



- Air Resources Council
- Waste Management Council
- Water Council
- Wetlands Council

**PRELIMINARY NOTICE OF APPEAL AND OFFER
TO ENTER INTO SETTLEMENT DISCUSSIONS**

for appeals of New Hampshire Department of Environmental Services permitting decisions

A. Appellant (person who is aggrieved by the Department’s decision):

Name: David L. Smith et. al. (see attached)
 Address: Ossipee Lake Alliance P.O. Box 173 Freedom NH 03836 Telephone: (203) 273-0795
 Fax (if available): _____
 Email (if available): dsmith@ossipeelake.org

B. Appellant’s Representative:

Name: NA
 Address: _____ Telephone: _____
 Fax (if available): _____
 Email (if available): _____

C. Permittee (if other than Appellant):

Name (from issued permit): Deborah Randall
 Address (from issued permit): 50 Leavitt Rd. Ossipee NH 03814

D. Decision being appealed:

Date of Decision: 5/13/24 Decision signed by: Philip Trowbridge
 Permit/FileNumber (if any): 2024-00378

E. Reason(s) why the Decision was unlawful or unreasonable (if more space is needed, attach additional page(s)):

1. See attached document
2. _____
3. _____
4. _____
5. _____

F. Offer to enter into settlement discussion (check one): Mediated Unmediated Both [Either]

G. Statement of Service

As required by RSA 21-O:14, I-b(b), I served a copy of this Preliminary Notice of Appeal to the Commissioner of the Department of Environmental Services on _____, 20__ by U.S. Mail Delivery in hand AND to the Permittee (if not the Appellant) on _____, 20__ by U.S. Mail Delivery in hand

David L. Smith

Name (print or type) Signature Date

Material in Support of the Appeal of the Decision in 2024-00378

A. Names and Addresses of the Appellants

Organizations

1. Ossipee Lake Alliance
David L. Smith, Co-Founder
P.O. Box 173
Freedom, NH
2. Green Mountain Conservation Group
Matthew Howe, Executive Director
P.O. BOX 95
Effingham, NH
3. Berry Bay Association
Roberta MacCarthy, President
P.O. Box 258
Freedom, NH
4. Camp Marist
Tom Pellicciari, Executive Director
22 Abel Blvd
Effingham, NH
5. Loon Preservation Committee
John Cooley, Jr., Senior Biologist
P.O. Box 604
Moultonborough, NH 03254

Lake Property Owners

204 names and addresses have been redacted for this document but were submitted to the state.

Standing

Ossipee Lake Alliance is a community-based 501c3 charitable organization founded in 2003 and dedicated to preserving and protecting Ossipee Lake, including Leavitt Bay, as a unique recreational, environmental and economic resource. Its members are directly affected by DES's decision in 2004-00378.

Green Mountain Conservation Group, founded in 1997, is a community-based 501c3 charitable organization dedicated to the protection and conservation of natural resources in the Ossipee Watershed, which includes Ossipee Lake and Leavitt Bay. Its members are likewise directly affected by DES's decision in 2004-00378.

Berry Bay Association is a community-based lake property owners organization formed in 1987. It identifies and seeks solutions to environmental issues affecting Ossipee Lake, including Leavitt Bay, by developing programs and working cooperatively with other lake and conservation organizations. Its members are directly affected by DES's decision in 2004-00378.

Camp Marist is an international, co-ed Catholic overnight camp for campers ages 6-16 years old on Leavitt Bay. For more than 75 years, Camp Marist has nurtured campers' personal growth in faith, mind, body and friendship through a wide variety of activities and a welcoming, family-like atmosphere. Its campers and business are directly affected by DES's decision in 2004-00378.

Loon Preservation Committee has for 40 years worked to restore and maintain a healthy population of loons throughout New Hampshire; to monitor the health and productivity of loon populations as sentinels of environmental quality; and to promote a greater understanding of loons and the larger natural world. Its work is directly affected by DES's decision in 2004-00378.

