

06-096

DEPARTMENT OF ENVIRONMENTAL PROTECTION

**Chapter 335. SIGNIFICANT WILDLIFE HABITAT**

SUMMARY: These rules outline requirements associated with a Natural Resources Protection Act permit for an activity impacting significant wildlife habitat.

- 1. Applicability.** This chapter applies to an activity that takes place in, on, or over a significant wildlife habitat, or adjacent to a significant wildlife habitat contained within a freshwater wetland, and requires approval from the department pursuant to the Natural Resources Protection Act (NRPA), 38 M.R.S.A. §§ 480-A to 480-FF. This chapter applies to an application for an individual permit under the NRPA and describes basic standards for an activity affecting a significant wildlife habitat.

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NOTE: If a significant wildlife habitat contains a coastal wetland, great pond, river, stream, or brook, or freshwater wetland, the applicant is also required to comply with *Wetlands and Waterbodies Protection Rules, 06-096 CMR 310*.

See *Permit by Rule, 06-096 CMR 305*, concerning activities that may be eligible for permit by rule.

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- 2. Definitions.** As used in this chapter, unless the context otherwise indicates, the following terms have the following meanings.

The terms "freshwater wetland" and "significant wildlife habitat" have the same meaning as in the NRPA in 38 M.R.S.A. § 480-B.

- A. Activity.** Dredging, bulldozing, removing or displacing soil, sand, vegetation or other materials, draining or otherwise dewatering, filling or any construction, repair or alteration of any permanent structure in, on, or over a significant wildlife habitat, or adjacent to a significant wildlife habitat contained within a freshwater wetland, as applicable under the NRPA.

On a case-by-case basis as determined by the department, the term "activity" may not include:

- (1) The disturbance of very little soil through an activity such as installing a fence post or planting shrubs by hand;
- (2) The addition of a minor feature, such as a bench or hand rail, to a structure; or
- (3) The construction, repair or alteration of a small structure with minimal impact such as a nesting box, pasture fence, or staff gauge.

- B. Adjacent to a significant wildlife habitat contained within a freshwater wetland.** The area adjacent to and within 75 feet, measured horizontally, of that portion of the significant wildlife habitat contained within the freshwater wetland.

- C. Existing development area.** The area of property altered including, but not limited to, buildings, driveways, parking areas, wastewater disposal systems, lawns and other non-native vegetation, as of September 15, 1998.

**D. Practicable.** Available and feasible considering cost, existing technology and logistics based on the overall purpose of the project.

**E. Subject wildlife.** Wildlife species for which an area has been designated as significant wildlife habitat.

### 3. General standards applicable to all activities

**A. Avoidance.** An activity that would degrade the significant wildlife habitat, disturb the subject wildlife, or affect the continued use of the significant wildlife habitat by the subject wildlife, either during or as a result of the activity, will be considered to have an unreasonable impact if there is a practicable alternative to the project that would be less damaging to the environment.

**B. Minimal alteration.** Alteration of the habitat and disturbance of subject wildlife must be kept to the minimum amount necessary by, among other methods, minimizing the size of the alteration, the duration of the activity, and its proximity to the significant wildlife habitat and subject wildlife. Temporary structures must be used instead of permanent structures wherever possible when they would be more protective of the significant wildlife habitat or subject wildlife.

**C. No unreasonable impact.** Even if the activity has no practicable alternative, and the applicant has minimized the proposed alteration as much as possible, the application will be denied if the activity will have an unreasonable impact on protected natural resources or the subject wildlife. "Unreasonable impact" means that one or more of the standards of the NRPA at 38 M.R.S.A. § 480-D will not be met. In making this determination, the department considers the area of the significant wildlife habitat affected by the activity, including areas beyond the physical boundaries of the project and the cumulative effects of frequent minor alterations of significant wildlife habitats.

In order to meet the "harm to habitats; fisheries" standard at 38 M.R.S.A. § 480-D(3), the following requirements must be met.

- (1) Unreasonable degradation, disturbance, or effect. The activity may not unreasonably degrade the significant wildlife habitat, unreasonably disturb subject wildlife, or unreasonably affect the continued use of the site by the subject wildlife.

A specific impact may require mitigation on-site or within close proximity to the affected significant wildlife habitat in order to lessen the severity of the impact. For example, altering a portion of a shorebird feeding area that is providing critical habitat for migratory shorebirds will likely require mitigation on-site to ensure that potential effects of the proposed activity are reduced. Mitigation methods may include the implementation of a buffer enhancement plan, deed restriction or other methods as determined by the department.

