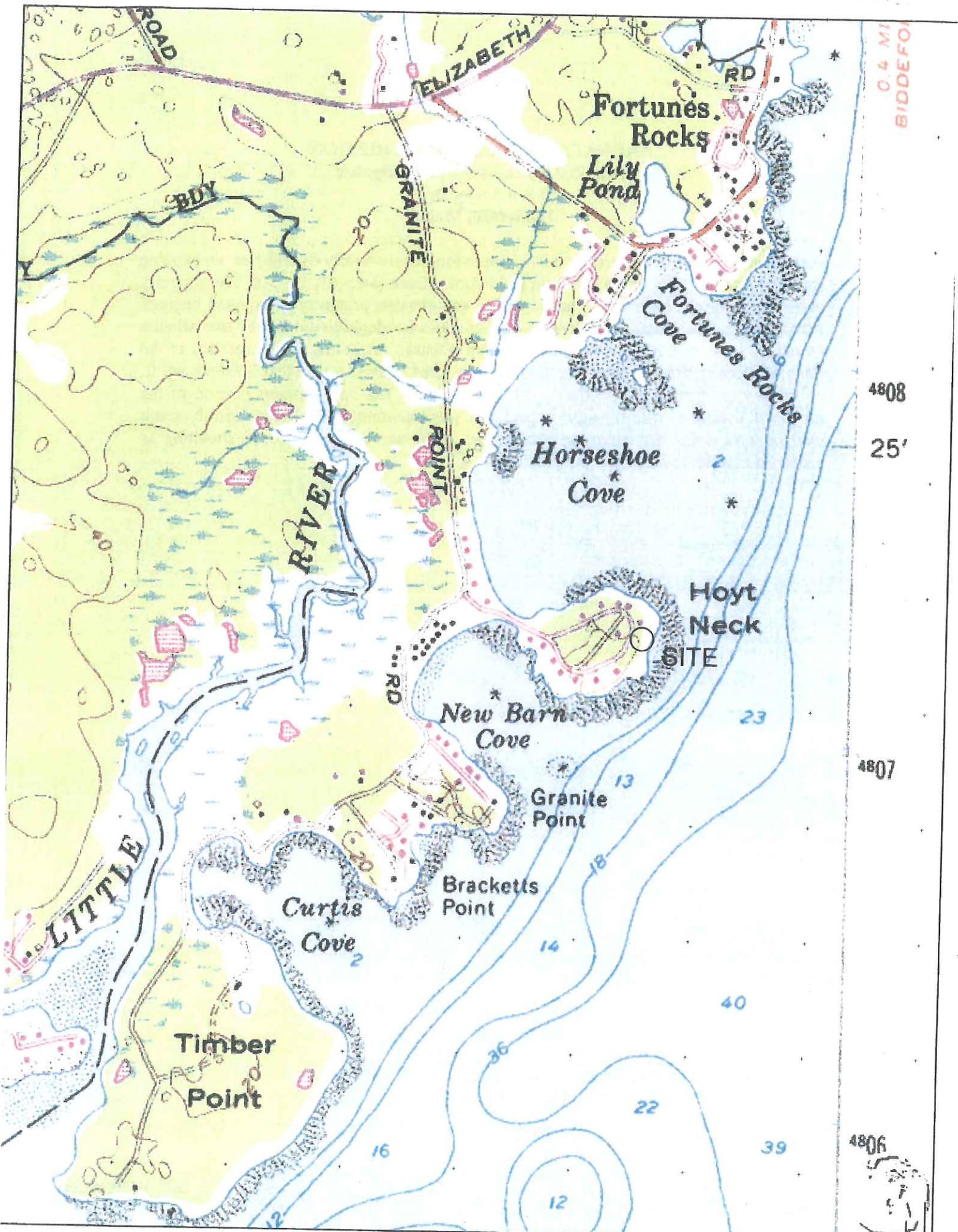
Respectfully,

Albert Frick  
Certified Soil Scientist # 66  
Licensed Site Evaluator #163

AF/nd

Enc.

