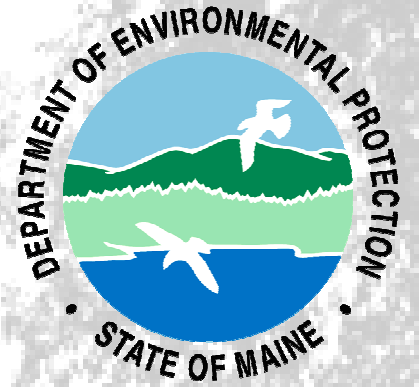


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Proposal for Mitigation and Compensation Standards for Tidal and Freshwater Significant Wildlife Habitat

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INTRODUCTION

This report is submitted pursuant to Public Law 2007, chapter 290, *An Act Concerning the Natural Resources Protection Laws and Related Provisions* which was enacted by the first session of the 123rd State Legislature. This law required the Department of Environmental Protection (DEP) to:

“Develop a proposal for mitigation and compensation standards for tidal and freshwater significant wildlife habitat. By January 5, 2008, the department is to report to the Joint Standing Committee on Natural Resources on its proposal, including any legislation necessary to implement the proposal. The Joint Standing Committee on Natural Resources may submit legislation related to the proposal to the 123rd Legislature.”

The recommendations and conclusions in this report can be summarized as follows:

- Mitigation and compensation are not appropriate for shorebird roosting areas.
- Mitigation and compensation provisions based on the current ratios and policies for wetland impacts are generally appropriate for significant vernal pool habitat, high and moderate value waterfowl and wading bird habitat, and shorebird nesting and feeding areas.
- In-lieu fee compensation should be authorized for unavoidable impacts in all significant wildlife habitats except for shorebird roosting areas. This requires amending 38 MRSA § 480-Z.

BACKGROUND AND DISCUSSION

The DEP’s significant wildlife habitat rules outline the requirements for a Natural Resources Protection Act (NRPA) permit for activities impacting significant wildlife habitat. Significant wildlife habitats include high and moderate value waterfowl and wading bird habitats, shorebird nesting, feeding and staging areas and significant vernal pools. Moderate and high value waterfowl and wading bird habitats are further broken down into inland moderate and high value waterfowl and wading bird habitat and moderate and high value tidal waterfowl and wading bird habitat. Shorebird nesting, feeding and staging habitat is further broken down into shorebird feeding areas and roosting areas.

The standards for review of a NRPA permit require that an applicant:

- **AVOID:** consider all practicable alternatives that would be less damaging to the environment to avoid degrading the significant wildlife habitat, disturbing the subject wildlife or affecting the continued use of the significant wildlife habitat;
- **MINIMIZE:** minimize the amount of alteration of the habitat and disturbance of subject wildlife necessary for the project; and
- **COMPENSATE:** provide for compensation when there are unavoidable impacts that have been minimized to the extent practicable.

When habitat is lost as a result of a permitted project, compensation (a form of mitigation) replaces it with restored, enhanced, created, or permanently conserved habitat that has the same or better ecological functions and values. For example, a habitat may function as a breeding area, a roosting area, or a foraging area with its value being characterized as “high” or “moderate”, depending on criteria established by the Department of Inland Fisheries & Wildlife (IFW). The amount of compensation required to replace those lost functions and values depends on a number of factors including: the size of the alteration activity; the functions of the habitat being altered; the type of compensation to be used; and the characteristics of the compensation site. Unless the DEP finds that a different ratio is appropriate to achieve an equal or higher net benefit for habitat, DEP Chapter 335 rules provide for minimum compensation amounts as follows,:

- 2:1 for restoration, enhancement, or creation;
- 8:1 for preservation, including adjacent upland or wetland habitat.

The DEP may waive the requirement for compensation if it determines that the impact to habitat functions and values from the activity is insignificant.

The location of the actual compensation or mitigation is important. When compensation or mitigation is required, an applicant is required to first consider options on the immediate project site. If on-site mitigation or compensation is not available or otherwise practicable, an applicant is required to consider mitigation or compensation options in the general area of the project. Alternatively, when on-site mitigation or compensation is not practicable and an applicant would prefer to avoid undertaking a search for adequate offsite compensation due to their lack of expertise, resources or timing, an applicant may request to pay a fee in lieu of completing their own resource mitigation project. This in-lieu program will be discussed in greater detail later in this report.

