

Chapter 335: Significant Wildlife Habitat
Chapter 375: No unreasonable adverse impact, Wildlife & Fisheries

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BASIS STATEMENT

When the NRPA was enacted in August 1988, it included protection for significant wildlife habitat, which was defined in the law; to the extent such areas were mapped or within another protected natural resource. A series of changes have been made to the original definition over the last 17 years. Most relevant to the proposed rule changes was the addition of “significant vernal pools” as a type of significant wildlife habitat in 1995. Additional language required that, to be regulated under the NRPA, these pools would have to be identified and mapped in a specific location by the Maine Department of Inland Fisheries & Wildlife (MDIF&W). DEP would then have to adopt these maps through rulemaking. [See PL 1987, ch. 809, Sec. 2 (in part) codified at 38 MRSA 480-I(1)]. No additional resources were allocated to MDIF&W to accomplish mapping of significant wildlife habitats and the costs proved prohibitive, and so to date only seabird nesting island maps have been adopted by the two departments.

Through Public Law 116, the 122nd Maine State Legislature made the following changes to the NRPA at the request of the department and Maine Audubon.

1. Maine Forest Service’s language defining timber harvesting activities was incorporated into the NRPA definition of forest management activities;
2. The statutory requirement to map significant vernal pools, shorebird and wading and waterfowl habitats as we do any other wetland was removed; and
3. The exemption for the filling of up to .10 of an acre of significant wildlife habitat was removed.

This legislative action also required that the department establish definitions and standards through rule for significant vernal pools, high to moderate value shorebird feeding, nesting, and staging habitat, and high to moderate value wading and waterfowl habitat. Chapter 335 is the existing rule which governs activities associated with seabird nesting islands and under which these three habitats will be defined. The changes in Chapter 375, Section 15, are proposed solely to increase consistency between the two state regulatory programs. Simultaneous to this rulemaking process, MDIF&W is undergoing its own process before its Advisory Council to adopt identical definitions and criteria for these three significant wildlife habitats. The rules the Board is asked to post to public hearing today also incorporate specific measures and protections for both the pools and applicants required by the Natural Resources Committee of the Maine State Legislature.

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LIST OF COMMENTERS

#	NAME	ADDRESS	AFFILIATION	Support /Oppose d/Neither*
1	Christine West	RR1 Box 32 Bayview Road Penobscot, Maine 04476-9703		S
2	Carl Leone	PO Box 116 Edgecomb, Maine 04556-0116		S
3	Mitchell Kihn	1320 Western Road Warren, Maine 04864-4463		S
4	Suzanne Kahn	244 Danforth Street Portland, Maine 04102		S
5	N. David Semon	87 Baxter Road Freeport, Maine 04032		S
6	Leslie Clapp	PO Box 341 Blue Hill, Maine 04614		S
7	Anne Godfrey	PO Box 508 Vinalhaven, Maine 04863-0508		S
8	Bryce Smith	3 Hurd Point Road Dedham, Maine 04429-4222		S
9	Lisa Willey-Critchfield	PO Box 193 South Casco, Maine 04077		S
10	Sherry Howard	1079 East Madison Road Madison, Maine 04950		S
11	Barbara Michael	38 Vesper Street Scarborough, Maine 04074		S
12	Saskia Janes	11 Parkwood Drive Augusta, Maine 04330-6252		S
13	Ian Cameron	364 Hudson Road Glenburn, Maine 04401-1201	Reg. ME Guide	S
14	Darcy Donald	413 Blackstrap Road Falmouth, Maine 04105		S
15	Jan Collins	83 McLaughlin Road Wilton, Maine 04294		S
16	Maryann Smale	37 Dyers Bay Road Steuben, Maine 04680-3110		S
17	Robyn Wiley	11 Tenney Lane Scarborough, Maine 04074		S
18	Anna Marie Thron	3 Anchorage Place South Portland, Maine 04106		S
19	Evelyn Duplessis	355 East Avenue		S