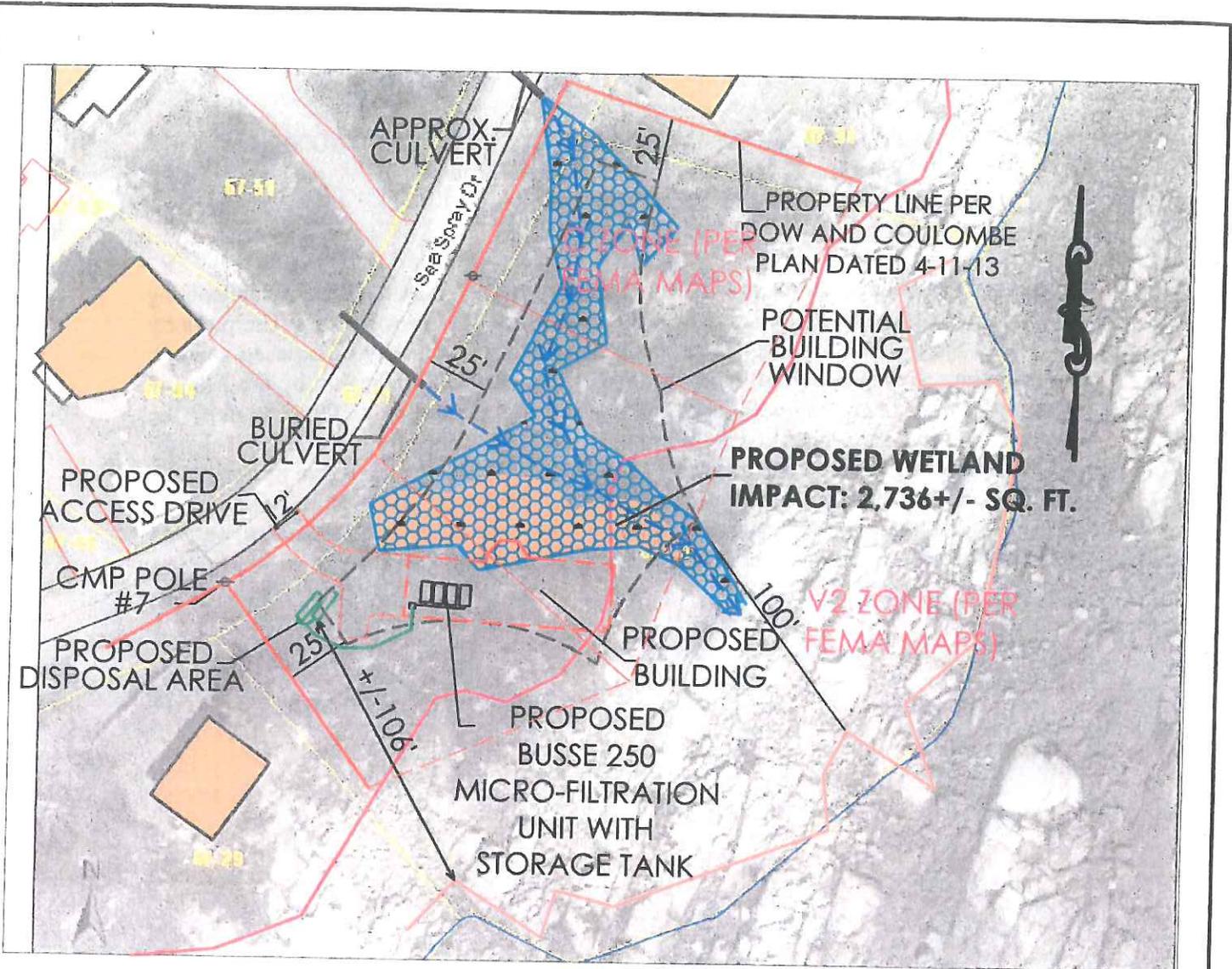
cc. Robert Anuszewski  
Beth Zagoren



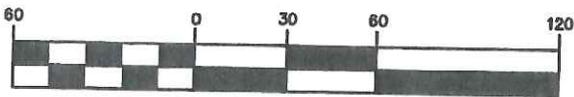
**NARRATIVE PROJECT DESCRIPTION****Beth Z. Zagoren & Robert Gilpatric****20 Sea Spray Drive****Biddeford, Maine**

Applicant proposes to construct a 2,078 square foot single-family dwelling on an existing lot of record at 20 Sea Spray Drive in Biddeford, Maine (Map 67, Lot 30). The property at 20 Sea Spray Drive is .65+/- acres in size, and consists primarily of exposed bedrock outcroppings, freshwater shrub scrub wetlands and is bordered to the east by the Atlantic Ocean. In order to comply with local building setbacks (including a 100' setback to the Atlantic Ocean), the proposed dwelling must be sited in such a way that 2,736+/- sq. ft. of freshwater, shrub scrub wetlands will be impacted. The northernmost portion of the proposed dwelling will directly impact the aforementioned freshwater shrub scrub wetland and a 25' fill envelope around the perimeter of the proposed dwelling is proposed in order to assure proper grading.





**GRAPHIC SCALE**



( IN FEET )

1 inch = 60 ft.

THIS MAP IS A COMPOSITE OF CITY OF BIDDEFORD TAX MAP & AERIAL PHOTOGRAPHY, FEMA FLOOD ZONE MAPS AND ALBERT FRICK ASSOCIATES, INC. SUBMETER GPS.

**LEGEND:**

-  EDGE OF SPRING HIGH TIDE WETLAND AREA
-  SURFACE DRAINAGE
-  PROPOSED IMPACT
-  FLOOD ZONE OVERLAY V-ZONE (100 YEAR) TO BE FIELD VERIFIED BY LAND SURVEYOR PRIOR TO CONSTRUCTION AND FEMA INSURANCE PERMIT

**SITE PLAN**  
 PREPARED FOR ZAGOREN/GILPATRICK  
 (ANUSZEWSKI)  
 20 SEA SPRAY DRIVE  
 (MAP 67, LOT 30, CR ZONE)  
 BIDDEFORD, MAINE



**Albert Frick Associates, Inc.**  
 Soil Scientists & Site Evaluators  
 Gorham, Maine 04038

Date:	Revision Description
4/22/10	ACCESS DRIVE DETAILS ADDED
12/3/10	PER RUSSELL MARTIN P.E. RECOMMENDATIONS
4/19/13	PROPOSED DISPOSAL AREA UPDATED

Drawn By: B.O./B.J.	Checked By: A.F.
Date: 8/18/09	Scale: 1" = 60'

600

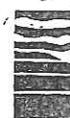
## STATEMENT OF AVOIDANCE AND MINIMIZATION

Beth Z. Zagoren & Robert Gilpatric

20 Sea Spray Drive

Biddeford, Maine

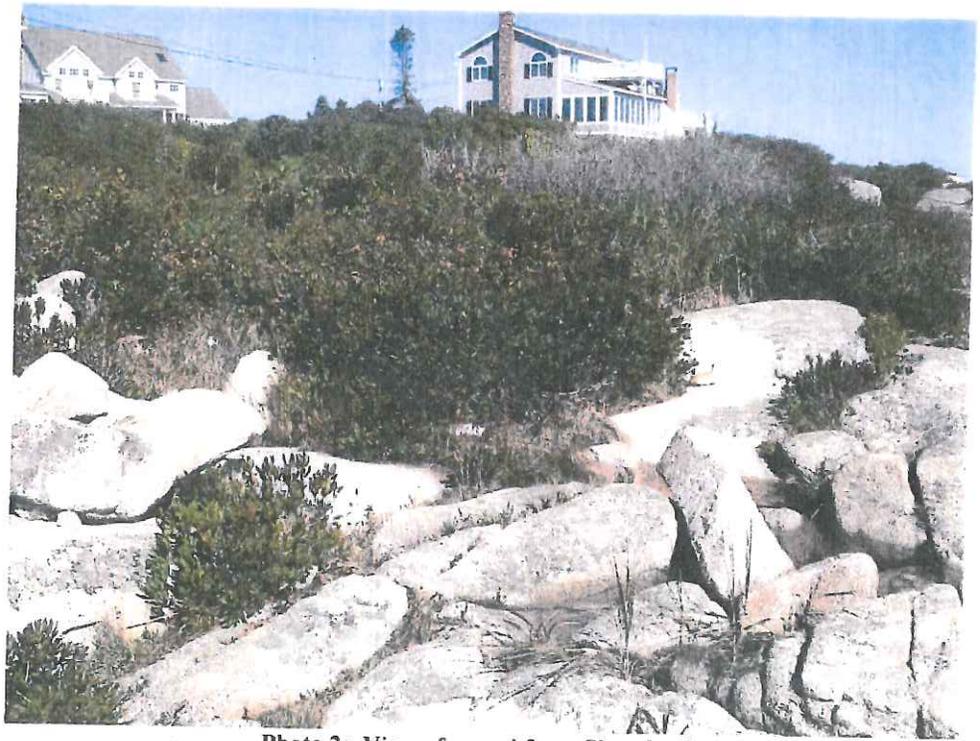
Applicant proposes to construct a 2,078 square foot single-family dwelling on an existing lot of record at 20 Sea Spray Drive in Biddeford, Maine (Map 67, Lot 30). The property at 20 Sea Spray Drive is .65+/- acres in size, and consists primarily of exposed bedrock outcroppings, freshwater shrub scrub wetlands and is bordered to the east by the Atlantic Ocean. In order to comply with local building setbacks (including a 100' setback to the Atlantic Ocean), the proposed dwelling must be sited in such a way that 2,736+/- sq. ft. of freshwater, shrub scrub wetlands will be impacted. Due to the small size of the parcel, proximity to the Atlantic Ocean and the presence of freshwater shrub scrub wetlands; the proposed dwelling and attendant fill envelope have been sited as to minimize wetland impacts and not adversely affect drainage runs which exist on the property.



