

MEMORANDUM

TO: Board of Environmental Protection
FROM: Hetty Richardson, Policy & Procedure Unit, Bureau of Land & Water Quality
DATE: November 20, 2008
RE: Request Adoption: Amendments to Section 5(A) of Wetlands and Waterbodies Protection, 06-096 CMR 310.

Statutory and Regulatory Reference:

Amendments to Section 5(A) of Wetlands and Waterbodies Protection, 06-096 CMR 310 (Chapter 310) are proposed pursuant to general statutory authority at 38 M.R.S.A. Section 341-D(1), and the Natural Resources Protection Act (NRPA), 38 M.R.S.A. §§480-A— 480-GG.

Process:

This is a routine-technical rulemaking. Amendments were suggested by DEP staff. In addition to the required newspaper notice, copies of the rulemaking notice were mailed to persons on the DEP's rulemaking subscription list, and on a list maintained by the Division of Land Resource Regulation for persons with an interest in the NRPA. The proposed amendments were posted to public comment without a hearing. No request for a hearing was received. Comments were received from five persons.

Description:

Substantive changes are proposed to expand the categories of activity located in, on or over wetlands of special significance that may be considered for approval by the department. These include:

- An activity for the purpose of restoring or enhancing the functions and values of the wetlands of special significance;
- An activity that is (a) located at least 250 feet from aquatic vegetation, emergent marsh vegetation, or open water, and (b) does not unreasonably adversely affect the functions and values of the aquatic vegetation, emergent marsh vegetation, or open water, or the functions and values of the freshwater wetlands enhanced or served by those features.
- Activity on a pier, wharf, dock or other structure over a coastal wetland when (a) the Commissioner has reviewed and approved an alternative set of standards pursuant to shoreland zoning (38 M.R.S.A. §438-A(2)) for evaluation of a non water-dependent use, and (b) the pier, wharf, dock or other structure was constructed before 6/30/1990 and is still in existence on the date of the application.

Amendments to the initial paragraphs of Section 5(A) are proposed to more clearly link back to the statutory standard, and is not intended as a substantive change.

Response to comments

Three of the comments received stated concerns about the last amendment described above, without asking for specific changes. In general, the commenters asked whether the amendments would potentially result in the inappropriate addition of new non-water-dependent uses to existing piers, harming coastal and island working communities. A related comment from the State Planning Office suggested including text, perhaps in a note, explaining that DEP would consider potential effects on existing, traditional working waterfront uses when making a decision pursuant to 38 M.R.S.A. §438-A(2) regarding alternative shoreland zoning standards.

As explained in the basis statement, the impact of the proposed amendment on coastal communities is expected to be minor. Although the DEP considers it appropriate to amend Chapter 310(5)(A) to allow for review under the NRPA of certain activities made possible due to the approval of alternative shoreland zoning standards, the DEP expects to continue approaching the review of alternative standards with due consideration for the policies reflected in the shoreland zoning statute and guidelines, which include an emphasis on the importance of protecting existing, traditional waterfront uses. A note on this subject has been added to the amendments as requested.

Two comments expressed general acceptance of or support for the amendments.

Correction: A typographical error has been corrected in numbering in the draft amendment. In Section 5(A)(1)(~~a~~), the “1” after “a” was not struck in the posted draft, and should have been.

Department Recommendation:

The department recommends that the Board adopt the proposed amendments to Chapter 310, Section 5(A).

Estimated Time of Presentation:

Approximately 25 minutes.