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		Lewiston, Maine 04240-4700		
20	Tony Owens, M.D.	19 Seaview Avenue Cape Elizabeth, Maine 04107-1009		S
21	Susan Harris	1512 Sennebec Appleton, Maine 04862-6202		S
22	Genevieve Levin	115 Front Street Portland, Maine 04103		S
23	Ellen Dumas	526 Ferry Road Saco, Maine 04072		S
24	Cindy Folsom	3 Union Street Topsham, Maine 04086		S
25	Karen Larsen	352 Monroe Road Hampden, Maine 04444-3010		S
26	Christine Carlson	131 Goulds Ridge Road Passadumkeag, Maine 04475-3112		S
27	Jeannette Lovitch	29 Woodland Road Pownal, Maine 04069		S
28	Nonny Ferriday	PO Box 133 Penobscot, Maine 04476	President, Bagaduc Watershed Assoc.	S
29	Charles Scontras	24 Kettle Love Road Cape Elizabeth, Maine 04107-2615		S
30	Marilyn Billings	2 Wakefield Pastures Kennebunkport, Maine 04046-6119		S
31	Eva Dimond	104 Heather Way Hampden, Maine 04444-1649		S
32	Sharon Cunningham	23 Libby Pines Road Standish, Maine 04084-6316		S
33	Renee Gannon	332 Chicopee Road Buxton, Maine 04093		S
34	Normand Rodrigue	PO Box 232 /26 Hillside Road Manchester, Maine 04351		S
35	Nancy McReel	29 Riverbend Road Wells, Maine 04090		S
36	Harvey Dinerstein	27 Beechwood Road Winthrop, Maine 04364		S
37	Joann Kogers	434 Carthage Road Dixfield, Maine 04224		S
38	Elizebeth Jackson	50 US Route 1 Robbinston, Maine 04671		S
39	Cheryl Thompson	69 Beechwood Road Winthrop, Maine 04364-3383		S
40	Anne Warner	8 Jody's Acre Southwest Harbor, Maine 04679		S
41	Jane Weinstein	109 Colonial Road		S

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		Portland, Maine 04102-2043	
42	Fred Wildnaur	28 Witzhtrot Road South Berwick, Maine 03908-2170	S
43	Judith Scher	5 Fern Avenue Windham, Maine 04062-5218	S
44	Willow McVeigh	127 Sunken Bridge Road Winterport, Maine 04496-4208	S
45	Sherwin Start	31 Terry Drive Sanford, Maine 04073	S
* 46	Gola Wolf Richards	802---?--- Denmark, Maine 04022	S
47	James (Skip) Pendleton	46 Bridge Street Belfast, Maine 04915-6636	S
48	Syliva Niznik	467 Harris Hill Road Weston, Maine 04424	S
59	Wanda Sprague	1559 Perkins Ridge Road Auburn, Maine 04210	S
50	Doug Woods	1755 Port Road Machiasport, Maine 04655	S
51	Sandra Tardiff	16 Middle Street Orono, Maine 04473-4032	S
52	George Seel	710 West Road Belgrade, Manie 04917	S
53	Tanya Acquaire	205 Wingood Road Windsor, Maine 04363	S
54	France Perlman	Box 293, West Paris, 04289-0293	S
55	Michael Dixon	126 Everett Road Auburn, Maine 04210	S
56	Gabe Weiss	168 Gilbert Farm Road Bar Harbor, Maine 04609-7711	S
57	Phil Norris	PO Box 17 East Blue Hill, Maine 04629	S
58	Harvey Flashen	15 The Long Winding Road Kennebunkport, Maine 04046	S
59	Denis Cote	938 Gore Road Alfred, Maine 04002-3036	S
60	Sharon Bailey	669 Lower Road Appleton, Maine 04862	S
61	Richard Flanagan	179 Covell Road Fairfield, Maine 04937-3137	S
62	Kevin McKeon	246 Blanchard Road Springvale, Maine 04083-6016	S
63	Roberta Brezinski	52 Quaker Ridge Road	S

