

BASIS STATEMENT  
Amendment of Section 9(A) of Ch. 310, Wetlands and Waterbodies Protection  
November 20, 2008

Permission was given by the Board of Environmental Protection (BEP) on 8/21/2008 to post amendments to Section 9(A) of Chapter 310 to public comment without a hearing. The comment deadline was October 3, 2008 at 5:00 pm. Comments were submitted by the following persons:

- (1) Hugh Cowperthwaite (Coastal Enterprises Inc.)
- (2) Jennifer Burns Gray (Maine Audubon)
- (3) Patricia Finnigan (City of Portland)
- (4) Gillian Garratt-Reed (Island Institute)
- (5) Kathleen Leyden (Maine Coastal Program, SPO), and David Etnier (Department of Marine Resources)

The source of each comment below is indicated in parenthesis, by number, at the end of the comment. No request for a public hearing was received.

---

**1. Comment.** Our constituents include working-waterfront dependent users from Maine's Island and coastal communities ranging from southern Maine to the downeast region. While we realize that this provision seems to be narrowly crafted to acknowledge the particular circumstances involving urban waterfront development in Maine's largest city, we are concerned about the potential precedent this will set for the rest of Maine's increasingly developed coastline.

In 2007, we, the Island Institute, completed a study of working waterfront access in Maine through which it was determined that of 1,045 access points on Maine's coast, only 81 are prime sites for working waterfront. Of these, many were built before 1990. It is imperative that these access points are maintained for traditional uses, specifically as development pressure increases along the coast. While the current situation is specific to Portland it is important to consider the potential effects this could have as the coast becomes more urbanized.

We are also researching the potential effects of sea level risk on Maine's coast, and are discovering that the combined effect of sea level rise and storm surge will endanger wharfs up and down the coast. We feel that allowing additional non-water dependent uses on these threatened piers significantly increases the amount of development at risk of flooding.

Conservation of shorelands for water dependent uses, such as commercial fishing, is a policy objective expressed in several other state laws and programs including the Coastal Policies Act, Shoreland Zoning, and programs such as the Working Waterfront Access Pilot Program. While NRPA is designed to protect natural resources it does address both impacts and uses and we ask that you take the concerns mentioned here into consideration. (4)

**Response.** The review of alternative standards under shoreland zoning is beyond the scope of this rulemaking. However, it is possible that between the approval of alternative standards under the Mandatory Shoreland Zoning Act and this rule change, a non water dependent use would be allowed on a pier. The non water dependent limitation would no longer be absolute. Therefore, some discussion of the

Maine Department of Environmental Protection

Basis Statement for Amendments to Section 5(A) of Ch. 310, Wetlands and Waterbodies Protection

DRAFT: 11/16/2008

review of alternative standards by the department under MSZA is appropriate in order to respond to the comment.

In reviewing alternative standards for shoreland zoning ordinances, the department considers coastal policies reflected in the Mandatory Shoreland Zoning Act (MSZA) and adopted guidelines. When standards for commercial fishing districts were first developed, only water dependent uses were allowed. There was extensive discussion of the ability of commercial fishing piers to survive, given pressure from other types of development, and a limitation prohibiting residential structures was included. Therefore, department would consider a request to allow non water dependent uses narrowly, consistent with the MSZA and guidelines.

An example of non water dependent use that would potentially be approvable under alternative standards, would be secondary non water dependent use that directly supports and is important to the viability of a primary water dependent use. Examples may include:

- An office on a second floor, serving the water-dependent use on the first floor.
- Re-use of an existing building, such as a defunct cannery, for lodging directly serving boaters at an existing marina.

A third example might be a change from an existing non-conforming use to another non-conforming use.

However, an ordinance allowing a new building for a non-water-dependent use on a pier would be unlikely to be accepted by the department.