Albert Frick Associates, Inc.  
Soil Scientists & Site Evaluators



**Photo 1: View of parcel from Shoreland.**



**Photo 2: View of parcel from Shoreland.**



**EXCERPTS FROM RELEVANT  
STATUTES & RULES**

STATE OF MAINE

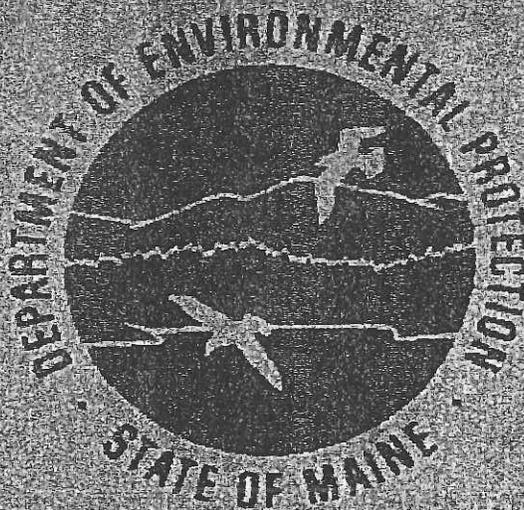
DEPARTMENT OF ENVIRONMENTAL PROTECTION

Natural Resources Protection Act

and 35-A M.R.S.A. § 3452

38 M.R.S.A. §§ 480-A to 480-HH

STATUTE



Bureau of Land and Water Quality  
No. DEPLW30-W2011

AUGUST 4, 1988  
REVISED: September 28, 2011

D. Any construction, repair or alteration of any permanent structure.

### 3. Application.<sup>3</sup>

4. **Significant groundwater well.** A person may not perform or cause to be performed the establishment or operation of a significant groundwater well without first obtaining a permit from the department.<sup>4</sup>

### § 480-D. Standards

The department shall grant a permit upon proper application and upon such terms as it considers necessary to fulfill the purposes of this article. The department shall grant a permit when it finds that the applicant has demonstrated that the proposed activity meets the following standards set forth in subsections 1 to 11, except that when an activity requires a permit only because it is located in, on or over a community public water system primary protection area the department shall issue a permit when it finds that the applicant has demonstrated that the proposed activity meets the standards set forth in subsections 2 and 5.<sup>5</sup>

1. **Existing uses.** The activity will not unreasonably interfere with existing scenic, aesthetic, recreational or navigational uses.

In making a determination under this subsection regarding an expedited wind energy development, as defined in Title 35-A, section 3451, subsection 4, or an offshore wind power project, the department shall consider the development's or project's effects on scenic character and existing uses related to scenic character in accordance with Title 35-A, section 3452. In making a decision under this subsection regarding an application for an offshore wind power project, the department may not consider whether the project meets the specific criteria designated in Title 12, section 1862, subsection 2, paragraph A, subparagraph (6), divisions (a) to (d). This limitation is not intended to restrict the department's review of related potential impacts of the project as determined by the department.

2. **Soil erosion.** 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.

<sup>3</sup>Repeal effective October 1, 1994. The repealed text read: "This section applies to all protected natural resources statewide without regard to whether they have been mapped pursuant to section 480-1. Significant wildlife habitat that is not within any other protected natural resource must be mapped before this section applies." For applicability requirements now, see Section 480-V and 480-E-1.

<sup>4</sup> PL 2007, ch. 399(13) provided: "Sec. 13. **Transition.** If a person who requires a permit for establishment or operation of a significant groundwater well from the Department of Environmental Protection pursuant to the Maine Revised Statutes, Title 38, section 480-C is authorized to transport water pursuant to Title 22, section 2660-A on the effective date of this Act and applies for a permit for establishment or operation of the significant groundwater well prior to expiration of the water transport authorization, the person may continue to withdraw water until final agency action on the permit application."

<sup>5</sup> A permit is not required under the Maine Revised Statutes, Title 38, chapter 3, article 5-A for an activity located in, on or over a community public water system primary protection area until the effective date of the rules provided for PL 2007, ch. 353(14), unless a permit is otherwise required under the Maine Revised Statutes, Title 38, section 480-C. PL 2007, ch. 353(14).

**3. Harm to habitats; fisheries.** 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.

In determining whether there is unreasonable harm to significant wildlife habitat, the department may consider proposed mitigation if that mitigation does not diminish in the vicinity of the proposed activity the overall value of significant wildlife habitat and species utilization of the habitat and if there is no specific biological or physical feature unique to the habitat that would be adversely affected by the proposed activity. For purposes of this subsection, "mitigation" means any action taken or not taken to avoid, minimize, rectify, reduce, eliminate or compensate for any actual or potential adverse impact on the significant wildlife habitat, including the following:

- A. Avoiding an impact altogether by not taking a certain action or parts of an action;
- B. Minimizing an impact by limiting the magnitude, duration or location of an activity or by controlling the timing of an activity;
- C. Rectifying an impact by repairing, rehabilitating or restoring the affected environment;
- D. Reducing or eliminating an impact over time through preservation and maintenance operations during the life of the project; or
- E. Compensating for an impact by replacing the affected significant wildlife habitat.

**4. Interfere with natural water flow.** The activity will not unreasonably interfere with the natural flow of any surface or subsurface waters.

**5. Lower water quality.** The activity will not violate any state water quality law, including those governing the classification of the State's waters. \*

**6. Flooding.** The activity will not unreasonably cause or increase the flooding of the alteration area or adjacent properties.

**7. Sand supply.** If the activity is on or adjacent to a sand dune, it will not unreasonably interfere with the natural supply or movement of sand or gravel within or to the sand dune system or unreasonably increase the erosion hazard to the sand dune system.

**8. Outstanding river segments.** If the proposed activity is a crossing of any outstanding river segment as identified in section 480-P, the applicant shall demonstrate that no reasonable alternative exists which would have less adverse effect upon the natural and recreational features of the river segment.

**9. Dredging.**<sup>6</sup> If the proposed activity involves dredging, dredge spoils disposal or transporting dredge spoils by water, the applicant must demonstrate that the transportation route minimizes adverse impacts on the fishing industry and that the disposal site is geologically suitable. The Commissioner of Marine Resources shall provide the department with an assessment of the impacts on the fishing industry of a proposed dredging operation in the coastal wetlands. The assessment must consider impacts to the area to be dredged and impacts to the fishing industry of a proposed route to transport dredge spoils to an ocean disposal site. The Commissioner of Marine

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<sup>6</sup>Amendments to this section effective September 19, 1997 are affected by an application provision (PL 1997, c. 164, § 2) that provides:

**Sec. 2. Application.** This Act applies to permit applications filed with the Department of Environmental Protection on or after the effective date of this Act.  
This section was later amended by Laws 1999, ch. 248, § 1.