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		Durham, Maine 04222	
64	Jane Solorzand	153 Samoset Trail Treasure Island Boothbay, Maine 04544	S
65	Bill Kreamer	129 Miller Street Belfast, Maine 04915	S
66	John Grillo	183 Harlow Street Apt. 217 Bangor, Maine 04401-4931	S
67	Colleen McKenna	85 Old Pennelville Road Brunswick, Maine 04011-7911	S
68	Robin Chasse	1397 Forest Avenue Ste 1 Portland, Maine 04103-1829	S
69	Ruth Grauert	84 Bearnstow Road Mt. Vernon, Maine 04352	S
70	Janette Lynch	317 Mudgett Road Parsonsfield, Maine 04047	S
71	Derek Lovitzh	29 Woodland Road Pownal, Maine 04069	S
72	Ron Poitras	1117 Newbury Neck Road Surry, Maine 04684	S
73	Judy Jones	PO Box 399 Woolwich, Maine 04579-0399	S
74	Keri Lindberg	PO Box 1056 Rockport, Maine 04856-1056	S
75	Eliza Townsend	45 Country Lane Portland, Maine 04103-6205	S
76	Jeffrey Mc Evoy	17 Cobbs Bridge Road New Gloucester, Maine 04260-3834	S
77	Tim Akers	Fire Road 150 Andover, Maine 04216	S
78	Patricia Hubbard	31 Dunn Street Thomaston, Maine 04861	S
79	Leslie McConnell	375 Edes Falls Road Naples, Maine 04055	S
80	Jane Littlefield	PO Box 8 Topsham, Maine 04086-0008	S
* 81	Robin Hadlock Seeley	PO Box ..?.. Pembroke, Maine 04666	S
* 82	Bill & Marilyn Voorhies	Clark Road	S
83	Richard Fontana	14 Valley Road Cape Elizabeth, Maine 04107	S
84	Joan Yates	98 Ashswamp Road	S

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		Scarborough, Maine 04074	
85	Douglas Dolan	107 Hardscrabble Road Hollis Center, Maine 04042-3028	S
86	Lillie Vitelli	35 Moose Carry Road Appleton, Maine 04862-7606	S
87	Maryann Ott	65 Woodland Hills South Berwick, Maine 03908	S
88	Ben Lund	499 Main Street Monmouth, Maine 04259-7536	S
89	Shirley Davis	64 Gardner Road Orono, Maine 04473-3403	S
90	Shauna Turnbull	PO Box 402 Kents Hill, Maine 04349-0402	S
91	Frank Harte	38 High Street Kennebunk, Maine 04043-6932	S
92	Ellen O'Donnell	1 Cedar Street Apt 8 Brunswick, Maine 04011	S
93	Elizabeth O'Donoghue	50 Beech Road Elliot, Maine 03903-1919	S
94	Sara Cleaves	66 High Street #10 Kennebunk, Maine 04043	S
95	Andrew Roth-Wells	80 Williams Road Georgetown, Maine 04548	S
96	Roberta Zur	Po Box 793 South Freeport, Maine 04078-0793	S
97	Piper Carey	1559 Perkins Ridge Road Auburn, Maine 04210	S
98	Frank Dehler	350 Mountain Road Cape Neddick, Maine 03902-7942	S
99	Xar Aduelberg	431 Readfield Road Manchester, Maine 04351-3210	S
100	Hope Brogunier	60 Leighton Street Bangor, Maine 04401-3824	S
101	Deborah Keyes	5 Ashlar Court Portland, Maine 04103	S
102	Stephanie Cox	14 State Street Cape Elizabeth, Maine 04107-1171	S
103	Heather Zur	476 Old Portland Road Brunswick, Maine 04011	S
104	Alicia Heyburn	215 Pennelville Road Brunswick, Maine 04011-7929	S
105	Laura Dehler	350 Mountain Road Cape Neddick, Maine 03902-7942	S
106	Susan Ruch	159 Foreside Road	S

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		Falmouth, Maine 04105		
* 107	Kafa Bhurt	610 Madison Huntsville, ALA 35801		S
108	Ralph Nodine	PO Box 156 Jonesboro, Maine 04648-0156		S
109	Christine Baker	281 Mountain Road Arundel, Maine 04046		S
110	Dan Hamilton	605 Wings Mills Road Mt Vernon, Maine 04352		S
111	Marie Malin	52 Wescott Street Falmouth, Maine 04105-1625		S
112	Andrew A. Cadot	101 Lower Flying Point Road Freeport, Maine 04032-6375		S
113	Megan Gahl	175 Otter Cuffs Road Bar Harbor, Maine 04609	UMO	S
114	Robert F. Baldwin	808 Forest Avenue Orono, Maine 04473		S
115	Maine Audovbon	20 Gilsland Farm Road Falmouth, Maine 04105	Jody Jones, Wildlife Ecologist Susan Gallo, Wildlife Ecologist Aram Calhoun, Assoc. Prof. of Wildlife Ecology, UM Jen Burns, Staff Attorney & Advocate	S
116	Richard Dresser	MDIFW		S
117	Kate Harris	15 Holman Point Road Harpwell, Maine 04079		S
118	Dina Trefethen	9 Castle Road New Gloucester, Maine 04260		S
119	Juliet Brown	One Portland Square Portland, Maine 04112-0586	Verrill-Dana	N
* 120	Gary Lamb		Asst. Town Planner, Kennebunk	N
121	Jamie Oman-Saltmarsh	21 Bradeen Street Suite 304 Springvale, Maine 04083-1901	Senior Planner, SMRPC	N
122	Hugh Durgin	PO Box 817 Blue Hill, Maine 04614-0817		N
123	Gerry Mirable	83 Edison Drive Augusta, Maine 04336	Central Maine Power	N
124	David Marceau	Oral comments only	Site Evaluator	O
125	Ray Owen	Oral comments only	University of Maine, Former IF&W Commissioner	S
126	Jerry Longcore	Oral comments only	University of Maine, Wildlife Professor	S

