



STATE OF MAINE
DEPARTMENT OF ENVIRONMENTAL PROTECTION



PAUL R. LEPAGE
GOVERNOR

PATRICIA W. AHO
COMMISSIONER

May 2014

City of Portland
C/o Kathy Alves
389 Congress Street
Portland, ME 04101

RE: Site Location of Development Act and Natural Resources Protection Act Applications
Portland, DEP #L-07866-26-T-M/L-07866-4D-U-N

Dear Ms. Alves:

Please find enclosed a signed copy of your Department of Environmental Protection land use permit. You will note that the permit includes a description of your project, findings of fact that relate to the approval criteria the Department used in evaluating your project, and conditions that are based on those findings and the particulars of your project. Please take several moments to read your permit carefully, paying particular attention to the conditions of the approval. The Department reviews every application thoroughly and strives to formulate reasonable conditions of approval within the context of the Department's environmental laws. You will also find attached some materials that describe the Department's appeal procedures for your information.

If you have any questions about the permit or thoughts on how the Department processed this application please get in touch with me directly. I can be reached at 207- 822-6300 or at robert.green@maine.gov.

Sincerely,

Robert L. Green, Jr., Project Manager
Division of Land Resource Regulation
Bureau of Land and Water Quality

pc: File



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

DEPARTMENT ORDER

IN THE MATTER OF

CITY OF PORTLAND) SITE LOCATION OF DEVELOPMENT ACT
Portland, Cumberland County) NATURAL RESOURCES PROTECTION ACT
SEAWALL REHABILITATION AND NEW) COASTAL WETLAND ALTERATION
MOORING GANGWAY) WATER QUALITY CERTIFICATION
L-07866-26-T-M (approval)) MINOR REVISION
L-07866-4D-U-N (approval)) FINDINGS OF FACT AND ORDER

Pursuant to the provisions of 38 M.R.S.A. Sections 481 *et seq.*, Sections 480-A *et seq.*, and Section 401 of the Federal Water Pollution Control Act, the Department of Environmental Protection has considered the application of the CITY OF PORTLAND with the supportive data, agency review comments, and other related materials on file and FINDS THE FOLLOWING FACTS:

1. PROJECT DESCRIPTION:

A. History of Project: In Board Order #L-07866-26-A-X, dated June 9, 1982, the Board approved the development of a ship repair and overhaul facility for Bath Iron Works (BIW) pursuant to the Site Location of Development Act (Site Law). The facility is located along Commercial Street in Portland. The Department subsequently issued several minor revisions and new permits for the project site under both the Site Law and the Natural Resources Protection Act (NRPA). On December 20, 2001, the Department transferred all Department Orders for the property to the City of Portland, the current owner.

In Department Order #L-07866-26-E-N/L-07866-4E-F-N, dated August 20, 2004, the Department approved the development of Phase 1 of the Ocean Gateway project. The Ocean Gateway project included improvements on the former BIW site and improvements to the Casco Bay Island Transit District facility located on the Maine State Pier. In Department Order #L-07866-26-G-M/L-07866-4E-H-M, dated December 21, 2004, the Department approved the after-the-fact construction of pile dolphins and the replacement of a ramp and floats. Department Order #L-07866-26-I-M/L-07866-4E-J-M, dated December 21, 2004, approved the removal of 1.06 acres of land from the jurisdiction of the Site Law, the construction of Gate 4 of the Casco Bay Lines Transit District, and the relocation of the receiving station building so that 500 square feet of the building would be over the coastal wetland to avoid a sewer main. In Department Order #L-07866-26-K-M/L-07866-4E-L-M, dated September 14, 2009, the Department approved the construction of a 100-ton mooring bollard on an extension to the Maine State Pier. In Department Order #L-07866-26-O-M/L-07866-4E-P-M, dated March 2, 2011, the Department approved improvements to the Pier A gangway and Berth 2 area to accommodate larger cruise ships and other vessels.

B. Summary: The applicant proposes to make site improvements at three locations in the vicinity of the Ocean Gateway Terminal. These improvements include buttressing the failing timber seawall around the Moon Tide Park with riprap, repairing the dry stack stone seawall and replacing the timber seawall at the Ocean Gateway Terminal parking lot, and installing a pedestrian gangway off the end of Pier 2. The project is shown on a set of plans, the first of which is entitled "Ocean Gateway Seawall Repair and Mooring Gangway Access," prepared by

TEC Associates, and dated November 21, 2013. The project site is located on the east end of Commercial Street and Thames Street in the City of Portland.