- (2) Timing. The department may require that construction activities occur during a time when impacts on protected habitats, wildlife, fisheries and aquatic life will be minimized, such as outside of any critical nesting or breeding periods or similar critical periods, depending on the specific habitat and species. For example, an activity that could potentially cause sedimentation, such as excavation, may not be carried out during times of the year when fish are spawning. This requirement must be met unless the work can only practically be completed at that time, and it is determined by the department that the impacts to the protected natural resource will be short term, and will not result in permanent harm to fish, wildlife, or marine resources.

**D. Compensation.** Compensation is the off-setting of a lost habitat function with a function of equal or greater value. The goal of compensation is to achieve no net loss of habitat functions and values. Every case where compensation may be required is unique due to differences in habitat type and geographic location. For this reason, the method, location, and amount of compensation work necessary is variable.

- (1) When required. 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, which may include an evaluation of appropriate information from other sources.
- (2) Types of compensation. Compensation may include one or more of the following methods.
  - (a) A compensation project may be required by the department. Habitat compensation may include the restoration, enhancement or preservation of in-kind significant wildlife habitat or uplands or wetlands adjacent to such habitat. The site of the compensation project must provide significant wildlife habitat functions that might otherwise be degraded by unregulated activity, be located within the affected habitat or within similar habitat located within close proximity to the affected habitat, and the site must be preserved. If habitat priorities have been established at a local, regional or state level, the applicant shall consider those priorities in devising a compensation plan. Directional buffers may also be used in some instances to off-set impacts.
  - (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).
- (3) Compensation amounts. The amount of compensation required to replace lost functions depends on a number of factors including: the type of habitat to be altered; the size of the alteration activity; the functions of the habitat to be altered; and the type of compensation to be used. Compensation as described in Section 3(D)(2)(a) must meet the following ratios of square footage or acreage at a minimum (area restored, enhanced, created or preserved/area impacted), unless the department finds that a different ratio is appropriate to directly off-set habitat functions to achieve an equal or higher net benefit for habitat:
  - (a) 2:1 for restoration, enhancement, or creation;
  - (b) 8:1 for preservation, including adjacent upland or wetland habitat.
- (4) Waiver. The department may waive the requirement for an assessment of habitat functions and values, compensation, or both. The department may waive the requirement for an assessment of the habitat if the department already possesses the information necessary to determine the functions and values of the area proposed to be altered. The department may waive the requirement for compensation if it determines that the impact to habitat functions and values from the activity will be insignificant.

**E. Seasonal factors.** When determining the significance of a wildlife habitat or impact from a proposed activity, seasonal factors and events that temporarily reduce the numbers and visibility of plants or animals, or obscure the topography and characteristics of a habitat such as a period of high water, snow and ice cover, erosion event, or drought are taken into account. Determinations may be deferred for an amount of time necessary to allow assessment of the resource without such seasonal factors.

#### 4. Pre-application and pre-submission meetings

**A. Purpose.** The pre-application meeting between the applicant and the department is an opportunity for the applicant to determine the statutory and regulatory requirements that apply to a specific activity. The purpose of this meeting is to identify issues, processing times, fees and the types of information and documentation necessary for the department to properly assess the activity. The pre-submission meeting is an opportunity to review the assembled application to ensure that the necessary types of information have been included prior to filing the application.

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NOTE: Activities requiring an NRPA permit are described at 38 M.R.S.A. § 480-C. Exemptions are described at 38 M.R.S.A. § 480-Q.

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**B. Submissions and scheduling.** The following information and items must be submitted prior to scheduling a pre-application meeting with the department.

- (1) Sketch plan. A sketch plan of the site showing the proposed activity, adjacent structures and features, property lines, and the significant wildlife habitat, with all distances and dimensions approximately to scale.
- (2) Location map. A map showing the location of the proposed project site in relation to major roads and landmarks.
- (3) Description of activity. A brief description of the activity including its dimensions.
- (4) Description of significant wildlife habitat. A description of the significant wildlife habitat to be altered.
- (5) Description of probable impacts. A description of probable impacts of the activity on the subject wildlife, significant wildlife habitat, and any other protected natural resources.
- (6) Photographs. Photographs of the project area showing its characteristics.

**5. Submission requirements.** The applicant shall submit evidence that affirmatively demonstrates that the activity will meet the standards of the NRPA and this chapter including, but not limited to, the information listed below. Because of the site-specific nature of activities and potential impacts to significant wildlife habitat, the department may, on a case-by-case basis, require more or less information than specified in this section in order to determine whether the standards will be met. Failure to provide any requested information necessary for the processing of the application may result in the application not being accepted as complete for processing or denial of the application.