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RESPONSE TO COMMENTS FOR 2005/2006 RULEMAKING

This document notes the substantive comments offered at a public hearing held by the Board of Environmental Protection on October 20, 2005 and in writing prior to the comment deadline of October 31, 2005, and the Department's response to those comments. The number in parentheses at the end of the comment corresponds to the commenters noted above. The comments are arranged according to issues addressed in the proposed rule. All references to Section numbers in the rules refer to the numbering as it appeared in the draft version posted to public hearing on September 22, 2005.

Issue: Habitat Protection.

- 1) General: All comments reflected support for the protection of significant wildlife habitats in general and specifically significant vernal pools.

No response required.

- 2) Maine Audubon submitted comments that describe the life history and ecological importance of vernal pools, waterfowl and wading bird habitat, and shorebird nesting, feeding, and staging areas. Maine Audubon strongly supports the proposed rules, and commends the DEP and the Department of Inland Fisheries & Wildlife for their problem-solving attitude toward protection of these significant habitats. (115)

No response required.

Issue: Significant Vernal Pool Identification period & criteria.

- 3) Of the indicator species listed in Section 9(B)(1), is only one species required or all four for a vernal pool to be identified as "significant?" (120, 121)

Response: To clarify this issue, the department proposes to change the language of Section 9.B(1) to read as follows:

“Abundance. Any one of or combination of the following species abundance levels, documented in any given year, determine the significance of a vernal pool.”

- 4) It is “unclear whether both the abundance and rarity criteria, or only one or the other, must be met in order to qualify a vernal pool as ‘significant.’” (123)

Response: This issue is clarified in the first sentence of the second paragraph of Section 9, as follows:

“Whether a vernal pool is a significant vernal pool is determined by the number and type of pool breeding amphibian egg masses in a pool, the presence of fairy shrimp, **or** use by threatened or endangered species as specified in Section 9(B).” (emphasis added)

This sentence states that either abundance **or** rarity may be used to determine significance of vernal pool habitat, and the department proposes to further clarify this by changing the language to read as follows:

“...egg masses in a pool, or the presence of fairy shrimp, or ...”

- 5) It appears that any documented use by a threatened or endangered species can justify significant status for a vernal pool. (120)

Response: Existing proposed language in Section 9.B.2 states more specifically than implied above that the threatened or endangered species must be one that commonly requires a vernal pool to complete a critical portion of their life-history.

Documentation must be accomplished by a qualified individual.

- 6) This commenter stated at the public hearing held on October 20, 2005 that Section 9 (B) (3) provided additional ways to determine the significance of a vernal pool; however, the commenter acknowledges that this statement was incorrect. (120)

No response required.

- 7) An applicant should have the opportunity to demonstrate that a vernal pool previously identified as significant is no longer significant if it fails to meet the criteria set forth in rule.

Response: The vernal pool working group has discussed the issue of criteria for disenrollment, but decided not to address it explicitly within the rule language, and instead direct the DEP to address it on a case by case basis. Consensus among the vernal pool working group was that 3 or more years of data are necessary for making a case that a pool is no longer a significant vernal pool.

Issue: Professional qualifications.