The Moon Tide Park extends into the coastal wetland and is lined on three sides with timber piles driven end-to-end. Existing riprap of various heights and widths lies seaward of the timber piles along the north and east sides of the park. The seawall along the south side of the park is a double layer of timber piles with an approximately six-foot gap between the two lines of timber piles. No riprap has been placed along this side of the seawall. Over time, the riprap has been pulled away from the timber piles causing the piles to lean outward and the erosion of fine-grained material from behind the seawall. The applicant proposes to stabilize the seawall by placing riprap along the entire perimeter to a height equal to the existing ground level behind the timber seawall. New riprap placed along the south side of the park will also serve to stabilize the two timber pile walls, on which a concrete walkway is proposed to connect the Terminal and Receiving Building. The new riprap along the north and east sides of the park will extend approximately five to eight feet further seaward than the existing riprap slope, and the new riprap placed along the south side of the park will also extend approximately five to eight feet seaward of the existing timber seawall. The proposed project will result in the filling of approximately 3,550 square feet of coastal wetland.

The Ocean Gateway parking lot seawall runs from the Maine State Pier to the Ocean Gateway Pier and consists of two sections, a timber wall and a dry stacked stone wall. The upland area behind the entire seawall is paved and a guardrail that runs nearly parallel to the seawall is located between 10 to 16 feet landward of it. The timber wall extends approximately 214 feet southward from the Ocean Gateway Pier. Deterioration of this portion of the wall has resulted in the erosion of fine-grained material and the subsidence of the upland behind the wall. The applicant proposes to cut existing timber piles at the mud line and cast in place a new concrete footing, on which will be set pre-cast and interlocking modular concrete blocks. The concrete footing will extend approximately two feet seaward of the existing timber wall and will fill approximately 428 square feet of coastal wetland. The new seawall will be raised to elevation 16.5 feet, matching the height of the parking lot. A filter blanket and sand backfill with tie-back rods will stabilize the uplands behind the new seawall, and new asphalt will be laid over the disturbed area.

The stacked stone seawall extends an additional 177 feet southward from the timber seawall. Gaps in the stone wall have resulted in erosion of fine-grained material and the subsidence of the upland behind the wall. The applicant proposes to replace the top two courses of stone with a concrete cap and raise the seawall to elevation 16.5 feet, matching the height of the parking lot. A filter blanket of crushed stone and geotextile fabric will be placed behind the seawall to allow for groundwater to weep through the wall, while keeping fine-grained material in place. The upland area behind the seawall will be backfilled with sand, and new asphalt will be laid over the disturbed area.

The pedestrian gangway is proposed to be five feet wide and approximately 220 feet long. It will extend from the eastern end of Pier 2 to the existing mooring platform. The gangway will be comprised of three segments on two bents. Each bent includes four 12-inch diameter steel piles. Installation of the gangway will facilitate securing larger vessels to the mooring platform, as the current means of access is only by boat. The project is expected to result in filling eight square feet of coastal wetland. Due to the water depth at this location, shading impacts are not anticipated.

C. Current Use of the Site: The Ocean Gateway complex includes two berths, Pier 2 Berth 1 and Pier 2 Berth 2. Each consists of a system of gangways, catwalks, mooring dolphins, and breasting dolphins. The project site is located seaward of catwalks 1 through 4 of Pier 2 Berth 2.

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

In accordance with Chapter 315, Assessing and Mitigating Impacts to Scenic and Aesthetic Uses, the applicant submitted a copy of the Department's Visual Evaluation Field Survey Checklist as Appendix A to the application along with a description of the property and the proposed project. The applicant also submitted several photographs of the proposed project site, including an aerial photograph of the project site. Department staff visited the project site on May 15, 2013.

The proposed project is located in the Fore River at the entrance to Portland Harbor, which is a scenic resource visited by the general public, in part, for the use, observation, enjoyment and appreciation of its natural and cultural visual qualities. There will be no permanent changes to the scenic and aesthetic values of the river. Because of the amount of developed area around the Ocean Gateway complex, the proposed project will not significantly alter the shoreline view.