**A. Description of avoidance measures.** A narrative describing whether a practicable alternative to the alteration exists that would be less damaging to the environment and what alternatives were considered during project design. The narrative must address why the activity cannot avoid or

lessen impacts to the significant wildlife habitat by utilizing, managing or expanding one or more other sites; reducing the size, scope, configuration or density of the proposed activity; developing alternative project designs; or by some other means.

**B. Site description and impacts.** A narrative addressing the following.

- (1) Description of activity. A narrative including the following:
    - (a) The dimensions of the activity, the activity site, and the area of the significant wildlife habitat to be altered;
    - (b) The impacts of the activity on subject wildlife and protected natural resources; and
    - (c) The nature and timing of procedures intended to reduce the impacts of the activity on subject wildlife and protected natural resources.
  - (2) Location map. A map showing the location of the proposed activity site in relation to major roads and landmarks.
  - (3) Drawings (Sketch plan). Scale drawings (overhead and side views) showing dimensions of the activity, the activity site, and the area of the significant wildlife habitat to be altered.
  - (4) Description of site characteristics. A description of existing significant wildlife habitat characteristics.
  - (5) Photographs. Photographs of the activity area, showing its characteristics.
  - (6) Description of activity construction. A description of how the activity will be constructed with information on how the activity site will be accessed, and any erosion control measures proposed.
- 6. Terms and conditions.** The department may, as a term or condition of approval, establish any reasonable requirement to ensure that the proposed activity will meet the standards of Title 38 M.R.S.A. § 480-D and comply with this chapter.
- 7. Severability.** Should any provision of these rules be declared invalid or ineffective by court decision, the decision shall not invalidate any other provision of these rules.
- 8. Seabird nesting island.** Seabird nesting islands are significant wildlife habitats. An activity impacting a seabird nesting island must meet the standards of this chapter.

Seabirds live over the open ocean, returning to land only once a year to nest, and their survival depends on undisturbed nesting habitat. Small, unforested, rocky islands such as those off the coast of Maine provide a setting free of mammalian predators such as foxes, coyotes, and raccoons. Flying distance from the mainland discourages avian predators such as great horned owls. Many seabird species nearly eradicated in Maine by the end of the 19th century have recovered dramatically, thanks to the passage of state and federal conservation laws and the restoration efforts of dedicated scientists. In 1998, 234 seabird nesting Islands in Maine were afforded protection as Significant Wildlife Habitat under the Natural Resource Protection Act.

**A. Definitions.** As used in this chapter, unless the context otherwise indicates, the following terms have the following meanings.

- (1) Seabird. Colonial nesting waterbirds including Leach's Storm-petrel, Great Cormorant, Double-crested Cormorant, Laughing Gull, Herring Gull, Great Black-backed Gull, Common Tern, Arctic Tern, Roseate Tern, Razorbill, Black Guillemot, Atlantic Puffin, and Common Eider.
- (2) Seabird nesting island. (a) An island, ledge, or portion thereof in tidal waters that has documentation of 25 or more: nests or seabirds, adult seabirds displaced from nests, or in combination (single species or aggregate of different species) in any nesting season during, or since, 1976; provided that the island, ledge, or portion thereof continues to have suitable nesting habitat. (b) An island, ledge, or portion thereof in tidal waters that has documentation of one or more nests of a seabird that is a Maine endangered or threatened species in any year during, or since, 1976 provided that the island, ledge, or portion thereof, continues to have suitable nesting habitat.

**B. Maps.** Seabird nesting islands are delineated on 7.5 minute U.S. Coast and Geodetic Survey maps developed by the Maine Department of Inland Fisheries and Wildlife. The maps are identified as Significant Wildlife Habitat Seabird Nesting Island Maps #1-55, January 1998.

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NOTE: The criteria used to define seabird nesting islands was developed by the Maine Department of Inland Fisheries and Wildlife (09-137 CMR 10.02(F)). Maps of seabird nesting islands are available from the Department of Environmental Protection or the Maine Department of Inland Fisheries and Wildlife (IF&W).

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**C. Removal or displacement of vegetation.** For seabird nesting islands, removal or displacement of vegetation does not include:

- (1) Gardening, lawn cutting, removal of fallen vegetation, and tree and shrub pruning within an existing development area as of September 15, 1998.
- (2) Removal of an entire tree when it threatens a building.

**D. Seabird critical nesting period.** The seabird critical nesting period is from April 15 to August 31 each year unless otherwise approved by the Maine Department of Inland Fisheries and Wildlife.

