

**Chapter 587, Response to Comments Received at the Public Hearing
and Written Comments provided during the Comment Period through August 18, 2006**

Comments received specific to certain sections of the rule.

1. Applicability

Section 1.A – Public Emergency

Comment: More definition is needed for public emergency with a time limit of 24 or 48 hours. (USFWS)

Response: The intent of the public emergency language is clear and the examples are by definition of limited duration. Any time limitation could further jeopardize public safety. There is no expectation that withdrawals would ever continue beyond the immediate period of need.

Section 1.B – Tidal Waters

Comment: The rule does not protect tidal systems. (TNC)

Response: Section 1-B removes the application of flow standards in tidal waters. Because flow and aquatic habitat is so highly variable on an hourly, daily, seasonal, and annual basis in tidal areas, it did not seem reasonable within the context of this rule to set applicable standards. This does not absolve someone who alters flows in a tidal segment from protecting all other water quality standards.

Section 1.C – Storage Ponds

Comment: Would storage ponds created within wetlands and other surface waters be exempt? (USEPA)

Response: No. Storage ponds constructed within any classified surface water would have to attain the flow or water level standards for that waterbody (and affected downstream waters). Construction of such ponds requires a NRPA permit and these rules would be used to establish flows and water levels through that permitting process.

Section 1.D – Nonconsumptive Use

Comment: The proposed rule appears to change the definition of non-consumptive use from less than ¼ mile to more than ¼ mile. The Department should remove the distance requirement entirely or adopt suggested language. (Maine Aquaculture Association)

Comment: The rule alters the statutory definition (470-A) for nonconsumptive uses. Recommend nonconsumptive uses be subject to the rule. (USFWS, USEPA).

Comment: Clarify whether downstream return flows to a different class of water are allowed (for instance, GPA water returned to downstream Class A water). (MeIFW)

Response: The rule extends the nonconsumptive definition to include existing situations where the point of return flow is greater than ¼ mile but which otherwise meet the definition in Section 470-A. There are a few such existing facilities in the state (e.g. some of the paper mills). Most of those facilities are on waters that already have regulated flows and otherwise do not affect water quality standards due to their

existing practice. Some minor language changes are proposed in the amended rule to clarify that the rule does not apply to segments with point of return flows less than ¼ mile and, for existing facilities, that distance can be greater than ¼ mile. The Department does not find any significant value to apply the standards in this rule to nonconsumptive uses, as defined. Regarding return flows to a different class water, the rule is amended to state the point of return flow must be to contiguous waters. The definition in 470-A already refers to “hydraulically connected surface waters” so this language is consistent with the statute.

Section 1.E – Hydropower Projects

Comment: It is not clear whether the flow standards remain applicable for any other purposes to waters that are affected by hydropower projects. There is no rationale for treating hydropower projects differently from other uses affecting stream flows. (USFWS, USEPA)

Comment: The proposed rule reflects both the statutory language and legislative intent by maintaining the existing standards and processes for in-stream flows and water levels related to hydropower projects and avoids upsetting the current regulatory framework for hydropower because there is a comprehensive and well-established system in place today. (IEPM)

Response: Section 1.E of the draft rule has been moved in its entirety to a new Section 8.B (Flows and water levels related to hydropower projects, as defined in 38 M.R.S.A. Section 632(3)) to clarify how flows and water levels related to hydropower will be determined. The flow and water level standards established through the hydropower permitting process (Clean Water Act Section 401 or Maine Waterway Development and Conservation Act) will apply to those affected waters just like any other permit issued by a regulating agency that sets flow or water level standards. As with any permit, the standards will be protective of water quality standards, notably aquatic life. Thus, other consumptive uses which could affect flow or water level of those waters will have to operate within the flow and water level standards established in the hydropower license. The Department has a long record of flow and water level management related to hydropower regulation. That process is extensive and has a significant body of precedent, and unlike other consumptive uses to be covered by this rule, has already been very effective at bringing hydropower facilities into compliance with water quality standards. The Department has focused particularly on protecting our aquatic life use standards when establishing flow and water level requirements for hydropower in Section 401 water quality certificates. This rule clearly points to the processes for establishing flows and water levels related to hydropower operations so there is no inference that hydropower is in anyway exempt from providing flows and water levels that protect water quality standards, but that it will be conducted through those existing processes. The Department recommends that those procedures for hydropower permitting remain in effect and expects that no further water quality improvements would accrue by changing those procedures.

Section 1.F. Existing Community Water Systems operating with a Community Water System Withdrawal Certificate.