The proposed project was evaluated using the Department's Visual Impact Assessment Matrix and was found to have an acceptable potential visual impact rating. Based on the information submitted in the application, the visual impact rating, and the site visit, the Department determined that the location and scale of the proposed activity is compatible with the existing visual quality and landscape characteristics found within the viewshed of the scenic resource in the project area.

The Department of Marine Resources (DMR) stated that the proposed project should not cause any significant adverse impact to navigation or recreation.

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

3. SOIL EROSION:

To protect the water quality of the Fore River during and after construction, the applicant proposes to follow erosion control measures recommended in the Maine Erosion and Sediment Control Best Management Practices manual and submitted a detailed erosion control plan as Attachment 8 in the application.

The Department finds that the activity will not cause unreasonable erosion of soil or sediment nor unreasonably inhibit the natural transfer of soil from the terrestrial to the marine or freshwater environment.

4. HABITAT CONSIDERATIONS:

Department staff reviewed a Geographic Information System (GIS) database that contains site-specific information on existing natural resources provided by both the Department of Marine Resources (DMR) and the Department of Inland Fisheries and Wildlife (MDIFW). The GIS database indicates that there are no Significant Wildlife Habitats, as defined in the NRPA, located at the project site or within approximately 2,000 feet of the project site.

The DMR stated that the proposed project should not cause any significant adverse impact to marine resources.

The Department finds that the activity will not unreasonably harm any significant wildlife habitat, freshwater wetland plant habitat, threatened or endangered plant habitat, aquatic or adjacent upland habitat, travel corridor, freshwater, estuarine or marine fisheries or other aquatic life.

5. WATER QUALITY CONSIDERATIONS:

To protect the water quality of the Fore River during and after construction, the applicant submitted a detailed erosion control plan as discussed in Finding 3.

The Department does not anticipate that the proposed project will violate any state water quality law, including those governing the classification of the State's waters.

6. WETLANDS AND WATERBODIES PROTECTION RULES:

In Department Order #L-07866-26-E-N/L-07866-4E-F-N, the Department approved the filling of 210 square feet of coastal wetland from new pile-supported piers and to alter 29,000 square feet of coastal wetland as a result of shading impacts from over-water structures associated with the Ocean Gateway complex.

The applicant proposes to directly alter 4,000 square feet of coastal wetland to construct the proposed project, and to indirectly alter 1,100 square feet of coastal wetland as a result of shading impacts from the gangway. The cumulative wetland impacts following completion of the proposed project will include approximately 4,210 square feet of fill and approximately 30,100 square feet of indirect impact as a result of shading impacts from over-water structures.

The Wetland Protection Rules interpret and elaborate on the NRPA criteria for obtaining a permit. The rules guide the Department in its determination of whether a project's impacts would be unreasonable. A proposed project would generally be found to be unreasonable if it would cause a loss in wetland area, functions and values and there is a practicable alternative to the project that would be less damaging to the environment. Each application for a NRPA permit that involves a coastal wetland alteration must provide an analysis of alternatives in order to demonstrate that a practicable alternative does not exist.

A. Avoidance. No activity may be permitted if there is a practicable alternative to the project that would be less damaging to the environment. The applicant submitted an alternatives analysis for the proposed project completed by TEC Associates and dated November 15, 2013. The purpose of the proposed project is to rehabilitate deteriorating

existing seawalls along Moon Tide Park and the terminal parking area, and to install a gangway to the mooring platform off the end of Pier 2 to facilitate securing larger vessels, as the current means of access is only by boat.

The no-action alternative was considered for each portion of the proposed project and was dismissed because failure to repair the timber seawall around Moon Tide Park and the seawall along the parking area would ultimately lead to the failure of these structures. In addition, not installing the gangway would continue to impair the safety of personnel during berthing operations. The applicant considered replacing the timber seawall around Moon Tide Park with a new timber pile wall, but this alternative was rejected because of replacement costs and because the timbers would need to be replaced again over time.

The applicant considered replacing the timber seawall around the parking area with a new timber pile wall. This alternative was rejected because of replacement costs and because the timbers would need to be replaced again over time. The applicant stated that this portion of the site is subject to severe wave action during storm events, and that use of pre-cast and interlocking modular concrete blocks will better withstand wave action. All new coastal wetland fill will occur within two to eight feet of existing seawalls or from the placement of new piles. Because of the location of the existing structures, some impact to coastal wetland is unavoidable.