**9. Significant vernal pools habitat.** A vernal pool, also referred to as a seasonal forest pool, is a natural, temporary to semi-permanent body of water occurring in a shallow depression that typically fills during the spring or fall and may dry during the summer. Vernal pools have no permanent inlet or outlet and no viable populations of predatory fish. A vernal pool may provide the primary breeding habitat for wood frogs (*Rana sylvatica*), spotted salamanders (*Ambystoma maculatum*), blue-spotted salamanders (*Ambystoma laterale*), and fairy shrimp (*Eubranchipus* sp.), as well as valuable habitat for other plants and wildlife, including several rare, threatened, and endangered species. A vernal pool intentionally created for the purposes of compensatory mitigation is included in this definition.

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, use by rare, threatened or endangered species, or other criteria as specified in Section 9(B). Significant vernal pool habitat consists of a vernal pool depression and that portion of the critical terrestrial habitat within 250 feet of

the spring or fall high water mark of the depression. An activity that takes place in, on, or over a significant vernal pool habitat must meet the standards of this chapter.

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NOTE: The term vernal (vernal = spring) pool is used in the Natural Resources Protection Act, and has typically been used to discuss the types of pools described in Section 9. However, because some pools are wet in both spring and fall, and others are never dry, they have also been referred to as “seasonal forest pools.” Vernal pool is still a common term, and will continue to be used in this section.

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NOTE: The 250 feet of critical terrestrial habitat protected as significant vernal pool habitat is only a portion of the habitat used by adult wood frogs, ambystomatid salamanders, and rare, threatened and endangered species. Tracking studies of adult pool-breeding amphibians have shown that they can travel over a third-mile away from their breeding pool, and that the area within 750 feet of the pool is valuable for protecting viable amphibian populations. The department encourages efforts to protect more habitat adjacent to a vernal pool than this rule has authority over.

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NOTE: For more information on identifying vernal pools, see “Maine Citizen’s Guide to Locating and Documenting Vernal Pools.” Maine Audubon Society, 2003.

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**A. Definitions.** As used in this section, unless the context otherwise indicates, the following terms have the following meanings.

- (1) Critical terrestrial habitat. Uplands and wetlands associated with significant vernal pools used by pool breeding amphibians for migration, feeding, and hibernation, in particular, forested wetlands and forested uplands that provide deep organic litter, coarse woody debris and canopy shade.
- (2) Egg mass. Three or more individual eggs clumped in a gelatinous matrix constitute an egg mass. Egg masses often occur in clusters, but each mass within a cluster must be counted as an individual egg mass.
- (3) Natural. A natural vernal pool includes pools of natural origin that have been modified or excavated. A natural vernal pool does not include other natural wetland types (wet meadows, marshes, etc.) that have been altered and currently function as vernal pools.
- (4) Pool-breeding amphibians. Animals that, as part of their life cycle, reproduce in vernal pools. Most pool-breeding amphibians return to reproduce in the pool where they originated. Most adult pool-breeding amphibians spend less than one month in breeding pools; the rest of their annual cycle is spent in critical terrestrial habitat.
- (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.
- (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.
- (8) Vernal pool depression or vernal pool. This area includes the vernal pool depression up to the spring or fall high water mark, and includes any vegetation growing within the depression.

**B. Significant vernal pool habitat identification criteria.** Vernal pool habitat significance must be determined and documented by a qualified individual.

- (1) Abundance. Any one of or combination of the following species abundance levels, documented in any given year, determine the significance of a vernal pool habitat.

Species	Abundance Criteria
Fairy shrimp	Presence in any life stage.
Blue spotted salamanders	Presence of 10 or more egg masses.
Spotted salamanders	Presence of 20 or more egg masses.
Wood frogs	Presence of 40 or more egg masses.

- (2) Rarity. A pool that has documented use in any given year by a rare species, or state-listed endangered or threatened species that commonly requires a vernal pool to complete a critical portion of its life-history is part of a significant vernal pool habitat. Examples of vernal pool dependent state-listed endangered or threatened species include, but are not limited to, Blanding's turtles, Spotted turtles, and Ringed Boghaunter dragonflies. The rare species that must be considered are limited to: Ribbon Snakes, Wood Turtles, Swamp Darner Dragonflies and Comet Darner Dragonflies.
- (3) Identification period. Egg masses must be counted just past the peak breeding period of pool-breeding amphibians. Abundance of pool-breeding amphibians can only be used to determine the presence of a significant vernal pool during the identification period. The presence of fairy shrimp, rare species listed in paragraph (2), or a state-listed endangered or threatened species may be used to determine the presence of a significant vernal pool at times of the year other than the identification period.