Comment: It is unclear how the proposed rule will affect public water utilities. The rule lacks predictability in terms of the outcomes and costs for public water utilities. The State Drinking Water Program (DWP) and the Public Utilities Commission (PUC) should play a more central role in regulating utility withdrawals. (York, Sanford, MRWA, MWUA, Auburn WD)

Response: The Department proposes to include the PUC and DHHS in the list of agencies in section 1.F. of the proposed rule which will be consulted in making determinations on Community Water System Withdrawal Certificates. When the Department presents the provisionally adopted rule to the legislature for major substantive rule review, we will also propose legislation which would require the Department to provide a draft decision under these rules that affects a public community water system to the PUC and DHHS for review and approval before incorporating that decision into a final Department decision. The BEP is being apprised of this draft legislative language at the time of provisional adoption.

A Community Water System Withdrawal Certificate would constitute a final agency action as defined in the Department's Chapter 2 Rules Regarding the Processing of Applications. In any appeal of a Community Water System Withdrawal Certificate staff from the Drinking Water Program and the Public Utilities Commission, along with DEP staff, would be available to the Board as staff so that the BEP may have the advantage of their expertise.

Comment: A number of comments expressed concerns that the proposed rules would pose an unreasonable financial burden on public water supplies, prevent them from utilizing existing water sources and existing capital investment to continue to serve their communities and provide for future growth, and possibly force them to develop costly new water sources, possibly of lower quality, requiring additional investment in filtration. Some requested that utilities be exempt from the rules, at least until these impacts can be further studied, that financial assistance be provided, or that a sliding scale be used to determine a limit to costs. (AM, AWD, B/SWC, KKWWD, Houlton WC, MWUA, MRWA, Newport WD, York WD)

Response: The certification program proposed in section 1.F. provides a way for utilities to continue to use existing sources to provide water to the public. The Department proposes to clarify Section 1.F. to include the roles of the DWP and PUC in reviewing any determination to issue a Community Water Withdrawal Certificate under this section, and thus to ensure that the rule does not place an undue burden on public water suppliers. Additionally, the rule is clarified to specify that any conditions applied in a certificate will not jeopardize the safety, dependability, or the financial viability of the Community Water System.

Comment: The proposed rule does not satisfy the requirement of LD 2070 to “reconcile, to the extent feasible, the objectives of protecting aquatic life and other uses as provided in Title 38, section 470-H and the objective of allowing community public water systems to use their existing water supplies to provide water service.” (York WD, Sanford WD, MWUA, MRWA)

Response: The Department held five stakeholder meetings between March 9, 2006, and May 11, 2006, in response to the legislative directive of LD 2070. These meetings brought together representatives of water utilities and environmental interests with staff from the DEP, the Drinking Water Program and the Public Utilities Commission to discuss the potential impact of the proposed rules on community water systems. The certificate was created, with substantial input from those participating in these meetings, for the purpose of complying with the requirements of LD 2070. The approval criteria contained in section 1.F. represents a reasonable and fair balance of the interests involved and is a unique and careful implementation of the language and intent of LD 2070.

The Department proposes to clarify the language of section 1.F. to emphasize that the certificate program will allow community public water systems to continue to use their existing supplies. Any steps that are required to reduce the impacts of their water withdrawals will be subject to a reasonableness test that will consider input from the Public Utilities Commission and the Department of Health and Human Services.

The Department will also be proposing legislation to require that these certifications will require approval of the DWP and the PUC and that any recommendations from these agencies are reflected in the final decision.

Comment: There are some water districts which have legislative authority to operate but that have not yet been designed and built. Would these be considered “existing” and would they be allowed to use the certification process? (MRWA)

Response: These would not be considered to be existing, and would not be allowed to use the certification process.

Comment: The PUC believes that the water utilities’ concerns about the cost implications of section 1(F) are legitimate. The Commission agrees that it should be included in the section 1(F) review to provide input regarding financial feasibility and impacts associated with the certification process and the particular conditions of the certificate. (PUC)

Response: The Department is proposing to modify the language of 1.F. to clarify that financial feasibility is a factor to be considered in the certification process and to specifically include the PUC and DHHS in the decision process. Accompanying legislation to require certifications to reflect the input of the DWP and the PUC is proposed.

Comment: There should be no distinction between Water Districts, Municipal Water Departments, or Investor-owned systems. (Auburn WD)

Response: The proposed rule makes no distinction between these entities. The use of the term “Community Water System” is intended to include all of these entities.

Comment: CWS Withdrawal Certificates should be based on the greater of hydrologic yield or design capacity. (KKWWD)

Response: See response to similar comment under section 2.F. below.

Comment: In AWD’s case, what happens when it’s necessary to restart the water filtration plant? Can 2.0 to 2.5 MGD be withdrawn? If less water is available from Carleton Pond, will there be compensation? (Augusta WD)

Response: Without studying the actual resource, the Department cannot answer this question at this time. If present use, infrastructure or investment is in-place for an additional 2.5MGD, that would be calculated in system design capacity for the district. If system design capacity indicated that standards in the rule could not be attained, a withdrawal certificate would be issued to the district. The rule does not provide for compensation, but it has been amended to assure that financial viability of the water supplier will not be put at risk.