B. Minimal Alteration. The amount of coastal wetland to be altered must be kept to the minimum amount necessary for meeting the overall purpose of the project. The applicant proposes minimal encroachment into the coastal wetland to stabilize existing structures. The applicant has minimized the amount of coastal wetland fill by placing the riprap at a 1H:1V slope. The width of the proposed gangway is the narrowest possible and utilizes the fewest amount of piles possible, while still providing safe movement of personnel out to the mooring platform.

C. Compensation. In accordance with Chapter 310, compensation may be required to achieve the goal of no net loss of wetland functions and values. Based on the Site Condition Report, the applicant has demonstrated that the proposed project will not permanently alter the characteristics of the project area. Based on comments from DMR, the Department finds that the impacts from the proposed project are not expected to cause any significant adverse impact to marine resources. Therefore, no compensation is required.

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

7. FINANCIAL CAPACITY:

The total cost of the project is estimated to be \$1,232,000. The applicant submitted minutes from a City Council meeting held on June 24, 2013, in which the Council approved appropriating bond proceeds to fund the 2014 Capital Improvement Program (CIP). The 2014 CIP includes the proposed seawall replacement. The Moon Tide Park improvements will be funded by an available balance from previous CIP projects that have been completed. The gangway portion of the proposed project will be funded by the State of Maine.

The Department finds that the applicant has demonstrated adequate financial capacity to comply with Department standards.

8. TECHNICAL ABILITY:

The applicant provided resume information for key persons involved with the project and a list of projects successfully constructed by the applicant. The applicant also retained the services of TEC Associates, a professional engineering firm, to assist in the design and engineering of the project.

The Department finds that the applicant has demonstrated adequate technical ability to comply with Department standards.

9. OTHER CONSIDERATIONS:

The Department did not identify any other issues involving existing scenic, aesthetic, or navigational uses, soil erosion, habitat or fisheries, the natural transfer of soil, natural flow of water, water quality, or flooding. The will not significantly affect any other issues identified during previous Department reviews of the project site under the Site Law.

Based on its review of the application, the Department finds the requested minor revision to be in accordance with all relevant Departmental standards. All other findings of fact, conclusions and conditions remain as approved in Board Order #L-07866-26-A-X, and subsequent Orders.

BASED on the above findings of fact, and subject to the conditions listed below, the Department makes the following conclusions pursuant to 38 M.R.S.A. Sections 480-A et seq. and Section 401 of the Federal Water Pollution Control Act:

- A. The proposed activity will not unreasonably interfere with existing scenic, aesthetic, recreational, or navigational uses.
- B. The proposed activity will not cause unreasonable erosion of soil or sediment.
- C. The proposed activity will not unreasonably inhibit the natural transfer of soil from the terrestrial to the marine or freshwater environment.
- D. The proposed activity will not unreasonably harm any significant wildlife habitat, freshwater wetland plant habitat, threatened or endangered plant habitat, aquatic habitat, travel corridor, freshwater, estuarine, or marine fisheries or other aquatic life.
- E. The proposed activity will not unreasonably interfere with the natural flow of any surface or subsurface waters.
- F. The proposed activity will not violate any state water quality law including those governing the classifications of the State's waters.
- G. The proposed activity will not unreasonably cause or increase the flooding of the alteration area or adjacent properties.

- H. The proposed activity is not on or adjacent to a sand dune.
- I. The proposed activity is not on an outstanding river segment as noted in 38 M.R.S.A. Section 480-P.