All other appellants are waterfront property owners on Leavitt Bay and near-by who are directly affected by DES's decision in 2004-00378.

B. Timeline

- DES received a Standard Dredge and Fill Application (SDFA), File 2024-00378, on February 4, 2024. (See Appendix A).
- The SDFA requested approval to install five docks, each 6 ft. wide and 40 ft. long, on the south side of Loon Island, an uninhabited 0.90-acre property on Leavitt Bay in Ossipee.
- The SDFA lists Kevin Randall as the Applicant.
- The SDFA states the Permanent Impact Area is 1,200 SF and 200 LF.
- The SDFA classifies the proposal as a Major Project per Env-WT 306.05.
- The SDFA contained a diagram of the proposed docks hand-drawn on a Topographic Map dated December 1, 1994.
- The Applicant provided a copy of the SDFA to the Town of Ossipee Conservation Commission on February 1, 2024.
- Ossipee's Town Clerk acknowledged receipt of the SDFA on behalf of the Planning Board on February 9.
- Ossipee's Conservation Commission discussed the SDFA at a meeting on February 14, and submitted a letter to DES the same day (Appendix B).
- Ossipee Lake Alliance published a news story about the proposal on February 18.
- Ossipee's Planning Board conducted a public hearing on February 20 to review the SDFA and to receive public comments (Appendix C).
- Ossipee Lake Alliance published a news story about the Planning Board hearing on February 23.
- Ossipee Lake Alliance and Green Mountain Conservation Group submitted a letter to DES about the SDFA on February 26 (Appendix D).
- Ossipee's Planning Board submitted a letter to DES about the proposal on February 28 (Appendix E).
- The newspaper Carroll County Independent published an article about the proposal and the Planning Board hearing on February 29.
- DES issued a Request for More Information letter (RFI) on April 3 (Appendix F).
- Ossipee Lake Alliance published a news story on the RFI on April 9.

- Pursuant to the RFI, the Applicant submitted additional material(s) on May 5.
- DES approved the SDFa on May 13 (Appendix G).
- On June 4, Ossipee Lake Alliance submitted a Public Information Request (PIR) for all information provided to DES by the Applicant after April 3.
- DES responded to the PIR on June 5 by providing a copy of the original SDFa (dated February 4), and a letter from the Department of the Army stating that an Army permit was not required.
- Per the same PIR response, DES on June 5 provided a diagram in which the original design for the proposed docks was replaced with a design for a 3 ft. x 82.5 ft. wharf with five 4 ft. x 34 ft. attached piers (design document attached with Appendix H). The revised diagram of the docks was overlaid on the aforementioned Topographic Map dated December 1, 1994.
- On June 5, Ossipee Lake Alliance followed up on the PIR asking "for certainty" if DES would confirm that the documents provided via the PIR were in fact the only documents submitted to DES by the Applicant after April 3. DES (Deborah Brown) replied to say the Wetlands Bureau would need to answer the question.
- The question was sent to the Wetlands Bureau (Ryan Duquette) on June 6. Duquette responded on June 7 to say there were several documents in digital form in the database, and asked Ms. Brown to provide them.
- Neither Duquette nor Brown responded further.
- This appeal of the May 13 Letter of Approval of the SDFa was filed timely to the Wetlands Council, electronically on June 11, and by mail on June 12.

C. Reasons Why the Decision Was Unlawful or Unreasonable

C-1: Overview

RSA 482-A:1 reads in relevant part: "It is found to be for the public good and welfare of this state to protect and preserve its...fresh waters...from despoliation and unregulated alteration, because such despoliation or unregulated alteration will adversely affect the value of such areas...will damage or destroy habitats and reproduction areas...will eliminate, depreciate or obstruct the commerce, recreation and aesthetic enjoyment of the public...or otherwise adversely affect the interests of the general public."