Comment: Consideration should be given to the positive environmental impact that a utility has made to the overall resource rather than simply mandating further improvements. (KKWWD)

Response: In the cases the Department has already reviewed through the stakeholder process the benefits of the efforts of utilities to protect their water supplies have been clear. To the extent that these efforts result in water quality benefits, they would be included in the consideration of conditions in a certification. The Department is also aware that the districts’ work at source water protection has yielded secondary environmental benefits that protect habitat and environmental quality in general. The Department continues to support that work.

Comment: There should be more specificity with respect to conditions in a certificate. The eventual goal of the certificate should be attainment of standards. (USFWS, USEPA)

Comment: Rules should spell out steps required to show that a community public water supply cannot attain standards and needs a water withdrawal certificate. Make clear that a certificate is only available to existing facilities and that they must implement, to the extent possible, all listed alternatives as a precondition of a Certificate (list provided). (TU-Reardon, TU-Mayland)

Response: Additional language is provided in the amended rule that gives more specificity about conditions in the certificate and how those will be established. The certificate along with the conditions required and future revisions to any certificate clearly point to a goal of attainment of water quality standards. It is clearly stated that certificates are only for existing (which is defined) facilities. The purpose of the Certificate is to provide an alternative set of operating conditions for facilities that cannot meet these new standards and are not expected to in the 5-year implementation period. These conditions will be used to minimize to the extent feasible any

environmental impacts caused by the regular operation of the water supply facility. The conditions are meant to be operating conditions of the Certificate, not preconditions for receiving a Certificate as suggested in the comment letter. Conditions for each facility will be different, and implementation methods and time may be specific to each facility, therefore a specific, fixed list to be applied to all is not recommended. The intent of the Certificate is to allow the continued operation of community water supply systems and to implement changes that will lead to standards attainment over time. While this may take considerable time for some facilities, this is not a “lifetime exemption” as suggested in the comment letter.

Comment: Specific language from LD 2070 should be incorporated into Title 38, Section 470-H to codify the intent of the legislature, and this legislative change should be presented to the legislature with the provisionally adopted rules. (MWUA)

Response: The Department has drafted proposed revisions to Section 470-H to accomplish this goal and will present this legislative proposal with the provisionally adopted rules.

2. Definitions

Section 2.A. – Natural drought condition

No comments received on this section.

Sections 2.B., 2.C. – Natural variation of flow, Natural variation of water level

Comment: The proposed rule should be more specific as to what flora and/or fauna is being protected. (KKWWD)

Response: 38 MRSA Section 466 provides definitions for “aquatic life” and “resident biological community” along with other related terms as to their application in each of the water quality classifications.

Comment: Recommend inclusion of timing and rate of change of hydrological processes to the definition. Sections 7 and 8 should specify data requirements to describe natural variation. (USEPA)

Response: Timing is explicitly included in the definition. The definition is amended to include rate of change. The Department does not recommend that the rule include prescriptive data requirements to describe natural variation, rather that principles of hydrology be applied.

Section 2.E Seasonal Aquatic Base Flow

Comment: A monthly time step should be used to assess natural variation of flow. (USEPA)

Response: While more frequent time steps may provide a greater amount of detail to the hydrograph, it is the Department’s experience that such detail is unlikely to provide any greater protection to aquatic life. As explained in the Basis Statement, the Department’s establishment of ‘seasons’ is based on critical biological functions and processes which are not related to calendar intervals. This rule already doubles the number of seasons previously recommended by USFWS and USEPA in the New England ABF guidelines. Additional flow intervals creates unnecessary management changes for water users.

Section 2.F. System Design Capacity

Comment: System Design Capacity as used in the proposed rule should be replaced with Hydrologic Yield. (KKWWD, MWUA)

Response: The rule provides that design capacity should be used when establishing existing capacity of a facility. Hydrologic yield is based on the amount of water available assuming a reasonable expected annual refill. It is a hydrologic definition irrespective of water supply need or environmental effect. This yield can be a substantially larger amount of water than a facility has ever used or is capable of using with their existing infrastructure and could lead to more extensive environmental impact than presently occurs. LD 2070 requires that the flow and water level standards "... reconcile, to the extent feasible, the objective of protecting aquatic life and other uses...and the objective of allowing community public water systems to use their existing water supplies...". Hydrologic yield provides no reconciliation for protecting aquatic life and would allow further impacts to occur, even to waters that presently attain aquatic life standards. By using system design capacity based on current use and current design, reconciliation of the objectives is provided by allowing community water systems to continue to use their existing sources, and by limiting impacts to aquatic life and other uses to present conditions.