Resources may hold a public hearing on the proposed dredging operation. In determining if a hearing is to be held, the Commissioner of Marine Resources shall consider the potential impacts of the proposed dredging operation on fishing in the area to be dredged. If a hearing is held, it must be within at least one of the municipalities in which the dredging operation would take place. If the Commissioner of Marine Resources determines that a hearing is not to be held, the Commissioner of Marine Resources must publish a notice of that determination in a newspaper of general circulation in the area proposed for the dredging operation. The notice must state that the Commissioner of Marine Resources will accept verbal and written comments in lieu of a public hearing. The notice must also state that if 5 or more persons request a public hearing within 30 days of the notice publication, the Commissioner of Marine Resources will hold a hearing. If 5 or more persons request a public hearing within 30 days of the notice publication, the Commissioner of Marine Resources must hold a hearing. In making its determination under this subsection, the department must take into consideration the assessment provided by the Commissioner of Marine Resources. The permit must require the applicant to:

- A. Clearly mark or designate the dredging area, the spoils disposal route and the transportation route;
- B. Publish in a newspaper of general circulation in the area adjacent to the route the approved transportation route of the dredge spoils; and
- C. Publish in a newspaper of general circulation in the area adjacent to the route a procedure that the applicant will use to respond to inquiries regarding the loss of fishing gear during the dredging operation.

**10. Significant groundwater well.** If the proposed activity includes a significant groundwater well, the applicant must demonstrate that the activity will not have an undue unreasonable effect on waters of the State, as defined in section 361-A, subsection 7, water-related natural resources and existing uses, including, but not limited to, public or private wells within the anticipated zone of contribution to the withdrawal. In making findings under this subsection, the department shall consider both the direct effects of the proposed withdrawal and its effects in combination with existing water withdrawals.

**11. Offshore wind power project.** This subsection applies to an offshore wind power project.

A. If an offshore wind power project does not require a permit from the department pursuant to article 6, the applicant must demonstrate that the generating facilities:

(1) Will meet the requirements of the noise control rules adopted by the board pursuant to article 6;

(2) Will be designed and sited to avoid unreasonable adverse shadow flicker effects; and

(3) Will be constructed with setbacks adequate to protect public safety, while maintaining existing uses to the extent practicable. In making a finding pursuant to this paragraph, the department shall consider the recommendation of a professional, licensed civil engineer as well as any applicable setback recommended by a manufacturer of the generating facilities.

B. If an offshore wind power project does not require a permit from the department

pursuant to article 6, the applicant must demonstrate adequate financial capacity to decommission the offshore wind power project.

C. An applicant for an offshore wind power project is not required to demonstrate compliance with requirements of this article that the department determines are addressed by criteria specified in Title 12, section 1862, subsection 2, paragraph A, subparagraph (6).

#### § 480-E. Permit processing requirements

The department shall process all permits under this article, except as provided in section 480-E-1, in accordance with chapter 2, subchapter I, and the following requirements.

**1. Municipal and other notification.** The department shall provide notice according to this subsection.

A. Except as otherwise provided in paragraph B, the department may not review a permit without notifying the municipality in which the proposed activity is to occur. The municipality may provide comments within a reasonable period established by the commissioner and the commissioner shall consider any such comments.

B. The department may not review an application for an offshore wind power project without providing:

(1) Notice to the Maine Land Use Regulation Commission when the proposed development is located within 3 miles of an area of land within the jurisdiction of the Maine Land Use Regulation Commission; and

(2) Notice to any municipality with land located within 3 miles of the proposed development and any municipality in which development of associated facilities is proposed.

The Maine Land Use Regulation Commission and any municipality notified pursuant to this paragraph may provide comments within a reasonable period established by the commissioner and the commissioner shall consider such comments.

**2. Water supply notification.** If the resource subject to alteration or the underlying ground water is utilized by a community public water system as a source of supply, the applicant for the permit shall, at the time of filing an application, forward a copy of the application to the community public water system and the drinking water program of the Department of Health and Human Services by certified mail and the department shall consider any comments concerning the application filed with the commissioner within a reasonable period, as established by the commissioner.

**3. Dredge spoils disposal.** The commissioner may not accept an application for dredge spoils disposal in a coastal wetland unless the following requirements are met.

A. The applicant has collected and tested the dredge spoils in accordance with a protocol approved by the commissioner.

4. **Replacement after emergency action under permit by rule.** Notwithstanding any other provision of this chapter, the department shall approve a permit by rule to repair or replace a seawall, bulkhead, retaining wall or similar structure that has been destroyed or threatened with a structure that is identical in all dimensions and location as long as a property owner files a completed permit-by-rule notification for the repair or replacement of the structure and the following standards are met:

A. During project construction, disturbance of dune vegetation must be avoided and native vegetation must be retained on the lot to the maximum extent possible. Any areas of dune vegetation that are disturbed must be restored as quickly as possible. Dune vegetation includes, but is not limited to, American beach grass, rugosa rose, bayberry, beach pea, beach heather and pitch pine.

B. Sand may not be moved seaward of the frontal dune between April 1st and September 1st unless the owner has obtained written approval from the Department of Inland Fisheries and Wildlife.

C. The replacement of a seawall may not increase the height, length or thickness of the seawall beyond that which legally existed within the 24 months prior to the submission of the permit-by-rule notification. The replaced seawall may not be significantly different in construction from the one that previously existed.

#### § 480-X. Alterations of freshwater wetlands<sup>10</sup>

An application for a permit to undertake activities altering freshwater wetlands must be processed by the department using the review process described in this section.

1. **Application.** This section does not apply to activities otherwise qualifying for reduced review procedures, such as permits by rule or general permits; activities exempt from review under another section of this article; or activities involving protected natural resources other than freshwater wetlands, such as great ponds, coastal wetlands and rivers, streams or brooks.

2. **Three-tiered review process; tiers defined.** Except as provided in subsection 1, an application for a permit to undertake activities altering freshwater wetlands must be reviewed in accordance with the following.

<sup>10</sup>This section as originally enacted, and other provisions enacted by Laws 1995, ch. 460, are affected by an application provision which reads:

"This Act:

1. Does not apply to an activity that occurred prior to the effective date of this Act and for which a permit was required under the Maine Revised Statutes, Title 38, chapter 3, subchapter I, article 5-A prior to the effective date of this Act;

2. Does not apply to an activity for which a permit was not required under the Maine Revised Statutes, Title 38, chapter 3, subchapter I, article 5-A prior to the effective date of this Act, but is required if the activity began prior to the effective date of this Act; and

3. With the exception of those sections of this Act that amend the Maine Revised Statutes, Title 38, section 480-Q, subsection 6 and enact Title 38, section 480-Q, subsection 17, does not apply to an activity performed or caused to be performed on or after the effective date of this Act if the person performing the activity, or causing the activity to be performed, was in possession of applicable federal, state or local licenses prior to the effective date of this Act."

Laws 1995, ch. 460, §12 (effective September 29, 1995).

