



The State of New Hampshire
Department of Environmental Services
Wetlands Council



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STATE OF NEW HAMPSHIRE
WETLANDS COUNCIL

**Decision & Order
On Notice of Appeal**

Docket No. 05-05 WtC

Appeal of: Steven Seufert

In Re: Wetlands Permit No. 2003-00296

Background

On January 4, 2005 the Department of Environmental Services, Wetlands Bureau ("DES") issued an approval of an application, by Paul Chamberlin PE, to permanently remove an existing 23 ft x 25 ft boat storage facility with an existing 10 ft x 32 ft ramp, install a 4 ft x 30 ft seasonal dock attached to a 4 ft x 20 ft seasonal dock, in a 'T' shape, and retain 5250 sq ft of wetlands fill for parking access on an average of 4,719 ft of frontage on Mendums Pond in Barrington ("the project").

On January 24, 2005 Steven Seufert ("the Appellant") faxed a *Motion for Reconsideration* of the DES decision to DES after the DES offices after 4:00pm.

On February 24, 2005 DES issued a *Decision on Reconsideration* which upheld its January 4, 2005 decision approving the project. In the *Decision on Reconsideration* DES found that the *Motion for Reconsideration* was filed with DES on January 25, 2005 which represented 21 days after the issuance of the contested decision. DES ruled therefore that the *Motion for Reconsideration* was not timely filed.

On March 28, 2005 the Appellant filed a Petition for Appeal (“the Appeal”) with the NH Wetlands Council (“the Council”) on his own behalf. The subject of the Appeal was the DES decision to deny the *Motion for Reconsideration* by finding that the *Motion for Reconsideration* was not timely filed. The Appeal was assigned Docket No. 05-05 WtC by the Council.

On April 12, 2005 the Council voted to accept the Appeal.

On July 26, 2005, following proper notice to all parties, and a pre-hearing conference on June 14, 2005, the Council held an adjudicatory hearing on the subject appeal in accordance with RSA 21-O:5-a, RSA 482-A:10, VIII, and Env-WtC 205. In accordance with the Council’s June 15, 2005 Pre-hearing Order, the Appellant was allowed a maximum of thirty (30) minutes presentation time and a maximum of five (5) minutes for a closing statement. DES was allowed a maximum of thirty (30) minutes presentation time and a maximum of five (5) minutes for a closing statement. The Council listened to presentation and argument by the Appellant and DES. Immediately following the appeal hearing, the Council decided to deliberate and vote on the appeal.

Discussion/Conclusion

By Rule, the Wetlands Council considers decisions of the Department of Environmental Services, Wetlands Bureau (“DES”), to be *prima facie* reasonable and lawful unless an appellant can successfully overcome this rebuttable presumption. An appellant can do this by presenting the Council with a preponderance of clear and concise evidence that otherwise persuades the Council such a decision was unreasonable and/or unlawful.

The Council finds that by Rule it cannot substitute its independent judgment of the facts and circumstances of a decision for that used by DES in its own deliberations. It can instead only decide if, given the facts and circumstances presented to it by (a) the Certified Record of the particular application and (b) the interested parties during the formal processes of review and reconsideration below, that the resulting Bureau decision was unreasonable and/or unlawful.

The Council finds that in this Appeal the preponderance of evidence in both the Certified Record and in the presentations by the Appellants at hearing persuaded a majority of the Council that this presumption was successfully rebutted for the following reasons:

- Appellant argues that the Department's rules which prescribe the timing and specific procedures for the filing of a *Motion for Reconsideration* are unreasonably confusing to lay appellants, because instructions for their use are inadequately described in its decision documents.
- Specifically, Appellant points out that the January 4, 2005 decision document in this case did not properly inform interested parties as to the correct procedures, or specific rules that govern the reconsideration process.
- The Council finds that it agrees with the Appellant, and remands this matter back to the Wetlands Bureau for Reconsideration per the Appellant's Motion.
- The Council also finds and recommends that the textual instructions to applicants who want to move for Reconsideration should be modified and clarified to prevent further confusion of the sort that forms the basis of this Appeal.
- The Council also finds that confusion of the sort underlying this Appeal appears to occur routinely, and it thus recommends that the Department consider the formulation and use of a uniform timing and submission procedure/protocol for the filing of all documents with the Department.

Accordingly, based on the Certified Record in this matter, upon presentations by the parties at hearing, and upon its independent review and deliberation, the Council concludes and orders that:

- per ENV-WtC 205.17, Appellant has proven, by a preponderance of clear and concise evidence, that the DES decision in this matter was unreasonable and/or unlawful; and,

- Appellants *Motion for Reconsideration* is remanded to the Wetlands Bureau for acceptance and the conduct of its usual and customary reconsideration review procedure, along with consideration of the recommendations made by the Council.

Decision & Order

The subject Appeal is **GRANTED**.

Reconsideration

In accordance with, and as prescribed by, RSA 482-A:10 any party aggrieved by this decision and order of the Council may apply to the Council for reconsideration within 20 days of the issuance of this Decision & Order.

So Ordered for the Council:

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Michael P. Scifani, Appeals Clerk

September 16, 2005