**2. Comment.** Encouragement and support for management of shorelands for water dependent uses is a well-established state coastal management policy, as reflected by a number of state laws and programs, including the Coastal Management Policies Act, Shoreland Zoning Act, the Working Waterfront Grant Program, and the technical assistance programs of SPO's Maine Coastal Program that help coastal municipalities with waterfront planning. In addition, DEP's chapter 310 rules themselves, while largely focused on protection of the natural resources values of wetlands and waterbodies, also address related public uses of those resources. Notably, Chapter 310(5-A)(1) includes "water dependent uses" among the relatively narrow category of projects and uses for which there may be no practicable alternative to location in a coastal wetland. The proposed rule would, under a limited set of circumstances (existing docks and piers built before 1990 on which local zoning allows non water dependent uses), broaden this category to provide an opportunity for an applicant to demonstrate there is no practicable alternative for a proposed non water dependent use as well. Maine's working waterfronts, home of the State's traditional marine-based trades and industries and an integral part of our state's culture and history, are aggregations of water dependent businesses whose viability is linked to proximity to the shore. Accordingly, we encourage to DEP to ensure that this provision is narrowly tailored to ensure its wetlands rules' continued compatibility with state policies regarding maintenance of working waterfront areas. (5)

**Response.** Please see the response to Comment 1. The department has attempted to tailor the NRPA amendment narrowly. The department's review of proposed alternative standards under the Mandatory Shoreland Zoning Act is a crucial step in maintaining important coastal policies, and the department is committed to continued appropriate review of proposed alternative standards. If alternative standards were approved, the department would be able to review a proposed activity for conformance with the standards of the NRPA if the proposed amendment criteria in Chapter 310 were met.

**3. Comment.** Under the proposed rules, allowance for non-water-dependent use in a coastal wetland is contingent on DEP's prior approval of a local shoreland zoning ordinance with an "alternative set of

Maine Department of Environmental Protection  
Basis Statement for Amendments to Section 5(A) of Ch. 310, Wetlands and Waterbodies Protection  
DRAFT: 11/16/2008

standards" which, as contrasted with the state model shoreland ordinance, would potentially allow the water dependent use. *See* Proposed Ch. 310(5)(A)(3)(a). It's our understanding that DEP considers the Shoreland Zoning Act's legislative policy goals, which include protection of commercial fishing and marine industries, in deciding whether to approve alternative shoreland zoning standards. *See* 38 M.R.S.A. §438-A(3). Accordingly, to further harmonize the rules with working waterfront policy goals and provide guidance to applicants and coastal communities alike, we suggest inclusion of language, perhaps in a note explaining this new provision, that specifies that DEP will 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.

**Response.** Please see the responses to the first two comments. A note on the topic suggested has been added to the draft amendments. It reads:

---

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.

---

**4. Comment.** There appears to be some potential that these proposed rule changes would allow consideration of non water dependent development in flood hazard areas or areas that may in time be at risk due to sea level rise. As a general policy matter, we suggest that DEP give careful consideration in the design and implementation of its wetlands rules to assurance of due consideration of sea level rise, particularly in the case of publicly-owned infrastructure, and ways to enhance consistency and compatibility with requirements of the National Flood Insurance Program ("NFIP"). NFIP regulations restrict siting and construction of non-functionally water dependent uses in and over water; make new or substantially improved structures located entirely over water (on a wharf, for example) ineligible for flood insurance; and dictate that a lender must require demonstration of flood insurance coverage as a condition of a loan for a structure in a special flood hazard area. As a means to both harmonize and streamline project review and reduce flood hazards and the potential for related public and private costs, we encourages DEP to explore the relationship between and, as necessary, ensure the compatibility of the proposed rule changes and the NIFP. SPO would be glad to provide further information regarding flood hazard areas, the National Flood Insurance Program, as implemented through municipal floodplain ordinances, and related matters at DEP's request.

**Response.** In reviewing a potential non-water dependent activity following the proposed rule change, it is appropriate for the department to consider potential affects upon natural resources. The department has recognized the potential for sea level rise in *Coastal Sand Dune Rules*, 06-096 CMR 355. Section 9(A) of *Wetlands and Waterbodies Protection*, 06-096 CMR 310 does not conflict with or substitute for compliance with the National Flood Insurance Program. A person proposing an activity would need to meet the requirements of both programs.

The proposed amendment is a narrow one, being conducted in a routine technical rulemaking without a public hearing. It is likely that specifically addressing sea level rise in Chapter 310 would need broader public participation, and it not proposed to be addressed in this rulemaking. However, the department appreciates the offer of further information, and will follow up as needed.

Maine Department of Environmental Protection  
Basis Statement for Amendments to Section 5(A) of Ch. 310, Wetlands and Waterbodies Protection  
DRAFT: 11/16/2008

**5. Comment.** My concern is mainly with the third additional category of activities that may **be** considered for approval in wetlands of special significance “certain activity on a pier, wharf, dock or other structure in coastal wetlands, when (a) the structure was built before June 30, 1990 and is still in existence on the date of the application, and (b) the Commissioner of DEP has approved an alternative set of shoreland zoning standards pursuant to 38 MRSA §438-A(2).”