The Department is also required to monitor the effectiveness of the regulatory program established by 38 M.R.S.A. § 480-X and report back to the Legislature. See Laws 1995, § 10.

A. A Tier 1 review process applies to any activity that involves a freshwater wetland alteration up to 15,000 square feet and does not involve the alteration of freshwater wetlands listed in subsection 4.

B. A Tier 2 review process applies to any activity that involves a freshwater wetland alteration of 15,000 square feet up to one acre and does not involve the alteration of freshwater wetlands listed in subsection 4 or 5.

C. A Tier 3 review process applies to any activity that involves a freshwater wetland alteration of one acre or more or an alteration of a freshwater wetland listed in subsection 4 or 5.

If the project as a whole requires Tier 2 or Tier 3 review, then any activity that is part of the overall project and involves a regulated freshwater wetland alteration also requires the same higher level of review, unless otherwise authorized by the department.

In determining the amount of freshwater wetland to be altered, all components of a project, including all phases of a multiphased project, are treated together as constituting one single and complete project. Activity authorized or legally conducted prior to the effective date of this section is not included.

The standards of section 480-D do not apply to projects that qualify for Tier 1 review, except that habitat standards under section 480-D, subsection 3 and water quality standards under section 480-D, subsection 5 apply to those projects. Projects that meet the eligibility requirements for Tier 1 review and that satisfy the permitting requirements set forth in subsection 3 and 6, as applicable, are presumed not to have significant environmental impact.

**3. General requirements.** A person undertaking an activity for which a permit is processed pursuant to this section must satisfy the requirements of this subsection.

A. An applicant for Tier 1, Tier 2 or Tier 3 review shall meet the following requirements.

(1) Alteration of freshwater wetland areas on the property must be avoided to the extent feasible considering cost, existing technology and logistics based on the overall purpose of the project.

(2) The area of the freshwater wetland to be altered must be limited to the minimum amount necessary to complete the project.

B. Deleted.

C. An applicant for Tier 1 review shall meet the following requirements.

\* (1) Erosion control measures must be used to prevent sedimentation of protected natural resources. A 25-foot buffer strip must be maintained between the activity and any river, stream or brook.

(2) The activity must comply with applicable water quality standards pursuant to section 480-D, subsection 5.

D. An applicant for Tier 2 or Tier 3 review shall comply with the standards contained in section 480-D.

**4. Projects not eligible for Tier 1 or Tier 2 review.** The following activities are not eligible for Tier 1 or Tier 2 review unless the department determines that the activity will not negatively affect the freshwater wetlands and other protected natural resources present:

\* A. Activities located within 250 feet of:

(1) A coastal wetland; or

(2) The normal high-water line, and within the same watershed, of any lake or pond classified as GPA under section 465-A;

B. Activities occurring in freshwater wetlands, other than artificial ponds or impoundments, containing under normal circumstances at least 20,000 square feet of aquatic vegetation, emergent marsh vegetation or open water;

C. Activities occurring in freshwater wetlands that are inundated with floodwater during a 100-year flood event based on flood insurance maps produced by the Federal Emergency Management Agency or other site-specific information;

D. Activities occurring in freshwater wetlands containing significant wildlife habitat that has been mapped, identified or defined, as required pursuant to section 480-B, subsection 10, at the time of the filing by the applicant;

E. Activities occurring in peatlands dominated by shrubs, sedges and sphagnum moss, except that applications proposing work in previously mined peatlands may be considered by the department for Tier 1 or Tier 2 review, as applicable; or

F. Activities occurring within 25 feet of a river, stream or brook.

The department shall inform the applicant in writing within the review period specified in subsection 6 or 7 if the proposed project does not qualify for Tier 1 or Tier 2 review processing and shall explain permitting options if the applicant wishes to pursue the project. The department is responsible for providing information necessary to establish whether the types of wetlands described in paragraphs D and E will be affected by the proposed activity. Unless the applicant knowingly or willfully provided incomplete or false information to the department, if the department does not notify the applicant that the proposed project does not qualify for Tier 1 or Tier 2 review, the project is deemed to be qualified for Tier 1 or Tier 2 review, as applicable.

**5. Additional projects not eligible for Tier 2 review.** An activity in freshwater wetlands containing a natural community that is imperiled (S2) or critically imperiled (S1), as defined by the Natural Areas Program pursuant to Title 12, section 544 is not eligible for Tier 2 review unless the department determines that the activity will not negatively affect the freshwater wetlands and other protected natural resources present.

**6. Application process for Tier 1 review activities.** Applications for Tier 1 review are governed by this subsection.

A. The application must be sent by certified mail or hand-delivered to the department. The application must include:

(1) The application fee;

(2) The project location on a United States Geological Survey map;

(3) A description of the project, including a drawing showing the area of freshwater wetland to be filled or otherwise altered and areas of any marsh or open water within the freshwater wetland; and

(4) A signed statement averring that all of the requirements of subsection 3 will be met, that the activity will not occur in a wetland area described in subsection 4 and that a copy of the application has been submitted by the applicant for public display to the municipal office of the municipality in which the project will be located.

B. Work may not occur until 45 days after the department receives a complete application, unless written approval is issued sooner by the department. The department shall notify the applicant in writing no later than 45 days after the department receives a complete

application if the applicable requirements of this section have not been met or if the review period may be extended pursuant to section 344-B, subsection 4. If the department has not notified the applicant within the 45-day review period, a permit is deemed to be granted.

C. Fees for Tier 1 review may not exceed the following:

- (1) For projects up to 5,000 square feet, \$35;
- (2) For projects from 5,000 square feet up to 10,000 square feet, \$75; and
- (3) For projects from 10,000 square feet up to 15,000 square feet, \$150.

**7. Application process for Tier 2 review.** Applications for Tier 2 review are governed by this subsection.

A. An application form must be submitted, with the application fee, to the department and include the following information:

- (1) Documentation that public notice has been provided of the proposed project in accordance with department rules;
- (2) A United States Geological Survey map showing the project location;
- (3) Written certification by a knowledgeable professional experienced in wetland science that the project will not alter, or cause to be altered, a wetland described in subsection 4 or 5;
- (4) A top view drawing of the entire project, including existing and proposed fill, excavation, roads and structures; cross-sectional drawings of any fill or excavated areas; delineation of the wetland boundaries and calculated area of freshwater wetlands affected; description of existing vegetation on the project site; identification of any surface water bodies within 100 feet of the proposed alteration; and a drawing of the 25-foot buffer strip between the project and any river, stream or brook;
- (5) A soil erosion and sedimentation control plan;
- (6) For work in previously mined peatlands, information on the past mining activity, including the approximate dates of the mining activity, the area and depth to which peat has been excavated from the site, any restoration work on the site and the current condition of the site;
- (7) A statement describing why the project can not be located completely in upland areas and any alternatives that exist for the project that would either avoid or minimize the amount of proposed freshwater wetland alteration;
- (8) A plan for compensating for lost functions and values of the freshwater wetland when required by, and in accordance with, rules adopted by the department;
- (9) Any other information determined by the department to be necessary to meet the requirements of section 480-D and rules adopted by the department.