NOTE: Optimal times for counting egg masses of pool-breeding amphibians vary according to geographic location and weather. For instance, during cold springs, breeding can begin as much as 2 weeks later than it does in warm, wet springs. The optimal time to count masses is just past the peak breeding period. For wood frogs, this occurs approximately 2 weeks after they start full choruses. Wood frog egg masses hatch very quickly and are difficult to count much past peak breeding. Salamanders have a more extended breeding period and their eggs do not hatch as quickly as those of wood frogs. Therefore, surveys to count salamander egg masses should be conducted slightly later in the breeding season, generally 2-3 weeks following wood frog egg mass counts. The following are rough guidelines for optimal times for counting egg masses:

Geographic Region	Wood Frogs	Spotted & Blue Spotted Salamanders
Northern Maine	May 5 – May 20	May 15 – June 5
Central Maine	April 25 – May 10	May 5 - May 25

Southern Maine	April 10 – April 25	April 20 – May 10
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Note that optimal egg mass counting dates for high elevation localities are likely to be delayed by up to one or two weeks from the suggested dates provided within each geographic region above.

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(4) Geographic regions.

(a) The three geographic regions used in Section 9(B)(3) are as follows.

- (i) The Northern Maine region is approximately that part of the state north of a line extending from Rangeley to Dover-Foxcroft to Howland to Calais.
- (ii) The Central Maine region is approximately that part of the state south of that same line and north of a line extending from Fryeburg to Augusta to Belfast.
- (iii) The Southern Maine region is approximately that part of the state south of the line extending from Fryeburg to Augusta to Belfast.

(b) The two geographic regions used in Section 9(B)(4-A) are as follows.

- (i) The Northern Maine region is approximately that part of the state north of a line extending from Rangeley to Dover-Foxcroft to Howland to Calais.
- (ii) The Southern Maine region is approximately that part of the state south of the line described in (i).

(4-A) Drying. When a vernal pool habitat has not previously been determined to be significant, and the department or the Maine Department of Inland Fisheries & Wildlife (IF&W) makes a determination concerning whether the vernal pool habitat is significant, either department may determine that the vernal pool habitat is not significant if:

- (a) The vernal pool is located in northern Maine and dries out after spring filling and before July 31<sup>st</sup> based on winter, spring and early summer precipitation; or
- (b) The vernal pool is located in southern Maine and dries out after spring filling and before July 15<sup>th</sup> based on winter, spring and early summer precipitation.

(4-B) Lack of permanent flowing inlet or outlet. 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.

(5) Seasonality. The department may require an assessment of significance by a qualified individual during the identification period. In any season, indicators of a potentially significant vernal pool habitat may include flat topography with depressions or pit-and-mound topography, wetland flora, fingernail clams, caddisfly cases, and evidence of temporary flooding.

- (6) Voluntary identification. A landowner may voluntarily submit documentation to the department or IF&W regarding the significance of a vernal pool on that individual's property. Documentation must be completed by a qualified individual, or 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 will receive written confirmation of such documentation from the department.
- (7) Verification of significance. A significant vernal pool documented on a Geographic Information System (GIS) data layer maintained by either IF&W or the department is eligible for removal from that data layer following IF&W verification of three consecutive years of data demonstrating that a vernal pool no longer meets the criteria in Sections 9(B)(1) or (2). A written request to remove a significant vernal pool from the data layer must be submitted to both IF&W and the department and include documentation made during the identification period by a qualified individual. A written department determination that a vernal pool is not significant remains valid regardless of timeframe.

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NOTE: For more information on managing the critical terrestrial habitat surrounding vernal pools, see:

Calhoun, A.J.K. and M.W. Klemens. 2002. Best development practices: Conserving pool-breeding amphibians in residential and commercial developments in the northeastern United States. MCA Technical Paper No. 5, Metropolitan Conservation Alliance, Wildlife Conservation Society, Bronx, New York.

Calhoun, A.J.K. and P. deMaynadier. 2004. Forestry habitat management guidelines for vernal pool wildlife. MCA Technical Paper No. 6, Metropolitan Conservation Alliance, Wildlife Conservation Society, Bronx, New York.

Calhoun, A.J.K. and P.G. deMaynadier (Editors). 2008. Science and Conservation of Vernal Pools in Northeastern North America. CRC Press, Boca Raton, FL.

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**C. Habitat management standards for significant vernal pool habitat.** To the greatest extent practicable, the following management practices must be followed within significant vernal pool habitat.

- (1) No disturbance within the vernal pool depression;
- (2) Maintain a minimum of 75% of the critical terrestrial habitat as unfragmented forest with at least a partly-closed canopy of overstory trees to provide shade, deep litter and woody debris.
- (3) Maintain or restore forest corridors connecting wetlands and significant vernal pools;
- (4) Minimize forest floor disturbance; and
- (5) Maintain native understory vegetation and downed woody debris.

