

## **MAINE LAND USE PLANNING COMMISSION**

Department of Agriculture, Conservation, and Forestry



### **BASIS STATEMENT AND SUMMARY OF COMMENTS**

**FOR AMENDMENTS TO**

**CHAPTER 10: LAND USE DISTRICTS AND STANDARDS REGARDING THE**

**2018 SECOND MISCELLANEOUS RULEMAKING**

June 20, 2018

### **STATUTORY AUTHORITY**

12 M.R.S. § 685-A(3), (7-A), and § 685-C(5)(A);

38 M.R.S. § 480-E-1;

P.L. 2017, Ch. 89; and P.L. 2017, Ch. 236

### **EFFECTIVE DATE OF THE RULE AMENDMENT**

### **FACTUAL AND POLICY BASIS FOR THE RULE AMENDMENT**

This rulemaking by the Maine Land Use Planning Commission generally involves routine maintenance of its Chapter 10 rules, Land Use Districts and Standards. For organizational purposes, the revisions have been divided into three parts: Part 1 includes responses to two laws in 2017 that affect the Commission, as well as other revisions that cover general housekeeping matters, update references, and clarify existing provisions. Part 2 of this rulemaking updates the Commission's standards relating to protected natural resources to ensure consistency, as required in statute, with the goals of the Natural Resources Protection Act (NRPA). Part 3 includes revisions that correct errors and update references in Appendix C – Alphabetical List of Lakes Showing Wildlands Lake Assessment Findings.

#### *Part 1*

The Maine Legislature passed two laws in 2017 that affect the Commission's statute; these changes became effective November 1, 2017. The first revision (P.L. 2017, Ch. 89) affected Title 12, Section 685-B by adding subsection 7-B – a provision regarding nonconforming uses and nonconforming

structures. The second revision (P.L. 2017, Ch. 236) affected Title 12, Section 685-C by adding subsection 12 – a provision regarding the storage of camping devices at legally existing campgrounds. The revisions in this rulemaking implement both changes in Chapter 10.

Other of the proposed revisions cover general housekeeping matters, such as correcting inconsistencies, correcting formatting errors, updating citations, improving terminology and clarifying the process in the D-PD subdistrict, updating references, and clarifying certain provisions. Many of these proposed changes are self-evident. Following some of the more substantive proposed edits, explanatory notes are included in brackets within the redline document, immediately following the edit. This bracketed text is informational only and will not be included in the final rule.

## *Part 2*

The primary objective of the NRPA-related rulemaking was to review and improve the Commission's standards relating to water bodies and wetlands consistent with the goals of the NRPA. This NRPA-related rulemaking focuses on rezoning of wetland protection subdistricts (P-WL), applying the Commission's existing water body and wetland standards (Section 10.25,P,2) to all wetland alterations requiring a permit, and minimizing the potential impacts to wetland resources from filling and grading activities. In addition, changes include improving the consistency of minimum structure setbacks with the State's shoreland zoning program, clarifying and improving the consistency of wetland related definitions, and making additional improvements to the activity specific standards for filling and grading projects.

There are several key changes to Chapter 10 involved in these revisions. One change clarifies in rule the Commission's long-standing practice of rezoning certain P-WL subdistricts when a parcel is rezoned for development, providing for full buildout of the development and flexibility for expansion in areas otherwise suitable for development. Relatedly, the Commission has determined that it is reasonable for its existing water body and wetland standards to apply to any proposed wetland alteration requiring a permit regardless of the zoning subdistrict in which a wetland is located. Thus, consideration of wetland impacts will hinge on the presence of wetlands. Previously, the rules could be interpreted to mean the standards only apply to wetlands located in P-WL subdistricts. Changes clarify and operationalize how the standards apply to wetlands in other subdistricts. Lastly, the revisions add a limit of one acre to the amount of filling and grading allowed without a permit in M-GN subdistricts to provide an opportunity for the Commission to review for any potential wetland impacts associated with larger filling and grading activities in that zone. This one-acre threshold is consistent with the threshold for when wetland delineations are required in the Commission's Chapter 10 rules.

