

MEMORANDUM

TO: Board of Environmental Protection

FROM: Andrew Fisk and David Courtemanch
Bureau of Land and Water Quality, Augusta

DATE: November 16, 2006

RE: Adoption of Chapter 587, "In-stream Flow and Water Level Standards"

The Department requests adoption of Chapter 587, "In-stream Flow and Water Level Standards."

Statutory and Regulatory Reference: The statutory authority for this rule is contained in Title 38, Section 470-H, Water use standards, rules. Title 38, Section 470-H reads as follows:

The board shall adopt rules that establish water use standards for maintaining in-stream flows and GPA lake or pond water levels that are protective of aquatic life and other uses and that establish criteria for designating watersheds most at risk from cumulative water use. Standards adopted under this section must be based on the natural variation of flows and water levels, allowing variances if use will still be protective of water quality within that classification. Rules adopted under this section are major substantive rules as defined in Title 5, chapter 375, subchapter 2-A.

This mandate has been modified by two pieces of legislation passed in the current legislative session, addressing agricultural water use and public water supplies. LD 1776, adopted as Public Law Chapter 559 creates an agricultural water management board and gives agricultural water users five years to achieve compliance with these rules. And LD 2070, adopted as Resolve Chapter 190, directed the Department to work with stakeholders 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."

Scope: This chapter describes the regulatory requirements for water withdrawals and other activities which affect stream flows or lake water levels.

Description: The proposed rule would establish instream flow and water level standards to protect natural aquatic life and other designated uses in Maine's rivers, streams and lakes. Instream flow standards for Class AA, A, B, and C waters are based on natural flows that occur in Maine waters, and the uses and characteristics assigned by the water quality classification program (38 M.R.S.A. Sections 464, 465) with attention given to protecting the outstanding natural resources associated with Class AA waters. Flow is managed to provide

natural variation of flow described by seasonal aquatic base flows, or other seasonally variable flows, shown to protect aquatic life resources and water quality standards. Water level standards for Class GPA waters take into account natural variation of water levels that occur in Maine lakes and ponds, and the uses and characteristics assigned by the water quality classification program (38 M.R.S.A. Sections 464, 465-A). Water level is managed to provide variation that takes into account expected seasonal levels shown to protect aquatic resources and other water quality standards of Class GPA and downstream waters. Instream flows and water levels may be established by 3 methods: (1) standard allowable alteration, (2) by a site-specific flow designation developed through a Water Flow Plan or Water Level Plan, or (3) as part of a new or existing regulatory permit.

As a result of the legislation cited above, special attention is given to agricultural water use and public water supplies. Agricultural water users are provided five years to achieve compliance with the proposed rules, and public water supplies are provided a certification option that allows them to continue to use their existing water sources while taking reasonable steps to protect and improve water quality.

Forty-three people submitted comments on the draft rules either in person at the August 3 public hearing or in writing before the close of the public comment period on August 18. A number of minor changes have been made to the proposed rule in response to these comments:

- Clarified the language of section 1.D. on nonconsumptive use.
- Added additional details and clarifying language to section 1.F. on Community Water System Withdrawal Certificates and the related definition of System Design Capacity in section 2.F.
- Clarified language in Section 5.B. for withdrawal from Class A waters.
- Added a new section 7.C. which states that Water Flow and Water Level Plans shall be kept on file and made available to the public.
- Made other changes to correct or clarify language as noted in the attached response to comments and as shown in the attached add/strike version of the draft rules.

Also in response to comments received, the Department proposes to include the PUC and DHHS in the list of agencies in section 1.D. (formerly 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 Community Water System Withdrawal Certificate to the PUC and DHHS for review and approval before issuing the certificate. A draft of that legislation is included in the attached materials for the Board's review.

Public Notice: The proposed rule was posted to rulemaking with the Board on June 15, 2006. Maine Administrative Procedures Act notification requirements were followed. Public notice of the opportunity to comment on the draft rule was published by the Secretary of State on July 12, 2006. Prior to the July 12 publication, the Department provided public notice to all persons requesting notice of DEP rulemaking activities and to all persons requesting notice of this rulemaking. In addition, public notice was posted on the DEP website prior to the publication. The Department also maintains a website with information

on this rulemaking process. A public hearing was held on August 3, 2006, and the public comment period closed at 5:00 p.m. on August 18, 2006. Forty-three persons submitted comments on the draft rule prior to the close of the public comment period.

Department Recommendation: For reasons stated in the Basis Statement and response to comments received, the Department recommends that the Board provisionally adopt the proposed Chapter 587 as modified in response to public comment. The Department also requests that the Board review the attached Draft Legislative Proposal and endorse the intent of the proposal.

Estimated Time of Presentation: 120 minutes