B. Work may not occur until 60 days after the department has received a complete application for processing, unless written approval is issued sooner by the department. The department shall notify the applicant in writing within 60 days of the department's receipt of a complete application whether the applicable requirements of this section have been met or if the review period may be extended pursuant to section 344-B, subsection 4. If the department has not notified the applicant within the 60-day review period, a permit is deemed to be granted.

C. Fees for Tier 2 review must be set in accordance with the department's fee schedule for freshwater wetland alterations under the natural resources protection laws.

**8. Application process for Tier 3 review.** Applications for Tier 3 review are governed by this subsection.

A. An application form must be submitted to the department that contains all the information required for Tier 2 review, in addition to any information determined by the department to be necessary to meet the requirements of section 480-D and rules adopted by the department.

B. Written approval from the department is required before work may begin.

C. Fees for Tier 3 review are set in accordance with the department's fee schedule for freshwater wetland alterations under the natural resources protection laws.

#### **§ 480-Y. Creation of agricultural irrigation ponds**

**1. General permit.** A general permit is required for the alteration of a freshwater, nontidal stream to construct an agricultural irrigation pond. If the provisions of this section are met, an individual permit is not required.

**2. Eligibility criteria.** The following eligibility criteria must be met.

A. The farm must have an irrigation management plan, referred to in this section as the "irrigation plan." The irrigation plan must identify the total number of irrigated acres on the farm or on a specified management unit, the amount of water needed, the potential sources of water for irrigating the field and the water management practices that will be used to ensure that the amount of water used for crop irrigation will be kept to a minimum. For the purposes of this subsection, "farm" has the same meaning as in Title 17, section 2805.

B. The department must have assessed the affected area as having no significant habitat for fish and wildlife. For the purposes of this section, "significant habitat" means the same as "significant wildlife habitat" in section 480-B, subsection 10; a fish spawning or nursery habitat; a habitat required for migration of fish species to or from a spawning or nursery habitat; or a habitat otherwise supporting a moderate to high population of salmonid species as determined by the Department of Inland Fisheries and Wildlife.

C. The pond may not be located in a wetland containing endangered or threatened plant species as determined pursuant to Title 12, section 544-B, subsection 3 or containing a natural community that is imperiled (S2) or critically imperiled (S1) as defined by the Natural Areas Program pursuant to Title 12, section 544.

D. A site assessment must be conducted by the department prior to the submission of an application. The department may defer a site assessment for a reasonable period when winter conditions prevent the department from properly evaluating the affected area.

E. The pond may not be located in a river, stream or brook if the department determines at the site assessment that there is a practicable alternative water supply that would be less damaging to the environment. For purposes of this paragraph, the term "practicable" means feasible considering cost, existing technology and logistics based on the overall purpose of the project.

**3. Standards.** The following standards must be met.

A. The pond, dams and outlets must be designed by a professional engineer to United States Natural Resources Conservation Service standards.

STATE OF MAINE

DEPARTMENT OF ENVIRONMENTAL PROTECTION

NATURAL RESOURCES PROTECTION ACT  
Wetlands and Waterbodies Protection Rules

Chapter 310



Bureau of Land and Water Quality  
DEPLW0297-D2009

Effective: June 30, 1990  
Revised: January 26, 2009

**Chapter 310: WETLANDS AND WATERBODIES PROTECTION**

1. **Preamble.** The Legislature has found that the State's freshwater wetlands, great ponds, coastal wetlands, rivers, streams, and brooks are resources of state significance, that these resources have great scenic beauty and unique characteristics, unsurpassed recreational, cultural, historical, and environmental value of present and future benefit to the citizens of the State, and that uses are causing the rapid degradation and, in some cases, the destruction of these critical resources, producing significant adverse economic and environmental impacts and threatening the health, safety and general welfare of the citizens of the State. The Legislature has also found that the cumulative effect of frequent minor alterations and occasional major alterations of these resources poses a substantial threat to the environment and economy of the State and its quality of life. The terms "wetland", "wetlands", "waterbody", and "waterbodies" are used interchangeably and collectively in this rule to refer to freshwater wetlands, great ponds, rivers, streams, brooks, coastal wetlands, and the areas adjacent to them.

In recognition of the important roles of wetlands in our natural environment, the Board of Environmental Protection supports the nation-wide goal of no net loss of wetland functions and values. In some cases, however, the level of mitigation necessary to achieve no net loss of wetland functions and values through construction of replacement wetlands will not be practicable, or will have an insignificant effect in protecting the State's wetlands resources. In other cases, the preservation of unprotected wetlands or adjacent uplands may achieve a greater level of protection to the environment than would be achieved by strict application of a no net loss standard through construction of replacement wetlands. Therefore, the Board recognizes that a loss in wetland functions and values may not be avoided in every instance.

The purpose of this rule is to ensure that the standards set forth in Section 480-D of the Natural Resources Protection Act, Section 464, Classification of Maine Waters and Section 465, Standards for Classification of Fresh Surface Waters are met by applicants proposing regulated activities in, on, over or adjacent to a wetland or water body.

**2. Applicability**

- A. This rule applies to the alteration of a coastal wetland, great pond, freshwater wetland, river, stream, or brook, as defined in 38 M.R.S.A. Sec. 480-B of the Natural Resources Protection Act (NRPA), that requires an individual permit or is eligible for Tier 2 or Tier 3 review. In addition, Sections 3 and 4 apply to the alteration of a freshwater wetland eligible for Tier 1 review.
- B. For Tier 2 and 3 applications, wetland boundaries must be delineated using the methods described in the "Corps of Engineers Wetlands Delineation Manual" (1987).
- C. This rule does not apply to an activity that is exempt from permit requirements under the NRPA, or that qualifies for a general permit or permit by rule.
- D. This rule does not apply to any application accepted as complete by the department prior to the effective date of this rule.

3. **Definitions.** The following terms, as used in this rule, have the following meanings, unless the context indicates otherwise.

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NOTE: The following terms are defined by statute: coastal sand dune systems; coastal wetlands; freshwater wetlands; great ponds; normal high water line; permanent structure; river, stream or brook; and significant wildlife habitat. A copy of these definitions will be included in a packet with this rule for informational purposes.

