

Response to Informal Comments
Draft Amendments to Chapter 335, Significant Wildlife Habitat

Informal written comments were received from:

(1) Patricia W. Aho, Maine Real Estate and Development Association (MEREDA). The comments are a compilation of comments she received from various MEREDA members.

(2) Jennifer Burns Gray, Maine Audubon.

1. Comment. It seems to me that the definitions of vernal pools and significant vernal pools in 9A(6) and (7) are vague. Vernal pools and significant vernal pools are defined in 9.B., so I'm not sure the purpose for these two new definitions. (1)

Response. Sections 9(A)(6) and (7) read as follows:

(6) Significant vernal pool. The vernal pool depression within a significant vernal pool habitat.

(7) Significant vernal pool habitat. A significant vernal pool and that portion of the critical terrestrial habitat within 250 feet of the spring or fall high water mark of the vernal pool depression.

The definitions in 9(A)(6) and (7) are more general than the identification criteria for significant vernal pools that is specified in detail in Section 9(B). The definitions are not intended to displace or affect the meaning of the identification criteria. They define commonly used terms that, in the DEP's experience implementing this chapter, are often confused. The area protected under the Natural Resources Protection Act (NRPA) is significant vernal pool habitat, which includes both a significant vernal pool and a specified amount of upland area. The department commonly hears the terms "significant vernal pool" and "significant vernal pool habitat" used interchangeably and incorrectly, which raises the possibility that the speaker may not realize that upland area is protected in addition to a pool itself. The definitions were added to try to help address this issue.

If the commenter, or others, has a suggestion for how this issue might be addressed more clearly in the rule, please do so in the formal comment period.

2. Comment. I think adding a Central Maine definition is confusing in 9B(4), since in the following paragraph a different definition is used for the line between Northern and Southern Maine for 'drying' purposes. I know the 'drying' provisions were added as a result of the recent legislation, but I think that adding a Central Maine definition could cause confusion. (1)

Response. The DEP agrees that adding a Central Maine definition in Section 9(B)(4), which describes the identification periods for certain significant vernal pool habitat criteria, may cause

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some confusion in the short term. However, the change is considered necessary to provide better guidance concerning the spring identification period.

In the recent legislative session, the Legislature provided for two regions (northern and southern Maine) in a new provision allowing the DEP or the Department of Inland Fisheries and Wildlife (DIF&W) to determine that habitat is not to be significant if the pool dries out before a specified date. The geographic division between the two regions was not stated in the legislation, and the division used in the proposed amendments is based on a recommendation from DIF&W.

The proposed amendments also add a Central Maine region to the general identification provisions, based upon another recommendation from DIF&W. It is important that people have appropriate guidance concerning the narrow window in time when it is necessary to be in the field looking at pools and counting egg masses. Given Maine's geographic size, providing guidance based upon three regions (north, south, and central,) rather than two, is more likely to produce accurate determinations.

3. Comment. Section 9(4-B) conflicts with the definition of significant vernal pool habitat in Section 9. Section 9 states: "Vernal pools have no permanent inlet or outlet and no viable populations of predatory fish." Section 9(4-B) should be revised to match that definition. It should not matter if the inlet or outlet is permanently flowing – it should matter if there is a permanent inlet or outlet. (1)

Response. The introductory material at the beginning of section 9, which the comment quotes in part, is a general description of vernal pools. This introductory material provides some useful background information, and makes clear that significant vernal pools, which are protected as part of significant vernal pool habitat under the NRPA, are a subset of all vernal pools.

Section 9(4)(B) specifies detailed identification criteria for significant vernal pool habitat. It would be inappropriate to revise the more specific criteria for significant vernal pool habitat in Section 9(4)(B) to match the description of vernal pools in general in the introductory paragraph.

In regards to the text concerning the inlet and outlet, recent legislation provided:

"C. In order to be identified as part of a significant vernal pool habitat, the vernal pool may not have a permanent flowing inlet or outlet." PL 2007, ch. 533(3).

The DEP's rules are required to be consistent with this text.

4. Comment. The reference to "qualified individual" (§9.C.5) should allow professionals with both training and experience to be considered "qualified" for the purposes of undertaking field assessments. Soil scientists should also be considered "qualified" if the person has had training and experience appropriate for vernal pool determinations. As the proposed definition currently reads, it appears that only biologists may be considered "qualified". Additionally, the DEP should maintain a list of "qualified individuals" so landowners and developers will know in advance those professionals who are satisfactory to DEP and thus not run into difficulties engaging someone who may not be considered by the Department to be "qualified". (1)

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Response. Section 9(A)(5)¹ provides:

(5) Qualified individual. An individual who has experience and training in either wetland ecology or wildlife ecology and therefore has qualifications sufficient to identify and document a significant vernal pool.

The definition does not limit “qualified individual” to biologists.

Determinations concerning whether someone is considered qualified are done in the context of specific determinations, with the assistance of DIF&W, and the DEP is not in a position to provide a general list of qualified professionals in Maine. However, the DEP will consult with DIF&W concerning whether it may be possible to make a list available on the web of those individuals who have previously been accepted as qualified.

5. Comment. We find the proposed changes to be consistent with the recently enacted legislation, Public Law Chapter 522,² An Act To Streamline the Administration of Significant Vernal Pool Habitat Protection, which we also supported.

Maine Audubon supported Public Law, Chapter 522 and supports the proposed rule changes because they aid landowners, developers, and consultants in determining if a vernal pool is significant by:

1. designating pools that dry before July 15 in southern Maine and July 31 in northern Maine as not qualifying as significant;
2. reducing the number of rare species that must be considered from 96 (1997 list) to only 4; and
3. clarifying that only those pools without a permanent inlet or outlet can qualify as significant.

These simple, straightforward changes are designed to facilitate administration of the new significant vernal pool rules. (2)

Response. No change in the rule requested in this portion of the comment.

6. Comment. We do have one minor correction to the rule changes. On page 18, section 10(c), lines 5-9, “who ... IF&W” should be deleted and “qualified” inserted before “individual.”

The full text referenced by the comment is:

Documentation must be completed by an individual who has experience and training in either wetland ecology or wildlife ecology and therefore has qualifications sufficient to identify and

¹ It is assumed that the section referenced in the comment is a typographical error, and that the commenter meant to reference the definition of “qualified individual” at Section 9(A)(5).

² It is assumed that the chapter referenced in the comment is a typographical error, and that the commenter meant to reference Chapter 533, which has the chapter titled quoted.

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document a high or moderate value waterfowl and wading bird habitat, or field verified by IF&W.

The suggested change was not made, because there is no definition of “qualified individual” in the definition section of Section 10, High and moderate value waterfowl and wading bird habitat. In section 10, the text refers to an individual qualified to identify high or moderate value waterfowl and wading bird habit. A reference to this person is only made once in the section. Generally, when a term is only used once, it is defined where it is used, as in the current rules.

In contrast, in Section 9, Significant vernal pool habitat, a similar provision specific to individuals qualified to identify significant vernal pool habitat has been made into a definition for “qualified individual”. The reference to this person was in several places in Section 9, so a definition of “qualified individual” has been added to the definition section, and the redundant descriptive text removed from a number of places within Section 9.

If after reading this explanation the commenter considers that it would be clearer to add a definition in Section 9 for “qualified individual”, consistent with the format of Section 10 but using the criteria from Section 9, please submit a comment to that effect in the formal rulemaking.