Other changes revise the definition of "forested wetland," add a definition of "non-forested wetland," and modify the Commission's minimum setback provisions so that minimum structure setbacks only apply to non-forested wetlands located in P-WL1 subdistricts, which is generally consistent with shoreland zoning. Changes to definitions clarify the definition of "non-tidal waterbodies" and improve the "shoreline" definition's consistency with the statutory definition. Finally, changes to the activity specific standards for filling and grading (Section 10.27,F) revise when filling and grading standards apply to activities near wetland resources, aligning the limits for filling and grading in other subdistricts with the water body and wetland standards, and simplifying and updating terminology.

### *Part 3*

A data discrepancy was discovered due to a citizen inquiry, which flagged Endless Lake as having the wrong management classification listing in Appendix C of the Commission's Chapter 10 Rules. To try and account for the change, the Commission reviewed Appendix C and rulemaking files. Finding no reason for the change, the Commission looked into whether other potentially unknown and unexplained inaccuracies were present in the appendix. A complete review was conducted of all columns within Appendix C comparing the original adopted version to the current version. After completing this analysis, the Commission determined that there was a subset of data changes that could not be accounted for by rulemaking and the list should be corrected. All of the unaccounted-for changes initially occurred in the July 2011 version of Chapter 10 and have been fixed as part of this rulemaking.

Since Appendix C was originally adopted in 1990, there have been several changes to names of Minor Civil Divisions and lake names that needed to be updated. In addition, some of the chain lakes had multiple management classes. Based on staff experience, this can be confusing to some users, so a different system of noting these management classes has been adopted. There were two listings that had data in the wrong columns that have been corrected. Staff also found Appendix C problematic to use because of its small font type and borderless table format. Font and border changes included in this rulemaking will make the appendix easier to read and use.

### **PUBLIC NOTICE OF RULEMAKING**

At a meeting held in Bangor on April 11, 2018, the Commission voted to post the proposed 2018 Second Miscellaneous Rulemaking to a 30-day public comment period. A public notice was posted in the State's consolidated Weekly Rulemaking Notice on April 25, 2018. In addition to that posting, the Commission posted notice by e-mail through the State's GovDelivery system to all individuals wishing to be contacted regarding any proposed changes to the Commission's rules, and those wishing to be contacted on matters relating to NRPA consistency. There were 1153 recipients of the GovDelivery e-mail notices. The notice of the proposed revisions was also posted on the agency's website.

The record remained open until May 29, 2018 to allow interested persons to file written statements with the Commission, and for an additional 7 days until June 5, 2018 to allow interested persons to file written rebuttal comments.

## COMMENTS AND RESPONSES

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The Commission received one submission of written comments, and no submissions with rebuttal comments. Testimony included several themes. In accordance with state statute and Commission policy, the Commission has summarized all testimony and comments received. In order to fully consider the range of comments in the context of the rule revision proposal, the Commission has organized the comments into topic areas.

### I. Testimony Related to the Shoreline Definition

#### A. 10.02 Definitions, 194. Shoreline

*The proposed definition defines the “shoreline” of coastal wetlands at the “normal high water mark”. However, the LUPC definition of Coastal Wetlands (29. Coastal Wetlands) is the Highest Annual Tide (HAT) line. This is confusing. Are Shoreline and Coastal Wetlands treated differently in the rule?*

**Commenter:** Aleita M. Burman, Burman Land and Tree Company, LLC.

**Response:** The LUPC statute, 12 M.R.S. § 682(17), includes a definition of shoreline that states:

**Shoreline.** "Shoreline" means the normal high water mark of tidal waters, a coastal or inland wetland, a standing body of water or flowing water.

