



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

DEPARTMENT ORDER

IN THE MATTER OF

CLARY LAKE ASSOCIATION)	REGULATION OF WATER LEVELS
Jefferson and Whitefield, Lincoln County)	AND MINIMUM FLOWS
CLARY LAKE DAM)	
WATER LEVEL ORDER)	TRANSFER
L-22585-36-F-T (approval))	FINDINGS OF FACT AND ORDER

Pursuant to the provisions of 38 M.R.S. §§ 817-840 and Chapter 2 of Department Rules Concerning the Processing of Applications (06-096 C.M.R. ch. 2, last amended June 9, 2018), the Department of Environmental Protection has considered the application of CLARY LAKE ASSOCIATION (applicant) with the supportive data and other related materials on file and FINDS THE FOLLOWING FACTS:

1. The Department has processed several applications related to establishing a water level order for Clary Lake, located in the towns of Jefferson and Whitefield. In 2006, the Department accepted a petition to set water levels and/or minimum flows (#L-22585-36-A-N); this application was subsequently withdrawn as the petitioners tried to resolve their issues privately. When that attempt failed, the petitioners renewed their request that the Department set a water levels and/or minimum flows for Clary Lake, resulting in Department Order #L-22585-36-B-N (Clary Lake Water Order). In 2013 the owner of the Clary Lake dam submitted a petition for release from dam ownership (#L-22585-36-C-N); this petition was rejected by the Department due to the applicant's failure to provide sufficient public notice of its intent to file the petition, in accordance with Department rules concerning the processing of applications. 06-096 Ch. 2. A second petition for release from dam ownership (#L-22585-36-D-N) submitted in September of that year was returned to the petitioner pursuant to a finding that he lacked title, right or interest in the Clary Lake dam. In July 2018, the Clary Lake Association filed an application (#L-22585-36-E-T) to transfer the Clary Lake Water Level Order pending the conclusion of a bankruptcy hearing; the application was ultimately returned, pursuant to a finding that the association lacked title, right or interest in the dam property as a result of delays in the bankruptcy proceeding.
2. The applicant is applying to transfer Department Order #L-22585-36-B-N, currently held by Pleasant Pond Mill, LLC.
3. The applicant submitted the following information in support of this transfer request:
 - A. A transfer application dated October 22, 2018 and signed by George Fergusson on behalf of the Clary Lake Association was submitted to the Department.

Pursuant to section 21 (C)(4) of the Department's Chapter 2 Rules: " If the proposed transferee demonstrates that the original licensee no longer has sufficient title, right, or interest in the property subject to the license, the Department may allow the transfer application to be processed without the signature of the original licensee".

Pleasant Pond Mill LLC, the current licensee, is in bankruptcy. The applicant submitted a signed deed indicating the Clary Lake Association is now the owner of the Clary Lake dam.

The applicant submitted a Certificate of Good Standing, issued by the Secretary of State.

B. Financial Capacity: The Department finds that the applicant submitted a statement indicating that yearly operations costs for the Clary Lake Dam are approximately \$500. The applicant further stated that the Clary Lake Association collects yearly membership dues in excess of \$500.00.

C. Technical Ability: The Department finds that the applicant submitted a letter detailing routine operations of the Clary Lake Dam, specifically adding or removing stoplogs to manage the water level. The applicant has also retained the services of True North Surveying Services of Newcastle to calibrate a lake level gauge, to be installed pursuant to Special Condition #6, of Department Order #L-22585-36-B-N, which will be necessary to adhere to the existing Water Level Order.

To satisfy the requirements of Special Condition #11, of Department Order #L-22585-36-B-N, the applicant submitted evidence of Public Notice, including certified mailing receipts to abutters and property owners around Clary Lake and confirmation of posting from the Lincoln County News. The applicant also submitted a letter indicating the Clary Lake Association's intent to comply with the terms and conditions set in Department Order #L-22585-36-B-N.

BASED on the above findings of fact, the Department CONCLUDES that the Clary Lake Association has provided adequate evidence of financial capacity and technical ability to comply with all conditions of Department Order #L-22585-36-B-N and to satisfy all applicable statutory and regulatory criteria.

THEREFORE, the Department APPROVES the above noted application of CLARY LAKE ASSOCIATION, to transfer Department Order #L-22585-36-B-N, SUBJECT TO THE FOLLOWING CONDITIONS and all applicable standards:

1. The Standard Conditions of Approval, a copy attached.
2. Severability. The invalidity or unenforceability of any provision, or part thereof, of this License shall not affect the remainder of the provision or any other provisions. This License shall be construed and enforced in all respects as if such invalid or unenforceable provision or part thereof had been omitted.