If more than 25% of the critical terrestrial habitat has been previously developed, restoring a portion of that area through supplemental planting or regrowth of native forest species may

be considered toward meeting these standards, or towards standards for avoidance, minimization, or compensation. For purposes of this section, developed area includes disturbed areas excluding areas that are returned to a condition with the same drainage patterns and the same or improved cover type that existed prior to the disturbance.

- D. Permit by Rule.** An activity occurring in, on, or over a significant vernal pool habitat or a potential significant vernal pool habitat is eligible for a Permit by Rule (PBR) as described in Chapter 305, Section 19, provided that the habitat management standards in Section 9(C) above are met. An applicant submitting a Permit by Rule notification pursuant to Chapter 305, Section 19, is not required to provide a seasonal assessment of significance.

Submission of a PBR notification pursuant to Chapter 305, Section 19 does not negate an applicant's ability to submit subsequent documentation to verify or negate applicability of Section 9 of this chapter provided that documentation is completed during the identification period by a qualified individual. GIS data points specific to Chapter 305, Section 19, will be uploaded to the GIS data layer maintained by IF&W or the department only following submission and verification of such documentation by the department or IF&W.

This subsection does not apply to an activity that is not or will not be in compliance with the terms and conditions of a permit issued under the Site Location of Development Law, 38 M.R.S.A. §§ 481 to 490, the Stormwater Management Law, 38 M.R.S.A. § 420-D, or the Natural Resources Protection Act, 38 M.R.S.A. §§ 480-A to 480-FF.

- E. Permit not required.** A permit is not required from the department under the following circumstances.

- (1) Forest management activities. Forest management activities in, on, or over a significant vernal pool habitat do not require a permit pursuant to this section if the significant vernal pool is not defined and mapped according to 38 M.R.S.A. § 480-I.
- (2) Location of pool. If an activity is located in, on, or over a vernal pool habitat but the significant vernal pool depression is not located on a parcel owned or controlled by the person carrying out the activity, then a permit is not required pursuant to this section unless:
  - (a) The significant vernal pool is defined and mapped according to 38 M.R.S.A. § 480-I or is located on a Geographic Information System (GIS) data layer maintained by either IF&W or the department; or
  - (b) Evidence of property transfers indicates an intent to evade regulation under the Natural Resources Protection Act.
- (3) Department determination. If, upon request from a landowner, department staff provide a written field determination or advisory opinion regarding the presence or absence of a significant vernal pool, a landowner acting on that determination or advisory opinion by carrying out an activity subsequently found to be in violation is not required to obtain a permit for that activity and will not be subject to enforcement action if jurisdiction or penalty would be based solely on that activity.
- (4) Communications and electric facilities. Construction of overhead communications and electric lines, poles, guy anchors, and related overhead infrastructure located within a public or private right of way, within 25 feet of the edge of the road right of way, or within an

existing clearing created for a public or private road does not require a permit pursuant to this section provided that poles are not placed within a significant vernal pool depression.

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NOTE: GIS data layer information may be obtained at IF&W and MDEP offices.

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**F. Implementation date.** Section 9 may not be enforced or implemented until September 1, 2007.

**10. High and moderate value waterfowl and wading bird habitat.** High and moderate value waterfowl and wading bird habitats are significant wildlife habitats. Waterfowl are members of the family Anatidae including but not limited to brant, wild ducks, geese, and swans. Wading birds include but are not limited to herons, glossy ibis, bitterns, rails, coots, common moorhens, and sandhill cranes. An activity that takes place in, on, or over a high and moderate value waterfowl and wading bird habitat must meet the standards of this chapter. High and moderate value waterfowl and wading bird habitats subject to this chapter are depicted on a GIS data layer maintained by IF&W and available from either IF&W or the department.

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NOTE: The IF&W rating procedure and list of waterfowl and wading bird species was created December 22, 1993, updated September 1, 2005, and is available at IF&W offices and on line at <http://www.maine.gov/ifw/index.html>.

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**A. Inland habitat identification criteria.** A high to moderate value inland habitat is an inland wetland complex, and a 250 foot wide zone surrounding the wetland complex, that through a combination of dominant wetland type, wetland diversity, wetland size, wetland type interspersion, and percent open water meets IF&W guidelines or is an inland wetland complex that has documented outstanding use by waterfowl or wading birds. Determination of high to moderate value inland habitat is based on the following.