BASED on the above findings of fact, and subject to the conditions listed below, the Department makes the following conclusions pursuant to 38 M.R.S.A. Sections 481 et seq.:

- A. The applicant has provided adequate evidence of financial capacity and technical ability to develop the project in a manner consistent with state environmental standards.
- B. The applicant has made adequate provision for fitting the development harmoniously into the existing natural environment and the development will not adversely affect existing uses, scenic character, air quality, water quality or other natural resources in the municipality or in neighboring municipalities.
- C. The proposed development will be built on soil types which are suitable to the nature of the undertaking and will not cause unreasonable erosion of soil or sediment nor inhibit the natural transfer of soil.
- D. The proposed development meets the standards for storm water management in Section 420-D and the standard for erosion and sedimentation control in Section 420-C.
- E. The proposed development will not pose an unreasonable risk that a discharge to a significant groundwater aquifer will occur.
- F. The applicant has made adequate provision of utilities, including water supplies, sewerage facilities and solid waste disposal required for the development and the development will not have an unreasonable adverse effect on the existing or proposed utilities in the municipality or area served by those services.
- G. The activity will not unreasonably cause or increase the flooding of the alteration area or adjacent properties nor create an unreasonable flood hazard to any structure.

THEREFORE, the Department APPROVES the application of the CITY OF PORTLAND to make site improvements in the vicinity of the Ocean Gateway Terminal as described in Finding 1, SUBJECT TO THE FOLLOWING CONDITIONS and all applicable standards and regulations:

- 1. The Standard Conditions of Approval, a copy attached.
- 2. In addition to any specific erosion control measures described in this or previous orders, the applicant shall take all necessary actions to ensure that its activities or those of its agents do not result in noticeable erosion of soils or fugitive dust emissions on the site during the construction and operation of the project covered by this approval.
- 3. Severability. The invalidity or unenforceability of any provision, or part thereof, of this License shall not affect the remainder of the provision or any other provisions. This License

shall be construed and enforced in all respects as if such invalid or unenforceable provision or part thereof had been omitted.

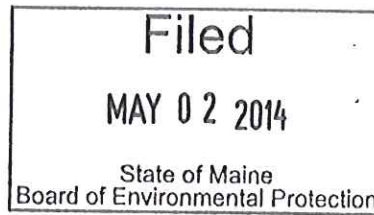
- 4. All other Findings of Fact, Conclusions and Conditions remain as approved in Board Order #L-07866-26-A-X, and subsequent Orders, and are incorporated herein.

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 2ND DAY OF May, 2014.

DEPARTMENT OF ENVIRONMENTAL PROTECTION

BY: Michael Kuhns
For: Patricia W. Aho, Commissioner



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

RLG/L07866TMUN/ATS#76911, 76912

**DEP SITE LOCATION OF DEVELOPMENT (SITE) STANDARD CONDITIONS
STRICT CONFORMANCE WITH THE STANDARD AND SPECIAL CONDITIONS OF THIS APPROVAL IS
NECESSARY FOR THE PROJECT TO MEET THE STATUTORY CRITERIA FOR APPROVAL.**

- A. Approval of Variations from Plans.** The granting of this approval 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. Further subdivision of proposed lots by the applicant or future owners is specifically prohibited without prior approval of the Board, and the applicant shall include deed restrictions to that effect.
- 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. Compliance with All Terms and Conditions of Approval.** The applicant shall submit all reports and information requested by the Board or the Department demonstrating that the applicant has complied or will comply with all preconstruction terms and conditions of this approval. All preconstruction terms and conditions must be met before construction begins.
- D. Advertising.** Advertising relating to matters included in this application shall refer to this approval only if it notes that the approval has been granted WITH CONDITIONS, and indicates where copies of those conditions may be obtained.
- E. Transfer of Development.** Unless otherwise provided in this approval, the applicant shall not sell, lease, assign or otherwise transfer the development or any portion thereof without prior written approval of the Board where the purpose or consequence of the transfer is to transfer any of the obligations of the developer as incorporated in this approval. Such approval shall be granted only if the applicant or transferee demonstrates to the Board that the transferee has the technical capacity and financial ability to comply with conditions of this approval and the proposals and plans contained in the application and supporting documents submitted by the applicant.
- F. Time frame for approvals.** If the construction or operation of the activity is not begun within four years, this approval shall lapse and the applicant shall reapply to the Board for a new approval. The applicant may not begin construction or operation of the development until a new approval is granted. A reapplication for approval 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.
- G. Approval Included in Contract Bids.** A copy of this approval must be included in or attached to all contract bid specifications for the development.
- H. Approval Shown to Contractors.** Work done by a contractor pursuant to this approval shall not begin before the contractor has been shown by the developer a copy of this approval.