On May 15, 2024, the Wetlands Bureau approved Permit Application 2024-00378 for seasonal dockage on 0.09-acre Loon Island on Leavitt Bay in Ossipee. The approved dockage will consist of an 82.5 ft. x 3 ft. wharf with five 4 ft. x 34 ft. piers accommodating nine boats and their occupants.

The appellants state that the Wetlands Bureau's review of the Application was inadequate, including but not limited to its failure to require the Applicant to cure material errors and deficiencies identified by the public well in advance of its ruling, and its failure to recognize the proposal as an issue of major public interest requiring a public hearing. The appellants therefore assert that the Bureau's approval is unreasonable and unlawful.

The appellants respectfully ask the Wetlands Council to stay the approval until or unless the Application's deficiencies have been cured by the Applicant and a public hearing has been held on the matter.

As detailed herein, the concerns of the appellants include but are not limited to:

- **Protected Species.** The Applicant inaccurately stated that the site does not contain protected species. In fact, the site is a documented nesting site for state-protected loons.
- **Non-Responsive Answers.** "Docks in accordance with applicable rules" as the Applicant's response to Section 7's requirement to provide detailed compliance information for four chapters of state regulations is one of many examples of required information that is missing in the Application.
- **No Public Hearing.** The Bureau's conclusion that the Application "is not of significant public interest and will not significantly impair the resources of Ossipee Lake" is in error. The Bureau was provided with evidence to the contrary well in advance of its approval.
- **No Certified Plan or Data.** The Applicant's "certified plan" is a hand-drawn illustration of docks using a Topographic Map created 31 years ago. Claims or inferences about the lake level, the linear footage of the site, the available space for docks and other relevant data have not been adequately documented.
- **Conflict with Dock Regulations.** The Bureau's approved dockage plan conflicts with state regulations that docks be no more than 6 ft. wide and 30 ft. long if the water body is less than 1,000 acres. Leavitt Bay is 176 acres, according to state records.

C-2: Discussion

Previous Statements Made to DES. The following four statements were made by Ossipee Lake Alliance and Green Mountain Conservation Group in their February 26 letter to DES:

1. In **Section 1** of the SDFA, the Applicant checked "no" when asked about the presence of protected species at the site. In fact, the site is a documented loon nesting site, and loons are listed on the Department of Fish and Game's list of threatened and endangered species. This is a material error in the SDFA.
2. **Section 2** of the SDFA requires a brief description of the project and its purpose, as well as an outline of the project's scope and whether the impact will be permanent or temporary. The Applicant did not provide a statement of the project's purpose, its scope or its level of impact, making the answer non-responsive. This is a material error in the SDFA.
3. **Section 7** of the SDFA reads as follows: "RESOURCE-SPECIFIC CRITERIA ESTABLISHED in Env-Wt 400, Env Wt-500, Env-Wt 500, Env-Wt 700, OR Env Wt-900 HAVE BEEN MET [Env-Wt 313,01(a)(3)]. Describe how the resource-specific criteria have been met for each chapter listed above (please attach information about stream crossings, coastal references, prime wetlands, or non-tidal wetlands and surface waters."

The Applicant's response to the above **Section 7** requirement reads in its entirety "Docks in accordance with applicable rules," making it non-responsive.

The information not provided by the Applicant pursuant to Section 7 includes, but is not limited to, the requirements for docking structures in Env-Wt 500, including details about shoreline frontage, high-water benchmarks, the shape of the shoreline and so forth.

The Applicant's failure to be responsive to **Section 7** is a serious omission and a material error in the SDFA.

4. In **Section 11** of the SDFA, the Applicant states that the permanent impact area of the proposed docks will be 1,200 SF and 200 LF. No basis for this calculation is provided, and the information is therefore speculative, making it a material error in the SDFA.