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- A. **Adjacent to a Protected Natural Resource.** The area within 75 feet, measured horizontally, of the normal high water line of a great pond, river, stream or brook or the upland edge of a coastal wetland or freshwater wetland.
- B. **Alteration.** Dredging; bulldozing; removing or displacing soil, sand, vegetation or other materials; draining or dewatering; filling; or any construction, repair or alteration of any permanent structure.
- On a case-by-case basis and as determined by the department, the term "alteration" may not include:
- (1) An activity disturbing very little soil such as installing a fence post or planting shrubs by hand;
  - (2) The addition of a minor feature to an existing structure such as a bench or hand rail; and
  - (3) The construction, repair or alteration of a small structure with minimal impact such as a nesting box, pasture fence, or staff gauge.
- C. **Aquatic Vegetation.** Plants that usually grow on or below the surface of the water for most of the growing season in most years.
- D. **Compensation.** Replacement of a lost or degraded wetland function with a function of equal or greater value.
- E. **Creation.** An activity bringing a wetland into existence at a site where it did not formerly occur for the purpose of compensation.
- F. **Critically Imperiled Natural Community (S1).** An assemblage of plants, animals and their common environment that is extremely rare in Maine or vulnerable to extirpation from the state due to some aspect of its biology. An example of an S1 community that occurs in freshwater wetlands is the Outwash Plain Pondshore community.
- G. **Emergent Marsh Vegetation.** Plants that: 1. are erect, rooted and herbaceous; 2. grow in saturated to permanently flooded areas; and 3. do not tolerate prolonged inundation of the entire plant. Examples of emergent marsh vegetation include cattails, burreed, tussock sedge, rice cut grass, pickerel weed, arrowhead and bulrush.
- H. **Enhancement.** An activity increasing the net value of a wetland.

- I. Fill.** a. (verb) To put into or upon, supply to, or allow to enter a wetland or water body any earth, rock, gravel, sand, silt, clay, peat or debris; b. (noun) material, other than structures, placed adjacent to a wetland or water body; or material placed in a wetland or water body with the result of a change in the bottom elevation or character or boundaries of the wetland or water body. This term also includes roads, paths and other projects consisting of uncontained material regardless of how long the material remains in the wetland or water body.
- J. Functions.** The roles wetlands serve which are of value to society or the environment including, but not limited to, flood water storage, flood water conveyance, ground water recharge and discharge, erosion control, wave attenuation, water quality protection, scenic and aesthetic use, food chain support, fisheries, wetland plant habitat, aquatic habitat and wildlife habitat.
- K. Health or Safety Project.** An activity undertaken to protect or improve public health and safety, or to lessen the risk of injury in a public area through the modification of existing or potentially hazardous conditions. Public health projects and safety projects include, but are not limited to, measures taken to provide or enhance a potable public water supply, to provide fire protection, to control flooding, to provide for safe disposal of solid waste and waste water, and to construct, upgrade, or repair public roads, bridges, airports, railroads and other transportation facilities.
- L. Imperiled Natural Community (S2).** An assemblage of plants, animals and their common environment that is rare in Maine or vulnerable to further decline. Examples of S2 communities that occur in freshwater wetlands are Atlantic White Cedar Swamp, Alpine Bog-Meadow, Circumneutral Fen, Maritime Slope Bog and Coastal Plain Pocket Swamp.
- M. Maintenance.** Activities required to assure continuation of a wetland or the accomplishment of project goals after a restoration or creation project has been technically completed, including, but not limited to, water level manipulations and control of non-native plant species.
- N. Mitigation.** Actions taken to off-set potential adverse environmental impact. Such actions include the following:
- (1) Avoiding an impact altogether by not taking a certain action or parts of an action;
  - (2) Minimizing an impact by limiting the magnitude or duration of an activity, or by controlling the timing of an activity;
  - (3) Rectifying an impact by repairing, rehabilitating, or restoring the affected environment;
  - (4) Reducing or eliminating an impact over time through preservation and maintenance operations during the life of the project; and
  - (5) Compensating for an impact by replacing affected resources or environments.
- O. Mitigation Banking.** Wetland restoration, enhancement, preservation or creation for the purpose of providing compensation credits in advance of future authorized impacts to similar resources.
- P. Peatland.** A freshwater wetland, typically called a bog or fen, dominated by ericaceous shrubs (heath family), sedges and sphagnum moss and usually having a saturated water regime.

- Q. Persistence.** The overall ability of a wetland to be self-sustaining, continue to exist, and to serve intended functions over an indefinite period of time, although its vegetation, soils, hydrologic characteristics and precise boundaries may change.
- R. Practicable.** Available and feasible considering cost, existing technology and logistics based on the overall purpose of the project .
- S. Preservation.** The maintenance of a wetland area or associated upland areas that contribute to the wetland's functions so that it remains in a natural or undeveloped condition. Preservation measures include, but are not limited to, conservation easements and land trusts.
- T. Restoration.** An activity returning a wetland from a disturbed or altered condition with lesser acreage or fewer functions to a previous condition with greater acreage or function.
- U. Utility Line.** A pipe, cable or wire, along with appurtenant facilities, used to transmit or transport a commodity, service or waste product including, but not limited to, water, oil, natural gas, electricity, communications and sewage. Appurtenant facilities include, but are not limited to, supporting structures such as poles, pump stations, storage tanks and cleared rights-of-way. Not included as part of a utility line are buildings, generating stations and transmission substations.
- V. [Repealed]**
- W. Water Dependent Use.** A use which cannot occur without access to surface water. Examples of uses which are water dependent include, but are not limited to, piers, boat ramps, marine railways, lobster pounds, marinas and peat mining. Examples of uses which are not water dependent include, but are not limited to, boat storage, residential dwellings, hotels, motels, restaurants, parking lots, retail facilities and offices.
- X. Wetland Value.** The importance of a wetland with respect to the individual or collective functions it provides.

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NOTE: A wetland may have different values for different functions. For example, a wetland may have a high value for wildlife habitat, but little value for flood storage.

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-  **4. Wetlands of Special Significance.** All coastal wetlands and great ponds are considered wetlands of special significance. In addition, certain freshwater wetlands are considered wetlands of special significance.
- A. Freshwater Wetlands of Special Significance.** A freshwater wetland of special significance has one or more of the following characteristics.
- (1) Critically imperiled or imperiled community. The freshwater wetland contains a natural community that is critically imperiled (S1) or imperiled (S2) as defined by the Natural Areas Program.

- (2) Significant wildlife habitat. The freshwater wetland contains significant wildlife habitat as defined by 38 M.R.S.A. § 480-B(10).
- \* (3) Location near coastal wetland. The freshwater wetland area is located within 250 feet of a coastal wetland.
- (4) Location near GPA great pond. The freshwater wetland area is located within 250 feet of the normal high water line, and within the same watershed, of any lake or pond classified as GPA under 38 M.R.S.A. § 465-A.
- (5) Aquatic vegetation, emergent marsh vegetation or open water. The freshwater wetland contains under normal circumstances at least 20,000 square feet of aquatic vegetation, emergent marsh vegetation or open water, unless the 20,000 or more square foot area is the result of an artificial ponds or impoundment.
- (6) Wetlands subject to flooding. The freshwater wetland area is inundated with floodwater during a 100-year flood event based on flood insurance maps produced by the Federal Emergency Management Agency or other site-specific information.
- (7) Peatlands. The freshwater wetland is or contains peatlands, except that the department may determine that a previously mined peatland, or portion thereof, is not a wetland of special significance.
- (8) River, stream or brook. The freshwater wetland area is located within 25 feet of a river, stream or brook.