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. Time frame for approvals. If construction or operation of the activity is not begun within four years, this permit shall lapse and the applicant shall reapply to the Board for a new permit. The applicant may not begin construction or operation of the activity until a new permit is granted. Reapplications for permits may include information submitted in the initial application by reference. This approval, if construction is begun within the four-year time frame, is valid for seven years. If construction is not completed within the seven-year time frame, the applicant must reapply for, and receive, approval prior to continuing construction.
- F. No Construction Equipment Below High Water. No construction equipment used in the undertaking of an approved activity is allowed below the mean high water line unless otherwise specified by this permit.
- G. Permit Included In Contract Bids. A copy of this permit must be included in or attached to all contract bid specifications for the approved activity.
- H. Permit Shown To Contractor. Work done by a contractor pursuant to this permit shall not begin before the contractor has been shown by the applicant a copy of this permit.



DEP INFORMATION SHEET

Appealing a Department Licensing Decision

Dated: March 2012

Contact: (207) 287-2811

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) in an administrative process before the Board of Environmental Protection ("Board"); or (2) in 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.A. § 3451(4)) or a general permit for an offshore wind energy demonstration project (38 M.R.S.A. § 480-HH(1)) or a general permit for a tidal energy demonstration project (38 M.R.S.A. § 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.A. §§ 341-D(4) & 346, the *Maine Administrative Procedure Act*, 5 M.R.S.A. § 11001, and the DEP's *Rules Concerning the Processing of Applications and Other Administrative Matters* ("Chapter 2"), 06-096 CMR 2 (April 1, 2003).

HOW LONG YOU HAVE 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 after 30 calendar days of the date on which the Commissioner's decision was filed with the Board will be rejected.

HOW TO SUBMIT AN APPEAL TO THE BOARD

Signed original appeal documents must be sent to: Chair, Board of Environmental Protection, c/o Department of Environmental Protection, 17 State House Station, Augusta, ME 04333-0017; faxes are acceptable for purposes of meeting the deadline when followed by the Board's receipt of mailed original documents within five (5) working days. Receipt on a particular day must be by 5:00 PM at DEP's offices in Augusta; materials received after 5:00 PM are not considered received until the following day. The person appealing a licensing decision must also send the DEP's Commissioner a copy of the appeal documents and if the person appealing is not the applicant in the license proceeding at issue the applicant must also be sent a copy of the appeal documents. All of the information listed in the next section must be submitted at the time the appeal is filed. Only the extraordinary circumstances described at the end of that section will justify evidence not in the DEP's record at the time of decision being added to the record for consideration by the Board as part of an appeal.

WHAT YOUR APPEAL PAPERWORK MUST CONTAIN

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

1. *Aggrieved Status.* The appeal must explain how the person filing the appeal has standing to maintain an appeal. This requires an explanation of how the person filing the appeal 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.* Specific references and facts regarding the appellant's issues with the decision must be provided in the notice of appeal.
3. *The basis of the objections or challenge.* If possible, specific regulations, statutes or other facts should be referenced. This may include citing omissions of relevant requirements, and errors believed to have been made in interpretations, conclusions, and relevant requirements.
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 arguments specifically raised in the written notice of appeal.
6. *Request for hearing.* The Board will hear presentations on appeals at its regularly scheduled meetings, unless a public hearing on the appeal is requested and granted. A request for public hearing on an appeal must be filed as part of the notice of appeal.
7. *New or additional evidence to be offered.* The Board may allow new or additional evidence, referred to as supplemental evidence, to be considered by the Board in an appeal only when the evidence is relevant and material and that the person seeking to add information to the record can show due diligence in bringing the evidence to the DEP's attention at the earliest possible time in the licensing process or that the evidence itself is newly discovered and could not have been presented earlier in the process. Specific requirements for additional evidence are found in Chapter 2.

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, made easily accessible by DEP. Upon request, the DEP will make the material available during normal working hours, provide space to review the file, and provide 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 questions regarding applicable requirements.
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. 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, including 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, and any materials submitted in response to the appeal will be sent to Board members with a recommendation from DEP staff. Persons filing appeals and interested persons are notified in advance of the date set for Board consideration of an appeal or request for public hearing. 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, a 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.A. § 346(1); 06-096 CMR 2; 5 M.R.S.A. § 11001; & 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. Failure to file a timely appeal will result in the Board's or the Commissioner's decision becoming final.

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.A. § 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.