To be consistent, the shoreline definition in Chapter 10 also refers to the "normal high water mark of coastal wetlands."

The existing Chapter 10 definition for "normal high water mark of coastal wetlands" includes the highest astronomical tide line (not the highest annual tide line), consistent with the LUPC definition of coastal wetlands. No changes to the existing shoreline definition relating to coastal wetlands were included in this rulemaking.

**Action:** No action is recommended.

## B. 10.26,D Minimum Setbacks

*It appears that Dimensional Requirements and Setbacks (at the least) in Chapter 10 reference the "shoreline". With the proposed change to add "the upland edge of a freshwater wetland" to the Shoreline definition, it appears to create a new setback from freshwater wetlands. It is unclear what that setback would now be.*

**Commenter: Aleita M. Burman, Burman Land and Tree Company, LLC.**

**Response:** In Chapter 10, Section 10.26,D, the existing minimum setbacks for structures from freshwater wetlands require that setbacks be measured from the upland edge of a wetland. Adding "the upland edge of a freshwater wetland" to the definition of "shoreline" does not affect the setback requirement for freshwater wetlands. The setback from freshwater wetlands is provided in Section 10.26,D,1,a and Section 10.26,D,2,a as follows:

1. The minimum setbacks for structures, other than those described in Section 10.26,D,2 and except as provided in Section 10.26,G are:
  - a. 75 feet from ... the upland edge of non-forested wetlands located in P-WL1 subdistricts;  
...  
2. The minimum setbacks for multi-family dwellings and commercial, industrial, and other non-residential principal and accessory structures, other than those described in Section 10.26,D,1 and 3 and except as provided in Sections 10.26,G and 10.27,Q are:
    - a. 100 feet from ...the upland edge of non-forested wetlands located in P-WL1 subdistricts;

**Action:** No action is recommended.

## II. Testimony Related to the Standards for Protected Natural Resources

### A. 10.25 Development Standards, P. Protected Natural Resources, 2. Water Bodies and Wetlands

*The clarification which requires inclusion of alteration of all non-tidal water bodies, freshwater wetlands, and coastal wetlands in the Uses Requiring a Permit and Special Exceptions is very important, and this change is strongly favored.*

**Commenter: Aleita M. Burman, Burman Land and Tree Company, LLC.**

**Response:** The revisions to Section 10.25,P,2 clarify that the standards for water bodies and wetlands apply to all wetland alterations for uses that require a permit, regardless of whether the proposed alterations are located in a wetland protection subdistrict. Chapter 10, Sub-Chapter II establishes which uses require a permit in each subdistrict. Depending on the subdistrict, there are uses that are allowed without a permit that may result in a wetland alteration. However, those alterations typically would not result in a significant loss of wetland functions and values.

**Action:** No action is recommended.

## III. Testimony Related to Activity-specific Filling and Grading Standards

### A. 10.27 Activity-Specific Standards, F. Filling and Grading

*The changes in this section appear to lessen setbacks, i.e. the standards no longer apply to all waterbodies and wetlands, but only to P-WL1 subdistricts.*

**Commenter: Aleita M. Burman, Burman Land and Tree Company, LLC.**

**Response:** The revisions to this section of Chapter 10 can be read as a lessening of the standards, i.e., allowing larger areas of filling and grading near wetlands and non-tidal waterbodies that are not zoned as P-WL1 subdistricts. The Commission decided that it is less burdensome on property owners and ensures a better compliance rate to have filling and grading activities that are allowed without a permit be subject to standards that apply only to wetlands shown on the Commission's Land Use Guidance Maps, i.e., mapped in P-WL subdistricts. Also, given the number of small streams and forested freshwater wetlands in the LUPC service area, it strikes a better balance to apply the most stringent limit of filling and grading, the limit of 4300 square feet, in areas adjacent to P-WL1, wetlands of special significance, as oppose to applying that limit to areas adjacent to all wetlands.

**Action:** No action is recommended