- (1) Wetland type. Dominant wetland type is rated by the assigned score for the wetland type of greatest area in the wetland. Wetland type is determined using the classification system published by IF&W based on McCall, 1972, for waterfowl and wading bird habitat rating. A score for the value to waterfowl and wading birds is assigned to each type using the IF&W rating procedure.
- (2) Wetland diversity. Wetland diversity is rated by assigning the wetland to one of the diversity categories based on the number of wetland types present in the wetland using the IF&W rating procedure.
- (3) Wetland size. Wetland size is rated by assigning the wetland to one of three size categories based on the total area of the wetland using the IF&W rating procedure.
- (4) Interspersion. Wetland type interspersion is rated by assigning the wetland to one of three interspersion categories using the Golet (1974) system, as modified for Maine in the IF&W rating procedure.
- (5) Open water. Percent open water is rated by assigning the wetland tone of four categories, based on the percent of the wetland in open water using the IF&W rating procedure.

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NOTE: The following are literature citations as referenced above:

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McCall, C.A. 1972. Manual for Maine wetlands inventory. Maine Department of Inland Fisheries and Game, Augusta, Maine. 38pp.

Golet, F.C., and J.S. Larson. 1974. Classification of freshwater wetlands in the glaciated northeast. Resource Publication 116. U.S. Department of the Interior, Washington, D.C. 56pp.

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NOTE: Regardless of its identification on maps as a high or moderate value waterfowl and wading bird habitat, an upland area adjacent to a great pond is not considered high or moderate value waterfowl and wading bird habitat unless the upland area is within 250 feet of one or more freshwater wetlands that are high or moderate value waterfowl and wading bird habitat. See 38 M.R.S.A. § 480-EE.

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**B. Tidal habitat identification criteria.** A high or moderate value tidal habitat is as defined in IF&W's rating procedure or is a tidal habitat that has documented outstanding use by waterfowl or wading birds or use by a rare species of waterfowl or wading birds. Habitat type is determined using the classification system published by Cowardin *et al.* (1979) and defined in the IF&W rating procedure. Four habitat types considered as potential high or moderate value tidal habitat are described below.

- (1) Aquatic bed habitat. The extent of aquatic bed habitat for the delineation of high value tidal waterfowl and wading bird habitat will be defined by the eelgrass (*Zostera marina*) beds currently mapped by Maine Department of Marine Resources. Eelgrass beds greater than 25 acres in size are high value. Eel grass beds greater than or equal to 2.5 acres but less than 25 acres are moderate value.
- (2) Reefs. Reefs included in tidal waterfowl and wading bird habitat in Maine are limited to mussel bars or beds. All mussel bars or beds are high value tidal waterfowl and wading bird habitat.
- (3) Emergent wetlands. Emergent wetlands equal to or greater than 25 acres in size are high value. Emergent wetlands greater than or equal to 2.5 acres but less than 25 acres are moderate value.
- (4) Mudflats. Mudflats equal to or greater than 25 acres are high value tidal waterfowl and wading bird habitat. Mudflats greater than or equal to 12.5 acres but less than 25 acres are moderate value. Mudflat immediately adjacent to one of the above habitats will result in the combined habitats being rated high if the total area is greater than 25 acres in size or moderate if the combination is greater than or equal to 2.5 acres but less than 25 acres.

NOTE: The following are literature citations as referenced above:

Cowardin, L.W., V. Carter, F.C. Golet, and E.T. LaRoe. 1979. Classification of wetlands and deepwater habitats of the United States. U.S. Department of the Interior, Washington, D.C. 103 pp.

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NOTE: Although an area is otherwise in conformance with significant wildlife habitat criteria adopted by the department for high and moderate value inland waterfowl and wading bird habitat, the Department of Inland Fisheries and Wildlife may determine that a specific portion of the area is no longer this type of significant wildlife habitat due to the

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topography or impact of development in existence on June 8, 2006 and continuing in existence as of the date of the determination, as provided in 38 M.R.S.A. § 480-DD.

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**C. Verification of habitat value.** A person may voluntarily submit documentation to the department or the Maine Department of Inland Fisheries & Wildlife (IF&W) regarding the value of a waterfowl and wading bird habitat on that person's property. 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 document a high or moderate value waterfowl and wading bird habitat, or field verified by IF&W. Following review of such documentation, IF&W may modify the boundary of a high or moderate value waterfowl and wading bird habitat depicted on the applicable GIS data layer. A landowner will receive written confirmation of such documentation from the department.

**D. Department determination.** If, upon request from a landowner, department staff provide a written field determination or advisory opinion regarding the presence or absence of a high or moderate value waterfowl and wading bird habitat, a landowner acting on that determination or advisory opinion by carrying out an activity subsequently found to be in violation is not required to obtain a permit for that activity and will not be subject to enforcement action if jurisdiction or penalty would be based solely on that activity.

