

**BASIS STATEMENT**  
Amendments to Chapter 305, Permit by Rule Standards

**History**

- The proposed amendments to Chapter 305, Permit by Rule Standards (PBR), are intended to strengthen and improve the rules by including new submission requirements in certain sections of the rule for describing and detailing the scope of proposed activities along with new standards that require adherence to those descriptions and details. Some amendments are designed to limit or eliminate activities currently eligible for PBR based on the Department's experience in permitting these types of projects and to ensure that allowed activities will not have an unreasonable impact on natural resources. Other amendments are proposed to clarify definitions and standards that would minimally, if at all, limit the applicability of the rule. 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 version showing the proposed changes and providing brief reasons for the amendments, was made available for informal comment on the Department's website.
- The proposed rules were posted to public comment and a public hearing was held on May 21, 2009. The comment period ended June 1, 2008 at 5:00 pm.
- Comments were received from three persons.

**Comment and Response**

The following persons submitted written comments.

- (1) Mark Bergeron, Sevee & Mahar Engineers, Inc.
- (2) Brian Swan, Department of Marine Resources
- (3) Judy Gates, Department of Transportation (DOT)

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 1. Introductions**

**Comment.** One commenter asked for the overall purpose of these routine technical rule amendments. (1)

**Response.** The proposed amendments are designed to strengthen and improve the rules by including new submission requirements in certain sections of the rule for

describing and detailing the scope of proposed activities along with new standards that require adherence to those descriptions and details. Some amendments are designed to limit or eliminate activities currently eligible for PBR based on the Department's experience in permitting these types of projects and to ensure that allowed activities will not have an unreasonable impact on natural resources. Other amendments are proposed to clarify definitions and standards that would minimally, if at all, limit the applicability of the rule.

**Comment.** Under Section 1(B), it was requested that electronic submission of PBR notification forms be allowed. (3)

**Response.** While the request has merit, electronic submission of applications is not currently allowed. The Department may explore this concept more generally in the future but no change was made.

**Comment.** Under Section 1(C)(1)(b), it was requested that activities listed in Section 11, State transportation facilities, that are performed or supervised by individuals certified in erosion control practices by the DEP be exempt from the 14 day waiting period, and that those Permit By Rule notifications result in the permit being effective immediately upon the filing of the notification. (3)

**Response.** While the request seems reasonable, it is the Department's position that this change would be a substantial amendment of the proposed rule at this time. The variety of activities allowed under Section 11 include much more than just stream crossings and utilizing erosion controls. The Department has always prioritized for review a PBR under this section at the applicant's request and will continue to do so. A PBR is generally effective within 14 days, or sooner upon signing by Department staff, and can be accomplished as quickly if requested. No change was made.

**Comment.** Under Section 1(C)(2), it was requested that PBRs for Section 11 projects be valid for 4 years. According to the commenter, approximately 25% of DOT projects approved under PBR are not started within 2 years but will be within the 2 years after that. (3)

**Response.** Expanding the effective period to 4 years would be a substantial change in the proposed rule. If an approval under PBR expires before the project is initiated, the applicant can re-file for another approval. No change was made at this time.

## **Section 2. Activities adjacent to protected natural resources**

**Comment.** A commenter questioned whether a permit for a platform could be obtained with a full Natural Resources Protection Act (NRPA) application if platforms are no longer eligible for approval under PBR as an accessway.. (1)

**Response.** An individual permit for a platform, and any permanent or temporary structures attached thereto, may be approved under the NRPA provided the standards of the law are met.

### Section 3. Intake pipes & water monitoring devices

**Comment.** Under Section 3(A)(1), a commenter asked if the reference to Note 2 at the end of the subsection referred to the exemption for water lines to serve a single family house and utility cables in great ponds. (1)

**Response.** Yes, the note contains the exemption language for these activities found at 38 M.R.S.A. §480-Q(1) of the NRPA.

### Section 8. Shoreline stabilization.

**Comment.** Under Section 8(A)(1), a commenter asked why riprap is being made ineligible for PBR and will riprap still be allowed under a full NRPA permit. (1)

**Response.** It has been determined that coastal riprap projects are potentially of a scale and impact that full review under the NRPA is necessary. Many projects result in armoring of the applicant's entire shoreline, including areas currently stable, and may extend further into the coastal wetland than allowed, resulting in unnecessary habitat loss. Excessive soil disturbance and vegetation removal often occurs when entire banks are armored. In addition, numerous riprap projects have been constructed as a series of stepped, vertical retaining walls by using large rectangular or square quarry stone. Much of this stone does not match the rock color on the existing shoreline. To ensure that coastal riprap projects are limited to that necessary to protect the property, not result in excessive habitat loss or clearing of natural vegetation, and fit into the surrounding environs, the department is proposing to remove coastal riprap from PBR and instead require an individual permit review. Riprap in coastal wetlands will be allowed in coastal areas under an individual permit review provided all standards of the law are met.

**Comment.** Under Section 8(A)(4), a commenter asked how the length of 100 feet of riprap which will be eligible for PBR was determined to be appropriate. (1)

**Response.** It has been the Department's experience that most inland riprap projects along great ponds are limited to 100 feet or less due to lot size constraints. Projects exceeding this length along shore can result in riprapping already stable areas and excessive vegetation removal without the greater review allowed under an individual permit process. Longer riprap projects along streams and lakes can also lead to off site effects such as new or increased erosion and/or sediment accumulation. The limitation to 100 feet of riprap still provides most applicants with the ability to use the PBR process while allowing the Department to more fully review the impact of larger riprap projects under an individual review process.