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3. All other Findings of Fact, Conclusions and Conditions remain as approved in Department Order #L-22585-36-B-N, and subsequent Orders, and are incorporated herein.

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 6TH DAY OF DECEMBER, 2018.

DEPARTMENT OF ENVIRONMENTAL PROTECTION

BY: Melanie Loyzim
For: Melanie Loyzim, Acting Commissioner



PLEASE NOTE THE ATTACHED SHEET FOR GUIDANCE ON APPEAL PROCEDURES.

ES/L22585FT/ATS#83699



DEP INFORMATION SHEET

Appealing a Department Licensing Decision

Dated: November 2018

Contact: (207) 287-2452

SUMMARY

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

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

This information sheet, in conjunction with a review of the statutory and regulatory provisions referred to herein, can help a person to understand his or her rights and obligations in filing an administrative or judicial appeal.

I. ADMINISTRATIVE APPEALS TO THE BOARD

LEGAL REFERENCES

The laws concerning the DEP's *Organization and Powers*, 38 M.R.S. §§ 341-D(4) & 346; the *Maine Administrative Procedure Act*, 5 M.R.S. § 11001; and the DEP's *Rules Concerning the Processing of Applications and Other Administrative Matters* ("Chapter 2"), 06-096 C.M.R. ch. 2.

DEADLINE TO SUBMIT AN APPEAL TO THE BOARD

The Board must receive a written appeal within 30 days of the date on which the Commissioner's decision was filed with the Board. Appeals filed more than 30 calendar days after the date on which the Commissioner's decision was filed with the Board will be dismissed unless notice of the Commissioner's license decision was required to be given to the person filing an appeal (appellant) and the notice was not given as required.

HOW TO SUBMIT AN APPEAL TO THE BOARD

Signed original appeal documents must be sent to: Chair, Board of Environmental Protection, 17 State House Station, Augusta, ME 04333-0017. An appeal may be submitted by fax or e-mail if it contains a scanned original signature. It is recommended that a faxed or e-mailed appeal be followed by the submittal of mailed original paper documents. The complete appeal, including any attachments, must be received at DEP's offices in Augusta on or before 5:00 PM on the due date; materials received after 5:00 pm are not considered received until the following day. The risk of material not being received in a timely manner is on the sender, regardless of the method used. The appellant must also send a copy of the appeal documents to the Commissioner of the DEP; the applicant (if the appellant is not the applicant in the license proceeding at issue); and if a hearing was held on the application, any intervenor in that hearing process. All of the information listed in the next section of this information sheet must be submitted at the time the appeal is filed.

INFORMATION APPEAL PAPERWORK MUST CONTAIN

Appeal materials must contain the following information at the time the appeal is submitted:

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

OTHER CONSIDERATIONS IN APPEALING A DECISION TO THE BOARD

1. *Be familiar with all relevant material in the DEP record.* A license application file is public information, subject to any applicable statutory exceptions, and is made easily accessible by the DEP. Upon request, the DEP will make application materials available during normal working hours, provide space to review the file, and provide an opportunity for photocopying materials. There is a charge for copies or copying services.
2. *Be familiar with the regulations and laws under which the application was processed, and the procedural rules governing your appeal.* DEP staff will provide this information on request and answer general questions regarding the appeal process.
3. *The filing of an appeal does not operate as a stay to any decision.* If a license has been granted and it has been appealed, the license normally remains in effect pending the processing of the appeal. Unless a stay of the decision is requested and granted, a license holder may proceed with a project pending the outcome of an appeal, but the license holder runs the risk of the decision being reversed or modified as a result of the appeal.

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

The Board will formally acknowledge receipt of an appeal, and will provide the name of the DEP project manager assigned to the specific appeal. The notice of appeal, any materials accepted by the Board Chair as supplementary evidence, any materials submitted in response to the appeal, and relevant excerpts from the DEP's application review file will be sent to Board members with a recommended decision from DEP staff. The appellant, the license holder if different from the appellant, and any interested persons are notified in advance of the date set for Board consideration of an appeal or request for public hearing. The appellant and the license holder will have an opportunity to address the Board at the Board meeting. With or without holding a public hearing, the Board may affirm, amend, or reverse a Commissioner decision or remand the matter to the Commissioner for further proceedings. The Board will notify the appellant, the license holder, and interested persons of its decision.

II. JUDICIAL APPEALS

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

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

ADDITIONAL INFORMATION

If you have questions or need additional information on the appeal process, for administrative appeals contact the Board's Executive Analyst at (207) 287-2452, or for judicial appeals contact the court clerk's office in which your appeal will be filed.

Note: The DEP provides this INFORMATION SHEET for general guidance only; it is not intended for use as a legal reference. Maine law governs an appellant's rights.