Comment: If historic water utility withdrawals have been reduced due to conservation, etc. will the new rules prohibit them from increasing withdrawals to higher historic withdrawal levels? (Augusta WD)

Response: Not necessarily. System design capacity, as defined in the rule, takes into account current and past withdrawal, as well as the capacity of the infrastructure and the investments in that infrastructure. If it is determined that the system design capacity exceeds a level of withdrawal needed to protect water quality standards, then the community water system would require a certificate to operate at that higher rate of withdrawal. Conditions in the certificate could require conservation or other measures that reduce withdrawals to less than an historic maximum, however, those conditions must be reasonable and protect the safety, dependability and financial viability of the community water system.

Comment: Rule should provide greater clarity of how system design capacity will be determined. Transferring the determination to DHHS is a concern. (USEPA, NRCM)

Comment: System Design Capacity should be based on average or peak annual withdrawals. It should not be based on design of the system since design did not consider environmental effects. Remove the term "withdrawing from surface waters" in the definition of System Design Capacity to include groundwater linkages (TU-Reardon, TU-Mayland)

Response: The definition has been expanded to include more detail but the general definition remains unchanged. System design as well as system operation parameters are used in the rule to describe the current facility investment and anticipated public demands on the surface water source. While it is understood that these designs were not determined with consideration of environmental effect, system design parameters do provide a means to assess relative effect when compared to the available supply

and can be used to determine which facilities may require separate operating conditions in a certificate to minimize environmental effects. The rule seeks to protect the existing public investments made in public water supplies while providing a means for minimizing environmental effect and providing a long term process that may lead to eventual attainment of standards. The Department does not want to limit the definition to actual withdrawals because that ignores existing public investment that in many instances provides for growth. These are important, existing public investments that need to be included in the determination.

The Drinking Water Program at DHHS is the most appropriate agency to make an assessment that will include actual use and system infrastructure. The rule already considers those systems that have adjacent wells that affect surface waters. The purpose of the rule is to set seasonal flow and water level standards and it already states how “withdrawal and other direct and indirect removal” is to be dealt with in the standards sections.

Comment: Sections 1-F and 10-A may violate state and federal water quality law that requires a Use Attainability Analysis if water quality standards cannot be met. (NRCM)

Response: Section 1-F does not preclude a Use Attainability Analysis from being conducted for removal of uses for a waterbody if it can be demonstrated that water quality standards cannot be attained. However, the Community Water System Withdrawal Certificate does not downgrade the water classification of the water body. Rather it provides for compliance over time by establishing an alternative process of attaining water quality standards whereby as facilities improve or increase capacity they move towards the goals of attainment of flow and water level standards. A certificate that is moving a system towards compliance is arguably preferable to immediately proceeding to a UAA which removes uses or lowers standards. Section 10-A and 10-B follows normal Department practice to allow a five-year compliance period whenever new standards are applied to a waterbody. This section allows the Commissioner to extend that period if sufficient progress is being made as provided in 7 MRSA Section 353.

3. Calculation of seasonal aquatic base flow values

Section 3.A. – Using flow records

Comment: In section 3.A. the use of non-USGS gages should not be limited to “unregulated” waters. (Steve Sutter)

Response: “Regulated” waters infers that flows may have already been established through a permit, and thus, different from a natural flow. Regulated waters are not expected to provide an accurate description of the natural hydrograph, so the provision for non-USGS gauges should remain to ensure the validity of data used for making decisions about flow limits.

Comment: Adequate flow records should include statement of quality and should have a drainage area greater than 30 square miles and greater than 20 years of record. Section 3.A.(2) should specify a similar period of record. (USFWS, USEPA)

Response: A statement requiring “good quality” records has been added. Moreover, any submission of non-USGS data will require Department approval which would require a demonstration of quality. Drainage area size is irrelevant since it will always be preferable for new data records to be provided for the waterbody where the withdrawal will occur. While it is clearly preferable to have a longer period of record, it was decided that having empirical data to establish seasonal ABF is preferable to use of the equations. Therefore, to have more data records available for use, a shorter time period is allowed. As data accrues for a site, a new determination of ABF can be made. Section 3.A.(2) is amended to require a minimum of ten years of record.

Section 3.B Without using flow records

Comment: The USGS calculations used to determine seasonal aquatic base flow values for waterbodies without adequate flow records have a high degree of error in them. (DAFRR, MFB)

Response: The USGS calculations referenced in the proposed rule represents the current state of the science for statistical modeling of aquatic base flows. Much of error simply reflects the high level of natural variation in these complex natural systems. Where better information, such as nearby gaged watersheds, is available to improve upon these calculations the Department would use that information, as anticipated in the referenced USGS reports.

4., 5., 6. Flow and water level standards

Sections 4.A. and 5.A. References to “indirect removal (e.g. groundwater extraction).”

Comment: The Department should remove all references to groundwater extraction in the proposed rule. This rule should be limited to surface water withdrawals and groundwater withdrawals should be dealt with through other existing processes. (Sanford WD, Houlton WC.)