Town of Ossipee Statements. The following comments are taken from letters to DES from the Town of Ossipee's Conservation Commission and Planning Board:

1. Conservation Commission. In its letter to DES dated February 14, 2024, the Commission stated its opposition to the SDFA. The commission's statements included:
 - a. "The Committee believes the island is not capable of supporting the proposed usage that may come with providing five (5) docks."
 - b. "The Committee [has] concerns with the size of Leavitt Bay and adding (5) 40 ft. docks off an island in the middle of the bay may make maneuvering through the bay narrower than what already exists."
 - c. "The island is a very fine natural resource in the Ossipee Lake area and... cannot support the usage for ex: 15 -20 boats at the docks, people being on the island, urinating/defecating on the island...disturbance of the nesting loons on the north side of the island and the obvious of increased boat traffic..."
2. Planning Board. In its letter to DES on February 28, 2024, the Planning Board summarized its February 20 hearing on the SDFA, including the following information:
 - a. The hearing was attended by 35-40 residents, virtually all of whom were there to express their concerns about the SDFA.
 - b. The Planning Board separately received 25-30 emails from residents expressing their concerns about the proposed application. (These were subsequently forwarded to DES, per the board secretary).
 - c. The board summarized the public's stated concerns as:
 - i. The island is a loon nesting site
 - ii. The island's size is inadequate to the proposed use
 - iii. There will be shoreline erosion from the additional boats
 - iv. There is no parking, as the Applicant has a small lot
 - v. The location on the south side of the island will decrease the boat traffic pattern and boat maneuverability
 - vi. Leavitt Bay could become a no-wake zone based on the increased traffic
 - vii. Pressure-treated lumber should not be used in the water¹
 - viii. The increased traffic could exacerbate existing infestations of milfoil

¹ The proposed use of pressure treated wood was stated in an undated letter from the Applicant to the Conservation Commission. The SDFA does not specify building materials or techniques.

Additional Comments on the SDFA. The Appellants offer the following additional comments on the materials submitted by the Applicant:

1. In its joint letter to DES on February 26, Ossipee Lake Alliance and Green Mountain Conservation Group stated that the Applicant's hand-drawn representation of the proposed docks in the SDFA utilized a Topographic Map dated December 1, 1994.
2. The Applicant's new hand-drawn representation of the revised proposed docks, submitted on May 5 (the "May Map") uses the same 1994 Topographic Map (document attached in Appendix G).²
3. Technical information in the Notes section of the May Map is outdated and misleading, and should not be used or inferred to be a means of complying with any aspect of the SDFA requirements. For example, the May Map states that the state's ownership of the lake extends to a height of 410 ft. The correct number, 407.25, was adopted in 2011.
4. Similar data on the dam elevation, floor elevation and the like in the Notes section of the May Map cannot be relied on.
5. Another example of why the Applicant's data cannot be relied on is found in the May Map's legend, which states the "lineal footage around the island" is 1,200 ft. There is no documentation for this claim, and it conflicts with the lineal footage number the Applicant gave to the Ossipee Planning Board on February 20 (Appendix C). The true measure of linear feet is undocumented.
6. One of the reasons Item 5, above, is important is that the Applicant has claimed an average of 605 ft. of frontage for the docks. This undocumented calculation was accepted by DES in **Finding 2** (see Section C-4 below).

C-3: Endangered Species. The Appellants offer the following comments on the impact of the SDFA on threatened and endangered species.

1. **Item 1** of the SDFA falsely states that there are no protected species on Loon Island. In fact, the island is a documented loon nesting site, and loons are a threatened and endangered species in N.H.
2. Notwithstanding the above, the Applicant has made various references to loons in his letters to town officials and in his public statements, giving the misleading impression that the Loon Preservation Committee (LPC), N.H. Fish and Game, DES and the public have been satisfied that his dock plan will not affect the island's loons.