- 8) DEP should work with the Maine Association of Wetland Scientists (MAWS) and the Wildlife Society (TWS) to set up registry and training minimums for identification and documentation of significant vernal pools (120); and
- 9) “More specific professional training or licensing criteria is warranted, similar to soil science; it is required in order to ensure that qualified judgments are made in the field.” (121)

Response: It is not within the department's purview to issue certification of professional qualifications for wetland scientists or wildlife ecologists; however it supports any attempt by another agency or non-government organization to add certainty and minimum qualifications for this professional service. Because the identification of vernal pools has been required for all permitting levels above Tier 1 (14,999 sf of freshwater wetland not of special significance) impacts since 1995, professionals currently performing wetland delineations or habitat characterizations are assumed to have experience in identifying vernal pools because the depressions meet the criteria of a wetland. By providing a wetland or habitat report as part of an application, an individual attests to their professional ability and qualifications to complete such a task. In addition, this information is routinely field-checked by permitting staff. Wetland and wildlife professionals consulted by the department during rule development confirmed that identification of significant vernal pools according to the proposed criteria was not only feasible, but consistent with standard professional practice. For applications that do not require formal wetland delineation, agency staff will provide resource determinations as is current practice.

Over the last 8 to 12 months the department has participated in multiple workshops aimed at increasing awareness of vernal pools and their ecology. These workshops have been sponsored by MAWS and others, and well-attended by educators, wildlife ecologists, wetland consultants, engineering consultants, regulators, and students. Topics have included jurisdictions under state and federal authorities, importance and biology of vernal pools, and field-tested methods used to identify vernal pools. Specifically, staff has presented overviews of both existing and proposed regulation of significant vernal pools and other significant wildlife habitats. Similar outreach efforts are expected to continue through the next calendar year and beyond as part of the department's participation in education and outreach programs.

Issue: Critical Terrestrial Habitat.

- 10) Based on research conducted on the migration ranges of adult amphibians, which has shown that 750 feet is the recommended protected habitat zone around a vernal pool depression, the proposed 250' protected area around a significant vernal pool depression is the minimum required to protect populations of amphibians. (115)

Response: The department recognizes that the proposed 250-foot critical terrestrial habitat is not determined solely by field research or the scientific literature, but rather is a reasonable number that is consistent with other state regulations. The 250-foot critical terrestrial habitat proposed by the department will provide protection that is not currently in place, and help sustain populations of pool-breeding amphibians, fairy shrimp, and threatened and endangered species. The department has added a Note to the rule explaining this issue. The U.S. Army Corps of Engineers and the U.S. Fish and Wildlife Service have indicated their intent to

continue to default to a 750-foot critical terrestrial habitat requirement under their federal jurisdiction.

- 11) The proposed rule does not “adequately differentiate between activities that impact the vernal pool depression and those that occur in the buffer.” (119)

Response: The department assumes that by “buffer,” the commenter is referring to critical terrestrial habitat. It is important to understand that while the vernal pool depression is the breeding habitat that must be used by the amphibian indicator species listed in the rule, those species only breed once a year, and for a short period of time. The rest of their time is spent in critical terrestrial habitat where the adults feed, seek refuge in forested wetlands in the summer, and find dry upland forests in which to over-winter. Therefore, protection of the critical terrestrial habitat is as important as protection of the vernal pool depression to prevent local extinctions of amphibian populations and maintain biodiversity. Ongoing vernal pool research has shown that the populations of amphibians will decline if critical terrestrial habitat is severely de-vegetated or hardened during development. The department recognizes the significance of the critical terrestrial habitat, and proposes to review activities that occur at least within the first 250 feet of a significant vernal pool depression. During this review, the department will apply all standards for avoidance and minimization in a manner identical to that currently used to protect other natural resources. This analysis is consistent with Chapter 310, the Wetlands and Waterbodies Protection Rules, and with existing provisions in Chapter 355.

That being said, the department does not intend this to be a “no build” zone. Section 3.D allows for activities to be permitted within the critical terrestrial habitat of a significant wildlife habitat if impacts are unavoidable, but not unreasonable. The proposed rules also allow for compensation if the department determines that impacts are unreasonable, but can be mitigated. In addition, the department will continue to permit activities in a significant wildlife habitat at the lowest possible permitting level, as is current practice.