Response: The references to groundwater extraction occur in Sections 4.A., 5.A. and 6 (added to amended rule) which states in part: ‘Withdrawal or other direct or indirect removal (e.g. groundwater extraction), diversion, or use of these waters that causes the natural flow (or water level) to be altered may occur as provided ... (in the rule).’ This only applies to groundwater extractions which cause the natural flow or water level of a river, stream or lake to be altered. This is necessary to prevent rivers or streams from being adversely impacted by withdrawals from nearby wells.

Comment: EPA interprets the requirement that the water quality of Outstanding National Resource Waters (ONRW), which include Class AA waters in Maine, be “maintained and protected” means no new or increased activities that would lower water quality. Therefore no consumptive withdrawals should be allowed in Class AA waters (USEPA) or there should be a more stringent standard alteration (USFWS).

Response: The inference of this comment is that any withdrawal must be causing a lowering of water quality. This is an incorrect assumption and an inappropriate

interpretation of Tier 3 antidegradation. Rivers are highly dynamic systems and water quality, measured either by physical, chemical, or biological properties, is highly dynamic and variable. Maine's water quality standards program as it relates to Class AA and other ONRW waters is designed to maintain those properties within the natural dynamic expected for those waters. The definition of "natural" as provided in 38 MRSA Section 466 "means living in, or as if in, a state of nature not measurably affected by human activity." The definition purposely emphasizes the living environment to assess the natural condition. The standard for protection of aquatic life, which is clearly a specific goal identified in the authorizing legislation for this rule, is to maintain a natural community in Class AA waters. The standard alteration for Class AA is well within regular expected seasonal flow conditions to which all aquatic species in those waters are well adapted. It is highly unlikely that there would be a measurable effect to the natural community from the relatively minimal amount of water permitted to be withdrawn under the standard alteration, let alone a 'lowering of water quality' as might be measured by any of the State's water quality criteria.

Comment: The rules still allow for potentially large withdrawals. Spring and early winter flows on AA waters are afforded less protection than other seasons. (TNC, USEPA)

Response: In all cases, the amount of water that can be removed by standard alteration is relative to the size of the watershed. Potentially large withdrawals may occur in larger watersheds and during seasons with higher seasonal ABF. The rule, therefore, is equally protective for all waters (within any class), and where large demand is required will direct that demand to larger watersheds that can sustain larger demands. Class AA uses a percent of flow method to determine a standard alteration. This method is conservative in the amount of water that can be removed. The rule is designed especially in Class AA to encourage construction of storage rather than direct removal. To accommodate water storage, a larger fraction of spring and early winter flows are allowed for refill since these are typically the times of peak flows, highest seasonal ABF, and thus the largest available water volumes. From a biological standpoint, these seasons are less critical relative to flow since the seasonal ABFs already provide full habitat coverage, are not growing seasons, and are not seasons prone to other significant habitat stress such as very high or low temperatures, low oxygen, ice frazzle, etc.

Comment: The rules provide no protection for high flows in Class A, B or C. (TNC)

Response: For Class A there is protection of high flows since no more than two consecutive seasons may be held to ABF flows. In practicality, there is no expectation that current withdrawal practices can eliminate flood and other high flows from occurring. Withdrawal plans are designed based on flow frequency and it would not be efficient or economical to design to withdraw flood scale events of low frequency. TNC is correct that in some low flow years when there may be few flow events above ABF, and where there are no large flood events, the rules may not provide flow above ABF.

Comment: Typographical error in section 5.A (USEPA)

Response: Corrected.

Comment: The standard that limits flows at or below ABF for more than two seasons is confusing and contradictory and may provide less protection than that for Class B or C waters. (USFWS, USEPA)

Response: The purpose of this standard for Class A waters is to assure that natural flows will occur for some portion of the year, thus providing some naturally high and low flows to occur and a portion of the natural hydrograph to remain intact. This subsection of the rule has been amended to specify that withdrawals or similar activities are limited to no more than two consecutive seasons of the year rather than confusing what flow is to be maintained. For the standard alteration, the seasonal ABF would be applied to those seasons when withdrawal activities occur. Water users will have to plan for which seasons of the year they will extract from Class A waters.

Comment: Sections 6.A(2) and 6.A(3) should have consistent language for protection of water quality and downstream flows. (USEPA)

Response: Section 6.A(3) is constructed differently because the presence of a dam may affect water levels differently than would occur from just the effects of water withdrawal alone. Both the integrity of the dam to retain water as well as any manipulation by the operator can affect water levels, and the rule makes it clear that this combined effect must still be protective of water quality standards. Water withdrawal use is established volumetrically because it may be difficult for a water user to anticipate water level fluctuations caused by the dam. The rule has been amended to read more consistently.