\* B. **Permit Process.** Alterations of wetlands of special significance usually require an individual permit. However, some alterations of freshwater wetlands of special significance may be eligible for Tier 1 or 2 review if the department determines, at the applicant's request, that the activity will not negatively affect the freshwater wetlands or other protected natural resources present. In making this determination, the department considers such factors as the size of the alteration, functions of the impacted area, existing development or character of the area in and around the alteration site, elevation differences and hydrological connection to surface water or other protected natural resources, among other things.

C. **Seasonal Factors.** When determining the significance of a resource or impact from an activity, seasonal factors and events that temporarily reduce the numbers or visibility of plants or animals, or obscure the topography and characteristics of a wetland such as a period of high water, snow and ice cover, erosion event, or drought, are taken into account. Determinations may be deferred for an amount of time necessary to allow an assessment of the resource without such seasonal factors.

5. **General Standards.** The following standards apply to all projects as described in Section 2. \*

- A. **Avoidance.** The activity will be considered to result in an unreasonable impact if the activity will cause a loss in wetland area, functions, or values, and there is a practicable alternative to the activity that would be less damaging to the environment. The applicant shall provide an analysis of alternatives (see Section 9(A)) in order to demonstrate that a practicable alternative does not exist.

For an activity proposed in, on or over wetlands of special significance, a practicable alternative less damaging to the environment is considered to exist and the impact is unreasonable, unless the activity is described in paragraph (1), (2) or (3) below. An applicant proposing an activity described in paragraph (1), (2) or (3) below shall provide an analysis of alternatives (see Section 9(A)).

- (1) Certain types of projects. The activity is necessary for one or more of the purposes specified in subparagraphs (a) – (g).
- (a) Health and safety;
  - (b) Crossings by road, rail or utility lines;
  - (c) Water dependent uses;
  - (d) Expansion of a facility or construction of a related facility that cannot practicably be located elsewhere because of the relation to the existing facility, if the existing facility was constructed prior to September 1, 1996;
  - (e) Mineral excavation and appurtenant facilities;
  - (f) Walkways; or
  - (g) Restoration or enhancement of the functions and values of the wetlands of special significance.
- (2) Wetlands with aquatic vegetation, emergent marsh vegetation or open water (Section 4(A)(5) wetlands of special significance). The activity is for a purpose other than specified in Section 5(A)(1)(a) – (g), is located in, on or over a wetlands of special significance having those characteristics described in Section 4(A)(5); and
- (a) The activity is located at least 250 feet from aquatic vegetation, emergent marsh vegetation, or open water as described in Section 4(A)(5); and
  - (b) The activity does not unreasonably adversely affect the functions and values of the aquatic vegetation, emergent marsh vegetation, or open water, as described in Section 4(A)(5), or the functions and values of the freshwater wetlands that are enhanced or served by the aquatic vegetation, emergent marsh vegetation or open water.

- (3) Certain activity on a pier, wharf, dock or other structure constructed before the effective date of this chapter. An activity is located on a pier, wharf, dock or other structure over a coastal wetland and;
- (a) The commissioner has reviewed and approved an alternative set of standards pursuant to 38 M.R.S.A. § 438-A(2) that would potentially allow a non water-dependent use; and
- (b) The pier, wharf, dock or other structure was constructed prior to June 30, 1990 and is still in existence on the date of the application.

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NOTE: When making decisions pursuant to 38 M.R.S.A. §438-A(2) regarding alternative shoreland zoning standards, the department considers requests to allow non-water-dependent uses narrowly, consistent with coastal policies reflected in the Mandatory Shoreland Zoning Act (MSZA) and adopted guidelines. The department considers potential effects on existing, traditional working waterfront uses.

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- B. Minimal Alteration.** The amount of wetland to be altered must be kept to the minimum amount necessary.
- C. Compensation.** Compensation is the 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. Every case where compensation may be applied is unique due to differences in wetland type and geographic location. For this reason, the method, location and amount of compensation work necessary is variable.

In some instances, a specific impact may require compensation on-site or within very close proximity to the affected wetland. For example, altering a wetland that is providing stormwater retention which reduces the risk of flooding downstream will likely require compensation work to ensure no net increase in flooding potential. In other cases, it may not be necessary to compensate on-site in order to off-set project impacts. Where wetland priorities have been established at a local, regional or state level, these priorities should be considered in devising a compensation plan in the area to allow the applicant to look beyond on-site and in-kind compensation possibilities.

- (1) When required. Compensation is required when the department determines that a wetland alteration will cause a wetland function or functions to be lost or degraded as identified by a functional assessment (see paragraph 2 below) or by the department's evaluation of the project. If a functional assessment is not required under this rule, no compensation will be required unless the department identifies wetland functions that will be lost or degraded.
- (2) Functional assessment. Resource functions that will be lost or degraded are identified by the department based upon a functional assessment done by the applicant and by the department's evaluation of the project. The functional assessment must be conducted in accordance with Section 9(B)(3) for all activities except for those listed in Section 5(C)(6) below.
- (3) Location of compensation projects. The compensation must take place in a location:

- (a) On or close to a project site as necessary to off-set direct impacts to an aquatic ecosystem;
  - (b) Otherwise, compensation may occur in an off-site location where it will satisfy wetland priority needs as established at the local, regional or state level to achieve an equal or higher net benefit for wetland systems, if approved by the department.
- (4) Types of compensation. Compensation may occur in the form of:
- (a) Restoration of previously degraded wetlands;
  - (b) Enhancement of existing wetlands;
  - (c) Preservation of existing wetlands or adjacent uplands where the site to be preserved provides significant wetland functions and might otherwise be degraded by unregulated activity; or
  - (d) Creation of wetland from upland.

More than one method of compensation may be allowed on a single project. Preference is generally given to restoration projects that will off-set lost functions within, or in close proximity to, the affected wetland. However, other types of compensation may be allowed by the department if the result is an equal or higher overall net benefit for wetland systems.

- (5) Compensation amounts. The amount of compensation required to replace lost functions depends on a number of factors including: the size of the alteration activity; the functions of the wetland to be altered; the type of compensation to be used; and the characteristics of the compensation site. Compensation shall be performed to meet the following ratios at a minimum, unless the department finds that a different ratio is appropriate to directly off-set wetland functions to achieve an equal or higher net benefit for wetlands:
- (a) 1:1 for restoration, enhancement or creation to compensate for impacts in wetlands not of special significance;
  - (b) 2:1 for restoration, enhancement or creation to compensate for impacts in wetlands of special significance;
  - (c) 8:1 for preservation, including adjacent upland areas, to compensate for impacts in all wetlands.
- (6) Exceptions. Neither a functional assessment nor compensation is required for the following single, complete projects:
- (a) Freshwater wetlands
    - (i) Alterations of less than 500 square feet in a freshwater wetland of special significance provided that the department determines that there will be only a