- 12) The definition of significant vernal pool is ambiguous with respect to the size of the buffer area. It is unclear whether the 250-foot “buffer zone” is measured from the vernal pool or the edge of the 100 foot vernal pool envelope. However, commenter #123 acknowledges that this issue was clarified during the public hearing (119, 123); and
- 13) “It is not clear whether the buffer includes all areas within 250 feet of the vernal pool depression, or only if that area independently constitutes critical terrestrial habitat.” (119)

Response: To accurately reflect its ecological function, the 250-foot protected terrestrial habitat around a significant vernal pool depression should be referred to as critical terrestrial habitat, not a “buffer zone,” and it should be acknowledged that

the 250-foot area is in fact only a portion of the terrestrial habitat required for the integrity of a vernal pool community. The department's proposed language recognizes the importance of this habitat area to the populations of amphibians using a pool depression for breeding. The "buffer" around a significant wildlife habitat could be considered to be the 75-foot area "adjacent to" the defined habitat type. This jurisdiction is provided by Section 480-C (1)(A) of the NRPA. A representation of these areas is provided as Appendix 1 at the end of this response to comments.

The Department acknowledges that reference to the vernal pool envelope is confusing and does not add to the understanding or regulatory intent of significant vernal pool protection; therefore references to it have been removed from Section 9.

Issue: Section 9(C) (2), No permit required provision.

- 14) The DEP should exempt re-vegetated utility corridors from permitting under Section 9 of Chapter 335. Roadside electric utilities within 250 feet of a significant vernal pool depression and located within or immediately adjacent to a road right of way or other utility corridor should not require a permit under this section; (123) and
- 15) The DEP should exempt re-vegetated utility corridors from permitting under Section 10 of Chapter 335. (119)

Response: The argument presented in these comments is based on the presumption of fewer impacts to significant vernal pools occur in habitats that are re-vegetated. This presumption may be true when the re-vegetation restores previously existing forested conditions, however research has demonstrated that the permanent conversion of critical terrestrial habitat from forested to meadow or scrub can have severe impacts on the ecology of an individual pool. The allowance for forest management activities within "permit not required" provision acknowledges the reduced effects of temporary deforestation within the critical terrestrial habitat and provides continuity with existing exemption language in the NRPA, Section 480-Q (7-A). As a comparison, the "permit not required" provision in instances where a significant vernal pool depression not located on a parcel owned or controlled by the person carrying out the activity was put in place because of the nature of vernal pool depressions in that they are typically small, and typically not geo-located on a publicly-offered GIS layer. The legislature and the department recognize that a person may not be able to survey land not owned or controlled by them for vernal pool depressions, and therefore may not be able to determine if their activity will impact significant vernal pool habitat.

A "permit not required" provision for re-vegetated utility corridors would not reflect language within the statute nor does it resolve any fundamental "fairness" issues. Therefore, the department did not add this provision to Section 9(C) (2) or Section 10 of the proposed rule. The department does not expect that the proposed regulation of significant vernal pools will add an unreasonable burden to utility companies during

the permitting process as protected natural resources are considered based on both individual functions and values and total impact areas under existing regulations. This process is consistent between state and federal regulatory processes.

- 16) Clarification of Section 9.C.(2), Location of Pool. The definition of a significant vernal pool includes both the depression and the 250 foot portion of the critical terrestrial habitat, therefore this section of the rule implies that a landowner will qualify for this measure only if the entire habitat area is located off the landowner's property. The comments suggested the following change to the rules:

“Location of pool. An activity impacting a significant vernal pool does not require a permit pursuant to this section if the vernal pool depression is not located on a parcel owned or controlled by the applicant. A permit is required, however, if the significant vernal pool depression is both defined and mapped according to 38 M.R.S.A. § 480-I or is located on a Geographic Information System (GIS) data layer maintained either by IF&W or the department.” (119, 123)

Response: The Department concurs that the addition of the word “depression” as shown above will clarify the intended use of this section of the rule. The proposed rule has been amended, please see Section 9.C(2).

- 17) The Department should not regulate the 250 foot habitat area around waterfowl and wading bird habitat (WWH) if the wetland itself is not located on property owned or controlled by the applicant. (119)

Response: The Department of Inland Fisheries & Wildlife has commented that, conservatively, 99% of WWH areas have been identified and placed on the WWH GIS layer, which is available to the public. The DEP and IF&W will print maps showing WWH areas at no charge for interested property owners, as they currently do for other regulated natural and wildlife resources. In addition, these habitats are very different from vernal pool depressions in that they are large bodies of open water and emergent marsh. With the information available on GIS maps and the distinct character of these habitats, ascertaining whether a WWH is within 250 feet of a property line does not require direct access a neighbor's property.

Issue: Implementation.