Sections 4.B., 5.A., and 6.A. Low flow conditions

Comment: Concern was expressed that the proposed rule may require public water utilities to augment streamflow in dry months when those streams might have been dry under natural conditions. (York WD, MWUA)

Response: The proposed rule recognizes that flow conditions which are not protective of water quality standards can be the result of a “naturally occurring condition.” These natural conditions are included in the standards set out in the rule in sections 4.B., 5.A., and 6.A. Water users would not be required to augment flows during these times.

7. Flow or water level established by a Water Flow Plan or Water Level Plan.

Section 7.A – Filing of a plan

Comment: Section 7.A.(4) This site-specific process is not simple, in fact we understand it to be much more complicated than the standard alteration. How does one water user determine how to protect “all designated uses?” This would be beyond the capabilities of most if not all farmers. This would require hiring experts and would cost tens of thousands of dollars. (WBC)

Response: Department staff will be available to assist agricultural water users in making this determination. Typically, only one designated use is the limiting use and

there is no need to establish protection for each use. For flows and water levels, that use is often “habitat for fish and other aquatic life.”

Comment: Section 7.A.(4) Adjust the standard alteration such that agricultural use is protected thereby obviating the need to develop a site-specific water flow plan. (WBC)

Response: The standard alteration is provided as one standard that is protective of aquatic life and other uses when broadly applied. Usually, however, it allows a smaller amount of water to be withdrawn than might be allowed through a water flow plan. In analyzing a range of actual irrigation proposals, as well as field visits to a number of existing agricultural operations, it has been found that for a number of users the standard alteration amount is sufficient to meet irrigation needs. Water flow plans with site-specific flow requirements will usually provide more water and can be determined expeditiously for most users by the Department.

Comment: The provision for review of water use plans by other state and federal natural resource agencies and the public is burdensome and unnecessary. (MPB)

Response: The intention of this provision is to ensure openness of the process for setting flows and water levels. The Department finds that such agency and public access to these plans, which are public records, and thus required to be made available, is reasonable, and will ensure that the Department has the best information available to it in making a decision. The Department’s Chapter Two rules also require the filing of a copy of the application at the local municipality, and publication of public notice once in a paper of local circulation. Chapter Two also requires mailing notice to abutters unless the type of application is exempt from this requirement.

Section 7.A.(5) Monitoring and compliance

Comment: Concern was expressed that the proposed rule does not clearly define the monitoring and compliance requirements that will be required under section 7.A.(5). (AWD, WBC)

Response: Section 7.A.(5) requires the water user to propose a monitoring plan. This gives the water user the opportunity to propose a plan appropriate to their situation. The Department will review these plans on a case-by-case basis, and would only require additional monitoring if the proposal failed to provide “information on water use and flows or levels with a monitoring schedule reasonably sufficient to monitor compliance with the proposed flows or levels,” as provided in section 7.A.(5). USGS gages will not be required for monitoring. In some cases the installation of a site-specific staff gage may be required to visually confirm flows when withdrawals are occurring. The DEP would only get involved in monitoring compliance if it were first determined that there was a compliance problem. There would be no fee for compliance inspections.

8. Flows or water levels established by regulatory permit or water level order.

Comment: Section 8 does not inform the decision maker about how to determine flows and water levels in a permit that adequately protect uses. Reissuance of permits should be based

on appropriate criteria in Sections 4-7. There should be more clarity about which flows apply to a waterbody. (USEPA)

Response: Additional language has been included, similar to Section 7, that states that site-specific flow or water level studies shall be used. The rule already states that reissuance is based on standards in this rule.

9. Drought flow variance for Community Water Systems.

Comment: DEP should identify factors to justify a drought flow variance and how variance procedure would work. (USEPA)

Response: This rule is addressed to flow and water level standards. The Department will address the general application and implementation of variances in a future rulemaking. In the meantime, however, the rule permits the Department to issue variances for Community Water Systems in the case of a drought on a case-by-case basis in accordance with the factors stated in the rule. The Department will establish operating procedures in the variance itself.

Comment: Farmers need water most during drought periods to prevent crop loss, and should also have a drought exemption similar to that provided for public water supplies. (MFB)

Response: The rule provides that a water flow plan may include “management provisions that may be implemented when drought conditions occur.” This is an appropriate means to allow agricultural withdrawals to be managed according to site-specific conditions during drought conditions. The variance in Section 9 for Community Water Systems is to assure that public supply will be maintained during drought conditions.

10. Implementation of water flow and water level standards.

Section 10.A. – for existing agricultural producers

Comment: The rule as drafted does not protect agriculture as a use. The proposed rule would prevent withdrawals from streams when farmers need it most, during dry periods, particularly on AA waters. (DAFRR, WBC)

Response: The rule allows withdrawal from all waters to the extent that other uses are not impaired. The rule does provide a five year (or longer) window for the development of water management plans for farms and the construction of storage or other out-of-stream supplies. The construction of storage ponds and groundwater supplies is being supported by substantial state and federal dollars. The Department encourages storage through this rule and actively supports public investment in developing these supplies. During this implementation period, the flow standards do not apply to agricultural withdrawal (7 MRSA Section 353). This provides a substantial convenience to agricultural users while they develop better, more dependable, supplies with the long-term result that both agricultural use along with other uses will be better protected.