For example, in an undated letter to Luke Douglas at N.H. Fish and Game the Applicant states that he moved the proposed dock location from the north to the south to "minimize impact on previously identified nesting sites," and DES has "no objection" to the new layout. The Applicant further states that he will "continue to work with the Preservation Committee when new nesting takes place." In our view, this letter gives a false impression that DES had already approved the docks, and LPC did not have concerns about new docks bringing more people and dogs to the island.

² In an undated letter to N.H. Fish and Game, the Applicant refers to the hand-drawn illustrations of the proposed docks as a "certified plot plan." The submitted document does not qualify as such in the general legal sense of the term.

3. In fact, John Cooley of LPC has submitted a letter to DES stating that the proposed docking system "would represent a substantial change in conditions at the island," which he said is a highly suitable loon nesting habitat. He said the substantial potential increased risk to loons merits further agency and public review, and his organization supports the appeal of the Wetlands Bureau's May approval. (See Appendix I).

C-4: Comments on the "Findings" in DES's May 13 Letter of Approval.

1. **Finding 2** states that "The Applicant has an average of 605 feet of frontage along Lake Ossipee." There is no documentation of this claim as the Applicant has not submitted a certified plan for the SDFA.
2. **Findings 3 and 4** state that the Applicant is permitted to have a maximum of 9 boat slips at the site based on state footage requirements. This conclusion is not justified because the Applicant has not provided a certified plan documenting the available frontage footage.
3. **Finding 5** states that "because the project is not of significant public interest and will not significantly impair the resources of Lake Ossipee, a public hearing under RSA 482-A:8 is not required. [Emphasis added]. This statement is false.

Evidence was available to DES during the review process that the SDFA was of significant public interest and poses an environmental threat to the lake. For example:

- a. A substantial number of Leavitt Bay residents organized in opposition to the SDFA as soon as it was revealed in February.
 - b. Between 35 and 40 opponents of the plan attended the Ossipee Planning Board hearing on the matter, and successfully urged the board to convey to DES the extent of the lake's opposition to the plan (See Appendices C and E).
 - c. Residents opposing the plan similarly approached Ossipee's Conservation Commission, and the commission subsequently wrote to DES to oppose the plan (See Appendix B).
 - d. Between 25 and 30 emails opposing the plan were received by Ossipee officials and forwarded to DES. An unknown number of additional letters were submitted directly to DES.
 - e. Two of the area's conservation organizations, Ossipee Lake Alliance and Green Mountain Conservation Group, sent a letter to DES identifying material errors and omissions in the SDFA and asking that the Application be denied.
 - f. Substantial public awareness of the proposal was created by news articles in the Carroll County Independent and Ossipee Lake News.
 - g. The extent to which this is an issue of substantial public interest and concern is further evidenced by the number of appellants submitting this appeal.
4. **Findings 6 and 7** state that the department received "numerous comments from concerned individuals" during the review period, with comments ranging from "concerns of litter, impacts to loons, vehicle parking to boat traffic, emergency service access and noise."

This not only conflicts with the claim in **Finding 5** that there was no significant public interest in the application, it also ignores the letter from Ossipee Lake Alliance and Green Mountain Conservation Group detailing material errors and omissions in the SDFA that the two organizations believed should have resulted in the application being denied.

C-5: Conflicts with State Dock Regulations

1. DES Environmental Fact Sheet WB-19, "Permitting for Private, Non-Commercial Freshwater Docking Structures," states: "Boat Slip" means...(b) On water bodies of 10,000 acres or less a volume of water 20 feet long, 6 feet wide, and 3 feet deep as measured at normal high mark and located adjacent to a structure to which a watercraft may be secured." (See Appendix H).

It is unclear from the Application how DES determined the proposed dockage will accommodate up to nine boats, as there is no certified data on the height of the lake, water depth and related factors.

2. State regulations require that docks on water bodies of less than 1,000 acres be no more than 6 ft. wide and 30 ft. long. Leavitt Bay is 176 acres, meaning the Bureau's approval of the Application is contrary to this state regulation. (See Appendix H).

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