- 18) “Will DEP have trained staff available to visit the hundreds of subdivisions that are processed in the Southern Maine region each year, which may request MDEP determination?” (121) and
- 19) Delays in permitting would be created due to the seasonality of identification, the limited number of staff available for field determinations, and the increase in permit applications after the identification period. (119)

Response: Although the department acknowledges that its permitting and field services staff have been functioning under high work loads, resource identification is a priority for all Land Resource Regulation staff. For applications requiring permitting above a Tier 1 (14,999 sf of freshwater wetland not of special significance), a wetland delineation, including the location of any wetland-based wildlife habitats, is a required submittal. This translates into field and permitting staff focusing on-site determinations on applicants applying for smaller wetland impacts, who are typically homeowners or small business owners proposing to impact limited areas of a resource. In addition, Chapter 30-A of Maine's municipal code requires that all wetlands on a parcel be identified on plans for all municipal subdivisions (three or more lots); the department mirrors this requirement for subdivisions under its jurisdiction. Division staff will be trained in vernal pool identification and in use of the criteria for significance by University of Maine and MDIF&W staff who are experienced in this field.

The department has statutory deadlines for processing permits. Department staff routinely process a variety of complex projects at the same time within those deadlines; the department does not anticipate that this new regulation will result in processing times exceeding the statutory limits.

- 20) The department should “provide a phase-in period” for [the proposed significant vernal pool regulations]. “I would prefer to see all vernal pools become subject to some regulation and then additional protection extended to those vernal pools exhibiting characteristics consistent with the significant vernal pool concept.” (122)

Response: The proposed regulations have been in development for 10 years. During that period, many state and regional educational workshops and conferences have been held on vernal pool ecology and identification. Given this timeline for development of a definition of a significant vernal pool and the major substantive rulemaking process, which puts any effective date out into summer 2006, the department considers that any requirement for a “phase-in” period has been met. It has been a conscious decision of the Vernal Pool Working Group to regulate only a portion of the vernal pools in Maine as significant wildlife habitat, acknowledging that not all resources are created equal. The proposed vernal pool indicator species and egg mass thresholds for determining significance are based on the best professional judgment of ecologists who have extensively studied vernal pools in different regions of Maine. At the current egg mass thresholds, less than 50% of Maine's vernal pools would be characterized as significant. The commenter's statement that all vernal pools should be subjected to some regulation is in fact the case as the vernal pool depressions would continue to be regulated as freshwater wetlands as they are currently, and the regulatory scenario suggested mirrors that proposed by the department through these rules.

Issue: Impacts on development or economy.

- 21) Limiting determination [of vernal pool] significance to when egg masses are present (2 months per year unless fairy shrimp present) has serious implications for real estate, construction, and land development industries (122, 124); and
- 22) The specific seasonality requirement for identification places a substantial burden on applicants and could potentially lengthen the permitting process and/or effectively preclude development activity. (119)

Response: The department understands the concerns about the limited identification period for determining whether a vernal pool meets the abundance criteria for significance. However, there are other limited identifications already in the statute and rules that have not prevented applications from coming before the department. These include the identification period for a deer wintering yard, which can only be identified during winter conditions with a sufficient depth of snow, and the wetland identification period, which for most wetlands must occur during the growing season. The department expects that the number of applicants with a suspected vernal pool on their property will be small, and will work with those individuals to address their permitting questions. Please also see the response to Comment #20 under "Implementation."

- 23) The significant vernal pool rules appear to be based on research primarily undertaken in Southern Maine. Vernal pools in Eastern Maine may be strung out as discrete or diffuse pockets along drumlins and therefore I would expect that significant vernal pools would be more abundant in Eastern Maine than thought. The impact on small landowners in this area may be much higher than anticipated (122)

Response: The department has proposed the regulation of significant vernal pools based on criteria rather than mapping in a specific location to avoid certain regulatory inequity. While most of the studies used to develop these rules did take place in Southern Maine where vernal pools are most abundant, there have also been a number of pools surveyed in central, eastern, Downeast, and northern Maine. Studies to date do not document a higher occurrence of vernal pools in eastern Maine, in fact they suggest that the occurrence will not be as high as in southern Maine, which has the highest recorded density of vernal pools in New England. Surveying for vernal pools is time consuming and expensive, which is why data across Maine is incomplete. It is this difficulty of surveying the entire state for vernal pool locations that prompted the department to change the regulation of significant vernal pools from mapping to criteria-based identification. The criteria-based regulations will insure a fair and equitable regulation of significant vernal pools.

