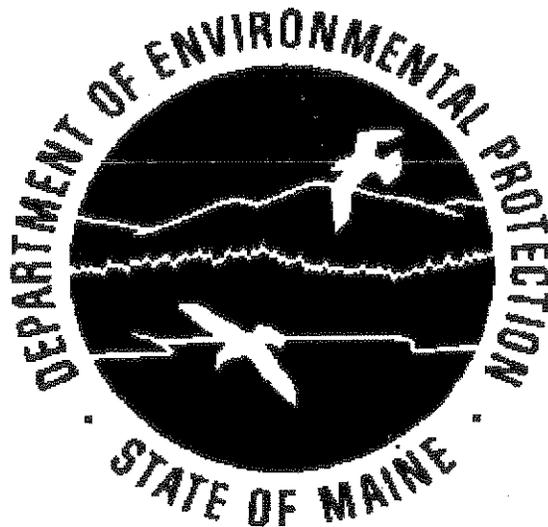


STATE OF MAINE

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

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

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.

→ **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.

→ **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.

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.

- 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

minimal effect on freshwater wetland functions and values, significant wildlife habitat or imperiled or critically imperiled community due to the activity;

- (ii) Alterations of less than 15,000 square feet in a freshwater wetland not of special significance, provided that the department determines that there will be only a minimal effect on freshwater wetland functions and values due to the activity;
- (iii) Alterations in a freshwater wetland for a road, rail or utility line crossing of a river, stream or brook for a distance of up to 100 feet from the normal high water line on both sides, measured perpendicular to the thread of the river, stream or brook, provided:
 - a. Any affected freshwater wetland does not contain significant wildlife habitat or a critically imperiled or imperiled community; and
 - b. The total project affects 500 square feet or less of the channel.
- (b) Coastal Wetlands. A coastal wetland alteration that does not cover, remove or destroy marsh vegetation, does not fill more than 500 square feet of intertidal or subtidal area, and has no adverse effect on marine resources or on wildlife habitat as determined by the Department of Marine Resources or the Department of Inland Fisheries & Wildlife as applicable.
- (c) Great Ponds. A great pond alteration that does not place any fill below the normal high water line, except as necessary for shoreline stabilization projects, and has no adverse effect on aquatic habitat as determined by the Department of Inland Fisheries & Wildlife or the Department of Environmental Protection.
- (d) Rivers, streams or brooks. A river, stream or brook alteration that does not affect more than 150 feet of shoreline for a private project or more than 300 feet of shoreline for a public project.
- (e) Walkways/Access structures. A wetland alteration consisting of a walkway or access structure for public educational purposes or to comply with the Americans with Disabilities Act.
- (7) Waiver. The department may waive the requirement for a functional assessment, compensation, or both. The department may waive the requirement for a functional assessment if it already possesses the information necessary to determine the functions of the area proposed to be altered. The department may waive the requirement for compensation if it determines that any impact to wetland functions and values from the activity will be insignificant.

D. No Unreasonable Impact

- (1) Even if a project has no practicable alternative and the applicant has minimized the proposed alteration as much as possible, the application will be denied if the activity will have an unreasonable impact on the wetland. "Unreasonable impact" means that one or more of the

standards of the Natural Resources Protection Act, 38 M.R.S.A. § 480-D, will not be met. In making this determination, the department considers:

- (a) The area of wetland that will be affected by the alteration and the degree to which the wetland is altered, including wetland beyond the physical boundaries of the project;
 - (b) The functions and values provided by the wetland;
 - (c) Any proposed compensation and the level of uncertainty regarding it; and
 - (d) Cumulative effects of frequent minor alterations on the wetland.
- (2) Activities may not occur in, on or over any wetland of special significance containing threatened or endangered species unless the applicant demonstrates that:
- (a) The wetland alteration will not disturb the threatened or endangered species; and
 - (b) The overall project will not affect the continued use or habitation of the site by the species.

When considering whether a single activity is reasonable in relation to the direct and cumulative impacts on the resource, the department considers factors such as the degree of harm or benefit to the resource; the frequency of similar impacts; the duration of the activity and ability of the resource to recover; the proximity of the activity to protected or highly developed areas; traditional uses; the ability of the activity to perform as intended; public health or safety concerns addressed by the activity; and the type and degree of benefit from the activity (public, commercial or personal).

6. Wetland Compensation Standards. Where compensation is required, the following standards apply:

NOTE: If the department's requirements for compensation are otherwise met, additional areas of compensation required by U.S. Army Corps of Engineers do not also have to meet the department's requirements for compensation.

- A. Expertise.** The applicant shall demonstrate sufficient scientific expertise to carry out the proposed compensation work.
- B. Financial Resources.** The applicant shall demonstrate sufficient financial resources to complete the proposed compensation work, including subsequent monitoring and corrective actions.
- C. Persistence.** For restoration, enhancement and creation projects, on the basis of an updated functional assessment, a minimum of 85% of the compensation area must successfully replace the altered wetland's functions after a period of three years unless otherwise approved by the department. If this level is not achieved, or if evidence exists that the compensation site is becoming less effective, the department may require additional monitoring and corrective action, or additional wetland restoration, enhancement or creation in order to achieve the compensation ratio as originally approved.