Comment: We appreciated DEP's commitment to determine the site-specific standards through LD 1776. Adjusting the rule to limit the number of these cases upfront will then focus DEP and other agency staff resources on sites where this type of determination is truly needed. (WBC)

Response: The Department remains committed to doing the site-specific determinations as set out in 7 MRSA Section 353. The Department made this commitment at least a year prior to the introduction of LD 1776 and has conducted a number of site visits in that time. Based on the work done by the Department of Agriculture, Food and Rural Resources to assess the number of farms that might require site-specific determinations, the Department is confident that it can live up to this commitment with no adjustment to the rule required.

Comment: Compliance schedules should be applied on a case-by-case basis only for producers or community water systems that actually need them for "up to" five years. (USEPA)

Response: 7 MRSA Section 353 establishes a five year compliance date for certain agricultural users (with provisions for extensions of time under certain circumstances). The rule follows what is in the law. Section 10-B establishes a similar implementation schedule for community water supplies which have up to five years to comply. Conditions established in a water withdrawal certificate can be used to establish shorter compliance schedules if appropriate.

11. Watersheds most at risk from cumulative water use.

Comment: The focus of the State's efforts should be on at-risk watersheds. (DAFRR)

Response: This section of the rule identifies waters that, due to present or future demand, may be expected to be at-risk of attaining standards as well as being insufficient to provide anticipated needs of the users even during normal water years. Specifically the rule identifies these waters for planning purposes with the expectation that the Department will direct its resources and those of other partner agencies to these waters first.

Comment: No documentation is provided for a choice of >50% of seasonal ABF as a criterion for most at-risk waters. (USEPA)

Response: This section of the rule is intended only to direct planning resources to waters with the greatest need for such assistance. The Department's review of existing users indicates that there are a relative few number of users that withdraw water in amounts that severely stress their source waters. The criterion used identifies those waters that the Department has already determined should receive immediate assistance. It assures that certain at-risk waters will be given timely assistance by the Department since implementation of new water management plans may require more time for these facilities. The most at-risk waters, using any criterion, are affected by either community water systems or agricultural withdrawal. It is expected that planning in all waters will be completed within the five year period of rule implementation for those two user groups.

12. New activities in state waters.

Comment: Are there unclassified waters where these standards should apply. (USEPA)

Response: All “Waters of the State” as defined in 38 MRSA §361-A(8) are classified. This rule establishes standards only for fresh surface “Waters of the State.”

13. Certain activities prohibited in Class AA waters.

No comments received on this section.

14. Legal Water Rights Not Affected

Comment: The proposed rule will have a major impact on the historic property rights of major water users. (Caribou UD)

Response: The proposed rule establishes a process to determine how much water must be left behind to protect water quality and designated uses of the waterbodies and thus protect the public’s interest in its natural resources. It is not intended to, nor does it, speak to the issue of water allocation otherwise determined by longstanding water use law.

General Comments received on the rule.

Clean Water Act Issues:

Comment: Including the proposed rule within the water quality classification system puts them under the provisions of the Clean Water Act. This exposes the potentially regulated community, including public water utilities, to the full complexity and risk of CWA regulation. Both the water user and the State may be open to citizen suits under the CWA, and there will be uncertainty regarding changes to water quality standards. Is the DEP compelled to adopt these rules under the CWA and what are the consequences if it does? The rules should be placed under some other statute so they do not come under CWA jurisdiction. (MWUA, WBC, MPB)

Response: Water quality standards protecting designated uses and aquatic life, adopted pursuant to both the State Water Classification Law and the CWA, are *currently* applicable to all waters of the State. This rule further interprets these existing standards; it does not create wholly new CWA standards where none existed previously.

It is, further, far from clear under existing case law, whether a citizen suit may be maintained under the CWA for water withdrawal activities that violate state water quality standards. To the extent that such a suit may be brought, however, it may be brought for violations of current water quality standards and the further interpretation of those standards by this rule does not affect the viability of such a suit.

Appeal rights under proposed rule

Comment: What recourse will there be when DEP makes an adverse decision on a withdrawal? (AWD)

Response: Final decisions by the Department can be appealed to the BEP pursuant to the provisions of Title 38 MRSA section 341-D. Paragraph 4 of section 341-D provides a 30 day appeal period for persons aggrieved by a Department decision. The appeal process is further defined in the Department's Chapter 2: Rules Concerning the Processing of Applications and Other Administrative Matters. Judicial review of a final Department or Board decision may also be obtained in accordance with Title 5, Section 11001 et seq. and M.R.Civ.P. 80C.