COMPENSATION AND MITIGATION: SIGNIFICANT WILDLIFE HABITAT

Staff from the IFW and DEP have considered the issues surrounding development in significant wildlife habitat resources and the potential for compensation and mitigation to offset development impacts. The recommendations for the various habitat types are as follows:

Shorebird Roosting Habitat.

Due to the extreme sensitivity of these locations, project reviews would focus on meeting the avoidance and minimization standards solely. In most situations, no compensation options would be considered to offset meeting the avoidance and minimization standards.

Shorebird Feeding Habitat.

Because the most recent amendments to the statute governing significant wildlife habitat limit jurisdiction to within 100 feet of the designated shorebird feeding or

staging areas, application of the avoidance and mitigation standards is anticipated to address most, if not all, of these potential projects. It is expected that most parcels have more than 100 feet of depth, so a project would be required to locate outside the 100-foot area.

In those situations where impacts are unavoidable and the project's impacts to the habitat are determined to be acceptable by IFW in their review of a project, development within the 100 foot limit may be mitigated by several options, including: a buffer management program which may include additional plantings of native species; placing an appropriate amount of land within the 100 foot limit in a deed restriction restricting further development; and/or using the in-lieu fee program once that option is available.

Here is an example of how this would apply in the case of permanent docks. A proposal for a permanent dock in shorebird feeding habitat can be decided in one of two ways based on the judgment of IFW. A permanent dock will not be permitted if it is determined to have an unreasonable impact on the shorebird area under all possible dock build-out scenarios. Alternatively, a dock may be allowed provided that it can be constructed so as to minimize its impacts to habitat to the greatest practicable extent. Unreasonable impacts cannot be mitigated for on-site in these habitats due to the very specific use by shorebirds. Amending the in-lieu fee program, with mitigation payments aimed at protection of more valuable shorebird habitats, may provide the most practicable mitigation option. In combination with this, other options include creating access to a common dock by multiple coastal property owners and/or a restriction on any additional docks on an applicant's property regardless of whether that property is subdivided in the future. In developing this option, applicants can elect common access or not at their option for subdivided parcels.

Tidal waterfowl and wading bird habitat.

In those situations where impacts are unavoidable and the project's impacts to the habitat are determined to be acceptable in consultation with staff from IFW, development within the tidal waterfowl and wading bird habitat may be mitigated by a placing some additional tidal waterfowl and wading bird habitat in a deed restriction that limits further development. Alternatively, or in addition, an applicant may use the in-lieu fee program once that option is available. Other options that may be considered include requiring an agreement to allow access to a common dock by multiple coastal property owners and/or a restriction on any additional docks on an applicant's property regardless of whether that property is subdivided in the future. In developing this option, applicants can elect common access or not at their option for subdivided parcels.

Consistent with docks in shorebird feeding habitat, no docks may be permitted if determined to have an unreasonable impact to habitat after considerations for avoidance and mitigation. Docks may be allowed if recommended by IFW staff.

Inland waterfowl and wading bird habitat.

Potential compensation and mitigation options for projects with unavoidable impacts may include: deed restrictions on an appropriate amount of habitat if existing on-site; habitat management plans, including enhancement options such as plantings of native species undertaken by a landowner or other interested parties such as Ducks Unlimited; and/or payment of mitigation payments into a wetlands in-lieu fee program which is amended to include significant wildlife habitat.

Significant vernal pools.

The DEP's significant wildlife habitat rule provides specific management standards for regulated activities occurring in significant vernal pool habitat. During the major substantive rulemaking process that came before this Committee, it was established that these management standards represented the minimum in most cases that a project must meet to ensure a viable significant vernal pool. The rule specifically identifies the restoration of previously disturbed areas within the habitat as suitable compensation. For larger projects, such as those reviewed under the Site Location of Development Law, in addition to on-site restoration as a compensation measure and on-site preservation of vernal pool habitat not impacted by a project, the use of an in-lieu fee program with funds targeted at significant vernal pool preservation should be considered an acceptable mitigation/compensation option as amendments are considered. (Examples of where on-site mitigation may *not* be practical due to specific project configuration include, a narrow existing utility right-of-way or the need to avoid taking certain lands through an eminent domain proceeding at the Federal Energy Regulatory Commission for utility projects.)