**Comment.** Under Section 8(C)(17), a commenter asked why this standard was eliminated and asked about the eligibility of work on vegetation restoration projects in coastal wetlands. (1)

**Response.** Standard 17 requires the use of mats or platforms for wheeled or tracked equipment that travels or works in a vegetated coastal wetland. Since riprap is no longer allowed under PBR in coastal wetlands, the standard is no longer needed. Vegetative stabilization projects are still allowed in coastal wetlands under this section but those should not require the use of heavy equipment in vegetated coastal wetlands.

**Comment.** In the new Section 8(C)(17), a commenter recommended inserting “protected” before “natural resource” in the third sentence. (1)

**Response.** The Department agrees with the proposed change. The following change was made:

~~(+817)~~ All excavated material must be stockpiled either outside the ~~wetland~~protected natural resource or on mats or platforms. Hay bales or silt fence must be used, where necessary, to prevent sedimentation. All excavated material must be removed to a location more than 75 feet from the protected natural resource, unless otherwise approved by the DEP, and properly stabilized with vegetation upon project completion.

## Section 10. Stream crossings (bridges, culverts and fords)

**Comment.** Under Section 10(C)(10)(c), a commenter asked whether there any requirements or restrictions inside the culvert to facilitate fish passage, with the requirement that the entire bottom of the culvert be installed at or below stream bed.(1)

**Response.** No. Proper culvert sizing in accordance with the rule and installation of the culvert(s) in accordance with all the requirements of this standard should allow for fish passage without the need for specially designed culverts.

**Comment.** One commenter thought that the proposed amendments to Chapter 305 are good and will help agencies such as DMR when reviewing for time of year concerns. It was suggested that if culverts are now to be set at or below the streambed, the culvert gradient should match the existing stream grade to be consistent with DOT’s Fish Passage Guidelines. (2)

**Response.** In Section 10(C)(10), there are existing standards requiring that culverts follow the alignment and grade of the stream and limit the culvert grade on perennial streams to 1% or less. No change was made.

**Comment.** Under Section 10(C)(10)(h), one commenter asked why the requirement to riprap the ends of culverts references Section 8 shoreline stabilization standards and not the DEP Erosion Control BMP manual. (1)

**Response.** The standards for constructing riprap in Section 8 were derived from the Maine Erosion and Sediment Control BMPS manual. The manual more fully describes how to determine the rock size to be used as well as installation and construction sequencing. BMPS are not written or set up as standards however. Rather than require adherence to either Section 8 standards or the BMP manual, the Department agrees to insert the following note referring to the manual.

(h) Have the inlet and outlet ends stabilized by riprap in accordance with Section 8 Shoreline stabilization standards ~~or other means~~ to avoid erosion of material around the culvert.

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NOTE:For guidance on riprap installation, consult the Maine Erosion and Sediment Control BMPs, dated March 2003. This handbook and other references are available from the DEP.

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## **Section 11. State transportation facilities**

**Comment.** A commenter requested numerous revisions to Section 11. Some revisions are to update references to construction guidance documents or to clarify language in the rule to accommodate DOT's construction practices. Other revisions are more substantive, and would allow applicants to perform activities outside of normally recommended work windows and to proceed in some cases without the need for consultation with DMR or the Department of Inland Fisheries & Wildlife (DIFW) or the need to incorporate those agencies' recommendations. The commenter proposes to allow for removal of transportation facilities, relocation of public utilities and intake pipes within the footprint of the facility, and to allow activities creating and enhancing habitat or protecting or improving water quality as well the removal of nonnative vegetation. It was requested that language be added that if a crossing project meets the goals of the MaineDOT's "Waterway and Wildlife Crossing Policy and Design Guide" then incorporating review agencies' recommendations is unnecessary. The commenter requested increasing the amount of alteration allowed under this section to 500 feet of shoreline alteration on rivers and streams and 300 feet on outstanding river segments. In addition, it was requested that the Department consider increases in the alteration limits contained in standard 7 as well but gave no specific numbers. New standards were proposed for "work in the dry" that if done would allow for work outside typical time of year restrictions. (3)

**Response.** The Department has determined that as a whole, these proposed amendments would constitute a substantial change from the original rule proposal. However, it agrees that a number of the requests should be addressed but with input

from natural resource agencies, DOT and the Maine Turnpike Authority, which is also authorized to perform work under this section of PBR. Until this effort is undertaken, no substantial changes will be made to this section. Activities involving moving utility lines, habitat or water quality improvements and restoration activities can currently proceed under other sections of Chapter 305.. One change is being made to update the reference to the DOT's current crossing policy and design guide as follows:

- (8) The activity may not permanently block any fish passage in any watercourse containing fish. The applicant must coordinate with the reviewing agencies listed in paragraph 2 above to improve fish passage and incorporate any recommendations from those agencies into the performance of the activity.

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NOTE: For guidance on meeting the design objectives for fish passage, including peak flow, maximum velocity, mining depth and gradient, see the MaineDOT Waterbody and Wildlife Crossing Fish Passage Policy and Design Guide (July 2008/December 2004), developed in conjunction with state and federal resource and regulatory agencies.

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