Modification of flow or water level determination

Comment: What assurances are provided that the allowable withdrawal from a permit won't change? (AWD)

Response: Modification of a final department decision would be subject to the requirements of the Department's Chapter 2 Rules Concerning the Processing of Applications. Section 27 of Chapter 2 sets out the requirements for such a modification, which include a petition to the Board of Environmental Protection, the opportunity for a hearing, and specific criteria that must be met to grant a modification.

Comment: What happens if the DEP's watershed management requirements (mandating specific lake levels worsening shoreline erosion) negatively affect source water quality? (AWD)

Response: These rules are provided to protect all designated uses as stated repeatedly in the rule. Drinking water supply is one of those designated uses that apply to all classified freshwaters, therefore, any action taken by the Department must also protect source water quality.

Complaint response process

Comment: How will disputes between complainants and utilities be resolved? (AWD)

Response: Complaints regarding violations of the proposed rule would be handled much as any complaint to DEP is handled, with appropriate investigation response. Resolution options would be proportional to the severity of any violation actually occurring, and would run the range from voluntary compliance, to negotiated consent agreements, to court action.

Administration of the proposed rule

Comment: What DEP staff resources will be necessary to administer this program? Will the regulated community be charged a fee to help pay for the expenses of administration? (AWD)

Response: Based on the results of the Water Withdrawal Reporting Program as well as research conducted by the Drinking Water Program and the Department of Agriculture, Food and Rural Resources, the Department finds that the scope of potentially regulated water withdrawals is reasonably limited. The Department intends to administer the rule with existing staff resources, including reallocating

resources that have been working on this rulemaking process. Accordingly, the Department does not at this time foresee that fees will be charged.

Fiscal impact on municipalities

Comment: The proposed rule would have a “fiscal impact on municipalities,” contrary to the statement in the public notice of rulemaking, as municipalities pay approximately 30% of a water systems revenue requirement for public fire protection. (MRWA, PUC)

Response: The Department was not previously aware of this connection between municipalities and water districts and appreciates the clarification. The public notice provision regarding fiscal impact on municipalities was made absent the Department’s understanding of this fact. Note that the Department has made every effort to understand the fiscal implications of this rule and has been forthright in our efforts. However, given the certification program option of section 1.F. and the proposed clarification that the PUC will be directly involved in reviewing the financial impact of certification decisions, the Department feels that any impact on municipalities will be relatively minor and indirect in nature.

Performance standards

Comment: The proposed rule lacks performance standards for water utilities. Title 5 MRSA section 8062 requires articulation of performance standards and should apply to this rule. (MRWA)

Response: Title 5, section 8062 states in pertinent part that “and when an agency determines that performance standards will assist regulated parties in complying with the criteria, the standards shall be developed during the rule-making process and incorporated into adopted rules when performance standards are equally effective in meeting applicable statutory criteria.” The Department has made no such determination, and to the contrary finds that making flow and water level determinations requires flexibility and consideration of multiple site specific variables.

General objections to the rule

Comment: A number of commenters questioned the need for the proposed rule. They suggested such alternatives as further research, restarting the Sustainable Water Use Policy process, doing watershed studies, developing statewide water use policies, etc. (Augusta WD, DAFRR, MFB, WBC)

Response: The Department has undertaken this rulemaking pursuant to legislative directive contained in Title 38, Section 470-H. Over the past four years since this directive was promulgated (originally as Section 470- E) the Department has been back before the legislature on numerous occasions, presenting annual reports of the Water Withdrawal Reporting Program, reporting on the status of this rulemaking process, and addressing proposed modifications of the original legislative directive. Throughout these sometimes lengthy discussions the legislature has never expressed a desire to stop or further delay this rulemaking process.

Comment: A number of representatives of public water suppliers commented that the DEP should not be regulating the withdrawal of water for public water supply purposes, that the DWP and PUC should have the responsibility of dealing with public water supply issues, and that public water supplies should be exempt from the proposed rule. (York WD, Augusta WD, et al.)

Response: The guidance given by the legislature in LD 2070 clearly includes public water supplies within the scope of the rule, while giving them appropriate consideration to continue to serve the public from existing water sources.

Draft Basis Statement (June 1, 2006)

Comment: The draft basis statement states that water withdrawal practice in Maine typically does not occur in more than a few seasons of each year. This is incorrect for public water supplies. (MWUA)

Response: The error will be corrected.

Comment: The draft basis statement also concludes that long term planning and management changes at community water systems will lead to water quality improvement and that over time water quality will improve and eventually attain standards. This is not attainable through conservation and would eliminate the ability to serve future growth. (MWUA)

Response: MWUA is correct that standards cannot be expected to be attained through conservation alone. However, if long-term planning and management includes consideration for water quality, improvements can occur as part of a future growth plan. This point will be clarified.