

BASIS STATEMENT
Amendments to Chapter 335, Significant Wildlife Habitat

History

- The proposed amendments to Chapter 335, Significant Wildlife Habitat, were intended to (1) to update text to be consistent with recent statutory changes, and (2) to make other corrections, clarifications and minor changes. This rulemaking is not intended to set significant new policy, and is a routine technical rulemaking.
- A draft of the amendments, together with a side-by-side providing brief reasons for the amendments, was made available for informal comment on the web.
- The proposed rules were posted to public comment without a hearing. The comment period ended December 1, 2008 at 5:00 pm. No requests for a hearing were received.
- Comments were received from two persons.

Comment and Response

The following persons submitted written comments.

- (1) Barbara Berry (Maine Association of Realtors)
- (2) Patrick J. Strauch (Maine Forest Products Council)

Comments reflected below are grouped according to topic, and may be abbreviated and/or consolidated. In some cases, typographical or other minor errors in comments have been corrected. Additional amendments proposed in response to comments are shown in double underline and double strike.

Section 3. General standards applicable to all activities

Comment. Section 3, General standards applicable to all activities, Paragraph (D) Compensation, sub-paragraph (1), states that “This determination may be based on the department’s or the Department of Inland Fisheries & Wildlife’s evaluation of the project *or other appropriate information.*” (emphasis added) We feel that such an open-ended statement seriously diminishes predictability in determining when compensation is required. Evaluation of the project by DEP or IFW should decisively determine the need for compensation. (2)

Response. This language allows the department to consider sources of information that it considers appropriate in making a determination. Appropriate information would be information that is credible and relevant. Information may be provided by an applicant or other sources. However, the ultimate determination concerning compensation still rests with the two departments. Therefore, predictability is not significantly affected. This has been clarified by the following text change:

Compensation is required when the department determines that an impact to significant wildlife habitat will cause habitat functions or values to be lost or degraded as identified by the department. This determination may be based on the department’s or the

Department of Inland Fisheries & Wildlife's evaluation of the project, or other appropriate information which may include an evaluation of appropriate information from other sources.

Comment. Section 3, sub-paragraph (2)(b) states that “the department is authorized to develop a compensation fee program...”. The Department has developed an “In Lieu Fee Compensation Program”, revised in June 2008. For the sake of clarity and simplicity, we would suggest that, if possible, the same program be utilized here. (1)

Response. This subparagraph is intended to refer to the in lieu fee compensation program. The following clarification has been made:

(b) In lieu of a compensation project, wholly or in part, payment of a compensation fee into the “Natural Resources Mitigation Fund” may be allowed by the department. The department is authorized to develop an in lieu fee compensation fee program for use in cases of impacts to certain types of significant wildlife habitat. See 38 M.R.S.A. § 480-Z(3).

Section 9. Significant vernal pool habitat

Comment. In Section 9(B)(6), replace the word “individual” with “landowner” to clarify that the party who has authority to voluntarily identify and submit an identification of a significant vernal pool. This is the intent of the directive in 38 M.R.S.A. 480-BB(5), which states:

5. Process for voluntary identification. Include a process for a landowner to voluntarily identify the landowner's land as a significant vernal pool habitat and to provide the Department of Inland Fisheries and Wildlife the authority to map the significant vernal pool habitat. (2)

Response. The requested change has been made as follows:

Voluntary identification. ~~An individual~~ landowner may voluntarily submit documentation to the department or IF&W ~~the Maine Department of Inland Fisheries & Wildlife (IF&W)~~ regarding the significance of a vernal pool on that individual's property. Documentation must be completed by an a qualified 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, or field-verified ~~field-verified~~ by either the department or IF&W prior to its inclusion on a Geographic Information System (GIS) data layer maintained by either IF&W or the department. A landowner w~~ill~~ receive written confirmation of such documentation from the department.

Comment. Under Section 9, Significant vernal pool habitat, there is a Note: “For more information on identifying vernal pools, see “Maine Citizen's Guide to Locating and Documenting Vernal Pools” Maine Audubon Society, 2003.” Reference to the Department's fact sheet has been struck from the language of the bill. We feel that it is inappropriate, and inconsistent with the usual Department policymaking, to rely on a non-government agency to provide this important information to Maine citizens. We believe the Department, as the governmental agency charged with enforcement of the law, should provide citizens with this information. (1)

Response. The note discussed by the comment reads as follows:

NOTE: For more information on identifying vernal pools, see “Maine Citizen’s Guide to Locating and Documenting Vernal Pools.” Maine Audubon Society, 2003, ~~or the department’s fact sheet entitled “Locating and Documenting Significant Vernal Pools”.~~

The note is intended to provide additional background information on vernal pools. The referenced fact sheet has been struck because it does not exist.

The department has on occasion relied upon material produced from other sources to provide useful background information. The material cited in this note is not incorporated by reference in the rule, and is not an enforceable document. In some cases it is more cost-effective for the department to reference good supplementary material produced by others, than to re-create such material. For additional information from the department on identifying significant vernal pools, please see the department’s web page on significant vernal pool habitat.

Section 10. High and moderate value waterfowl and wading bird habitat.

Comment. The first paragraphs of Section 10 (High and moderate value waterfowl and wading bird habitat) and Section 11 (Shorebird nesting, feeding, and staging areas) make reference to activities “meeting the standards of this chapter.” It is unclear where within chapter 335 these standards exist for activities associated with removal or displacement of vegetation. Please provide clarification. (2)

Response. One of the activities for which a permit is required under the Natural Resources Protection Act (NRPA) is removal or displacement of vegetation. See 38 MRSA 480-C(2)(A). Based on the definition of “significant wildlife habitat” in the NRPA, activities which are solely forest management are not regulated under the NRPA unless the areas have been defined and mapped in accordance with 38 MRSA 480-I by the Department of Inland Fisheries and Wildlife. This mapping has not occurred for these two significant wildlife habitats. Therefore removal or displacement of vegetation associated with solely forest management activities in these areas is not required to meet the standards in this chapter.

It should be noted that some cutting standards specifically for shorebird habitats are specified elsewhere in the NRPA, at 38 MRSA 480-CC. The general standards applicable to all activities in Section 3 of Chapter 335 are used to determine any allowable removal or displacement of vegetation. More specific standards for removal or displacement of vegetation in regards to non-forestry activities are not detailed in this chapter. These habitats and potential effects of activities on the habitats and the birds are very site specific, and general cutting standards are not appropriate.

Minor corrections

Some minor typographical, spelling and grammar errors were found while preparing the final draft and have been corrected. These are also shown in double-underline/double-strike and include:

- Sec. 2(A), delete a semi-colon and add a comma after “dewatering”, and add a comma after “freshwater wetlands”. These punctuation changes were apparently made in a previous rulemaking but not incorporated, and appear as struck and underlined text in the

- current text of the rule. They are shown in double-underline/struck text in the draft proposed for adoption.
- Sec. 3(C)(1). Replace “affects” with “effects”.
 - Sec. 3(D)(3). Insert “the” before “type”.
 - Sec. 9. Third note. Remove extra period at end of sentence, and indent note.
 - Sec. 11. First sentence. Capitalize “shorebird” at beginning of the sentence.