I work directly with commercial fishermen and commercial waterfront property owners along the Maine coast and have been doing so for the last 6 years. I am an advocate for creating and preserving fishing access along the coast and over the years I have heard first hand and documented many of the pressures and challenges that fishing and marine trade businesses are facing to simply access the water. CEI is one of the founding members of the Maine Working Waterfront Coalition (a statewide group of industry associations, nonprofits, state agencies and individuals dedicated to supporting and enhancing Maine’s working waterfront through policy, planning & research, investment and education). The Coalition & CEI have been a strong supporter of the Small Harbor Improvement Program (SHIP) and have helped to create two new statewide programs: Maine’s Working Waterfront Tax Law <http://www.maine.gov/revenue/forms/property/pubs/workingwaterq&a.htm> and CEI is currently in its third year of administering the Working Waterfront Access Pilot Program under contract to the Department of Marine Resources [www.wvapp.org](http://www.wvapp.org).

As you consider rule changes to Section 5(A) of Chapter 310, I ask that you please keep these existing programs in mind as well as the following points:

- If the rules are changed for Portland to allow a hotel to be built on the Maine State Pier, won’t this set a precedent for other coastal communities to seek similar permission(s)?
- What are the potential impacts these rule changes could have on Maine’s coastal and island working communities who depend on the water to make a living? Will they be easily displaced by non-water dependent uses?

I may not completely understand the implications of the proposed rule changes but my hope is that the DEP is seriously thinking about the potential implications these changes could have coast wide and that the changes do not undermine other existing programs in the state. Thanks for your time and consideration.(1)

**Response.** The department considers it appropriate to amend the rules as proposed in order to allow the department to review a project under the NRPA that may be allowed under an alternative set of shoreland zoning standards.

However, as indicated in prior responses, the department would not expect to allow construction of new building that was non water dependent use on a pier under alternative shoreland zoning standards, because such an approval would be inconsistent with coastal policies embodied in the MSZA and mandatory guidelines.

Please see prior responses. The department does not expect this rulemaking to result in significant impacts on Maine’s coastal and island working communities.

**6. Comment.** I am writing in support of the proposed changes to Chapter 310 Rules addressing Wetlands and Waterbodies Protection. We support the changes to clarify the provisions concerning wetlands of special significances and adding the three additional categories of activities that may be considered for approval.

Maine Department of Environmental Protection  
Basis Statement for Amendments to Section 5(A) of Ch. 310, Wetlands and Waterbodies Protection  
DRAFT: 11/16/2008

The first proposed change clarifies that projects to restore or enhance the functions and values of wetlands of special significance are not presumed to have a practicable alternative less damaging to the environment. If the purpose of the project is to restore or enhance the wetlands, then it doesn't make sense to assume there's a practicable alternative.

The second change outlines an additional exception to the presumption that a practicable alternative less damaging to the environment exists in the particular case where the activity is located at least 250 feet from aquatic vegetation, emergent marsh vegetation, or open water and 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 that are enhanced or served by the aquatic vegetation, emergent marsh vegetation or open water. The language is sufficient to narrowly define this exception.

The third change also provides an exception to the presumption. In this case, the exception addresses a certain activity on a pier, wharf, dock or other structure constructed before the effective date of the rule. It provides that the commissioner must have reviewed and approved an alternative set of standards. Again, we are comfortable that the language is sufficiently limited in scope. (2)

**Response.** No change requested.

**7. Comment.** I am writing in support of the proposed amendments to Chapter 310, Wetlands and Waterbodies Protection - Section 5(A). The City of Portland appreciates the thoughtful consideration and effort that DEP has put into creating the proposed amendments.

In particular, the City fully supports amending the rule to allow non water-dependent uses to be located on a pier, wharf, dock or other structure over a coastal wetland if DEP approves alternative shoreland zoning standards that allow non water-dependent uses and the structure was built prior to June 30, 1990. This amendment to Chapter 310 will continue to provide protection to significant wetlands, while offering flexibility to pier owners to locate non water-dependent uses on a pier in an effort to preserve the pier and the water-dependent and marine-related uses associated with it. The proposed amendment will benefit many pier owners in Portland and throughout the state who are struggling to maintain vital marine infrastructures.(3)

**Response.** No change requested.