**11. Shorebird nesting, feeding, and staging areas.** Shorebird nesting, feeding, and staging areas, and a zone surrounding those areas, are significant wildlife habitats. The zone surrounding a shorebird feeding area is 100 feet wide, and is referred to as "the feeding buffer". The zone surrounding a shorebird roosting area is 250 feet wide and is referred to as "the roosting buffer". Shorebird species include the members of the families Scolopacidae, Charadriidae, and Haematopodidae, including, but not limited to, sandpipers and plovers. A complete list of species is provided in the Maine Department of Inland Fisheries and Wildlife (IF&W) procedures for classifying significant shorebird habitat. An activity that takes place in, on, or over a shorebird nesting, feeding, and staging area habitat must meet the standards of this chapter. Shorebird habitats subject to this chapter are depicted on a GIS data layer maintained by IF&W and available from either IF&W or the department. To date, IF&W has not adopted a definition of nesting area habitat, and therefore no criteria are presently included in this chapter.

Maine feeding and staging areas provide migrating shorebirds with the food resources to acquire the large fat reserves necessary to fuel their transoceanic migration to wintering areas. Shorebird staging habitats include both feeding areas where shorebirds congregate to feed and roosting areas used by shorebirds to rest during high water when feeding areas are unavailable.

**A. Definitions.**

- (1) Shorebird feeding area. A shorebird feeding or staging area that is not a roosting area. The shorebird feeding area includes a 100-foot-wide surrounding buffer referred to as "the feeding buffer".
- (2) Shorebird roosting area. A shorebird feeding or staging area that is also a roosting area. The shorebird roosting area includes a 250-foot-wide buffer referred to as "the roosting buffer".
- (3) Staging. Staging areas include areas used for feeding, roosting, and loafing during spring and fall migration and post-breeding dispersal.

**B. Shorebird nesting, feeding, and staging area identification criteria.** A feeding or staging site qualifies as significant shorebird habitat if either of the following criteria is met, as determined by an individual with experience or training in wildlife ecology.

- (1) Number of observations. The mean number of shorebird observations since 1987 for a site is 10% or more of the total mean number of shorebirds surveyed in a particular shorebird survey unit as defined in IF&W procedures.
- (2) Number of shorebirds. The mean number of shorebirds for a single species since 1987 at a site is 10% or more of the overall or total mean number observed of that species in the encompassing shorebird survey unit.

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NOTE: Shorebird occurrence data is from the current IF&W database as described in procedure created December 22, 1993, and updated September 1, 2005. As new data is entered the mean of the observations is recalculated. The IF&W rating procedure and database information are available at IF&W offices and on line at <http://www.maine.gov/ifw/index.html>.

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NOTE: Although an area is otherwise in conformance with significant wildlife habitat criteria adopted by the department for shorebird nesting, feeding, roosting and staging areas, the Department of Inland Fisheries and Wildlife may determine that a specific portion of the area is no longer this type of significant wildlife habitat due to the topography or impact of development in existence on June 8, 2006 and continuing in existence as of the date of the determination. See 38 M.R.S.A. § 480-DD.

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**C. Verification of habitat value.** An individual may voluntarily submit documentation to the department or the Maine Department of Inland Fisheries & Wildlife (IF&W) regarding the value of a shorebird nesting, feeding or staging area. 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 document a shorebird nesting, feeding or staging area, or field verified by IF&W. Following review of such documentation, IF&W may modify the boundary of a shorebird nesting, feeding or staging area depicted on the applicable GIS data layer. A landowner will receive written confirmation of such documentation from the department.

**D. Department determination.** If, upon request from a landowner, department staff provide a written field determination or advisory opinion regarding the presence or absence of a shorebird nesting, feeding, and staging area, a landowner acting on that determination or advisory opinion by carrying out an activity subsequently found to be in violation is not required to obtain permit for that activity and will not be subject to enforcement action if jurisdiction or penalty would be based solely on that activity.

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NOTE: The cutting standards in 38 M.R.S.A § 480-CC(2) apply to shorebird feeding and roosting buffers.

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STATUTORY AUTHORITY: 38 M.R.S.A. §§ 341-D and 480-A *et seq.*

EFFECTIVE DATE:

September 15, 1998

AMENDED:

June 8, 2006 – filing 2006-196, major substantive

AMENDED:

Additional authority:

PL 2007, ch. 290, An Act Concerning the Natural Resources Protection Laws and Related Provisions

PL 2007, ch. 527, An Act to Expand the Natural Resources Protection Act Compensation Program

PL 2007, ch. 533, An Act to Streamline the Administration of Significant Vernal Pool Habitat