- 24) Taxpaying landowners may find it necessary to request a rebate of the real estate tax to reflect loss of use and value of valuable upland; (122) and

- 25) The significant vernal pool rules will have severe economic impact on owners of small approved subdivisions as well as owners of lots of record. Lots may become un-buildable or their location may preclude potential mitigation; (122, 124) and
- 26) Lots for single-family residences that are in existence or approved by a local planning entity should be subject to no higher than a Tier 1 permitting level or exempt from review. (122)

Response: It is not within the department's purview to determine relative real estate values based on the presence or absence of protected natural resources on a parcel of land. However, there is sensitivity to assuring that the implementation of this proposed rule governing significant wildlife habitat does not result in inequitable or predicted economic impacts to landowners. To assess whether negative land value impacts could be predicted, the department reviewed a similar implementation of Chapter 310, the Wetland Protection Rules (now the Wetland and Waterbodies Protection Rules), in 1995. Prior to those rules, the NRPA regulated only those freshwater wetlands greater than 10 acres in size. After its effective date, Chapter 310 provided for regulation of all freshwater wetlands, regardless of size. Similar concerns were expressed for loss of land value and impacts on continued development. Despite the reduction in freshwater wetland permitting thresholds, land development, and specifically single-family residential lot development, has continued to grow at record levels based on division of land resource regulation records.

Based on research conducted over the past 10 years, the land area in the State of Maine containing vernal pools is relatively small. In Southern Maine, where the number of vernal pools per square kilometer is the highest recorded in New England, the area of significant vernal pool habitat (including the 250-foot critical terrestrial habitat), in an average-sized town is approximately 2%. The proposed rules have the potential to regulate less than 50% of vernal pools as significant. As with other resources, the department considers the extent of the protected resource and the intent of the landowner for use of their property. Each activity is examined on a case by case basis, and division staff will work with individuals toward a reasonable solution to any habitat and land use conflicts. There is no inherent unfairness to individual lot owners versus other segments of the population associated with these regulations, especially given the department's commitment to continue to provide technical assistance for resource identification.

- 27) The significant vernal pool rules will cause an unreasonable permitting process for some land uses...Individual/Tier 3 permit applications are “generally associated with large, high value projects where permitting and mitigation expenses are an expected cost of doing business.” ...Tier 3 is not acceptable for lot of record due to the cost and complexity of permitting. (122)

Response: Contrary to the above statement, far more individual NRPA permit applications are completed for discrete projects proposed by an individual or small business than large corporations. The department routinely licenses a wide variety of activities that require individual approvals, including piers, shoreline stabilization, and stream crossings; any activity that does not meet tier or Permit by Rule applicability or standards must obtain an individual permit. There is some confusion in the comment above between a tier 3 application, which would only apply to alterations freshwater wetland that exceed an acre of impact, and an individual permit application, which is typically used for all other alterations of wetlands of special significance, including streams, great ponds, coastal wetlands and significant wildlife habitat.

An individual permit is currently required for an activity in, on, over, or adjacent to a significant wildlife habitat. While these applications require more information than a Tier 1 application, the information required is rarely technical in nature. Individual NRPA applications are routinely completed by lay people not experienced in natural resource identification or characterization. Division staff is always available to assist with filling out a permit application. A large consideration of an applicant is usually cost of permitting. The cost for an individual permit to alter a significant wildlife habitat is currently \$238, an amount increased annually only according to the Consumer Price Index. This fee is equivalent to the fee charged for the lowest level of Tier 2 permitting (\$239), for freshwater wetland alterations of between 15,000 and 19,999 square feet, and lower than fees for coastal projects such as piers (\$377). Based on this comparison, the department asserts that neither the cost nor the application requirements for altering a significant wildlife habitat place an unreasonable burden on the regulated public.

Issue: Definition of significant vernal pool.

- 28) It is not clear what wetland types are being excluded in the definition of “natural vernal pool.” (119)

Response: This definition excludes wetlands that do not meet the definition of vernal pool, found in the first paragraph of Section 9, Chapter 335. To be a vernal pool, the three major requirements are that a wetland must be free of a viable population of predatory fish, characterized by temporary to semi-permanent hydrology, and lacking a permanent outlet.

- 29) There is an inconsistency between the definition of significant vernal pools which references only the spring high water mark, and the vernal pool envelope definition which references both the spring and fall high water marks. (123)

Response: The definition of significant vernal pool has been modified to reference the spring and fall high water mark.