IN-LIEU FEE MITIGATION PROGRAM

In August 2007, the DEP established a compensation fee program for projects impacting freshwater and coastal wetlands. The DEP expects this newly developed program will be welcomed as providing an additional mitigation option for projects, particularly those that must proceed within a specific time frame. If mitigation on-site in the general project area is not available or otherwise impracticable, an applicant may request to make a simple mitigation payment “in lieu” of finding, arranging and financing a resource mitigation project. The DEP determines if a fee in lieu of mitigation is appropriate for a pending application. If appropriate, an in-lieu payment is used for the purposes of restoring, enhancing, creating or preserving resource functions that are equivalent to or better than the functions and values of impacted resources.

The compensation fee is based on the sum of the cost to restore or create a resource area with functions or values similar to those impacted by the activity plus the per-square foot average land acquisition costs. These costs are established on a county-by-county basis. Resource mitigation fees are assessed at a 1:1 ratio based on the acreage of the resource

that is altered, except that for certain wetland resource types determined to be wetlands of special significance where the ratio is assessed at 2:1.

In-lieu fee payments are managed by a third party to undertake identified projects that meet the requirements of the NRPA for compensation or mitigation. Currently, the in-lieu fee program is established for activities occurring in freshwater or coastal wetlands and is not available for those portions of significant wildlife habitats outside the wetland boundaries (e.g., upland inland wading bird and waterfowl nesting habitat within 250' of a high-value wetland, vernal pool critical terrestrial habitat within 250' of the vernal pool depression, and the 250' shorebird roost buffer and 100' shorebird feeding buffer).

RECOMMENDATIONS

The DEP recommends amending the Natural Resources Protection Act, Section 480-Z, to expand the in-lieu fee program to all portions of significant wildlife habitats (other than shorebird roosting areas) to provide applicants additional flexibility in permitting larger projects that are often time critical. Proposed statutory language changes to accomplish this recommendation are attached as Appendix A.

With the exception of an expanded in-lieu fee compensation program to allow the use of the program to consider impacts to non-wetland areas of significant wildlife habitat, all of the mitigation and compensation options discussed above are currently in use by the DEP during project reviews and are being applied in appropriate circumstances.

Appendix A – Proposed Statutory Amendment to 38 MRSA §480-Z

38 §480-Z. Compensation

The department may establish a program providing for compensation of unavoidable ~~freshwater or coastal wetland~~ losses to a protected natural resource area listed in subsection 7 due to a proposed activity. Compensation must include the restoration, enhancement, creation or preservation of an area or areas ~~wetlands~~ that have functions or values similar to the area ~~wetlands~~ impacted by the activity, unless otherwise approved by the department. Preservation may include protection of uplands adjacent to an area listed in subsection 7 ~~wetlands~~.

The department may require that compensation include the design, implementation and maintenance of a compensation project or, in lieu of such a project, may allow the applicant to purchase credits from a mitigation bank or to pay a compensation fee. If compensation is required, the completion and maintenance of a project, purchase of credits or payment of a compensation fee must be a condition of the permit.

The department shall identify an appropriate project, or determine the amount of credits or compensation fee, based upon the compensation that would be necessary to restore, enhance, create or preserve areas ~~wetlands~~ with functions or values similar to the areas ~~wetlands~~ impacted by the activity. However, the department may allow the applicant to conduct a project of equivalent value, or allow the purchase of credits or payment of a compensation fee of equivalent value, to be used for the purpose of restoring, enhancing, creating or preserving other ~~wetland~~ functions or values of the area or habitat that are environmentally preferable to the functions and values impacted by the activity, as determined by the department. The loss of functions or values of one type of area or habitat may not be compensated for by the restoration, enhancement, creation or preservation of another type of area or habitat. For example, ~~t~~The loss of functions or values of a coastal wetland may not be compensated for by the restoration, enhancement, creation or preservation of freshwater wetland functions or values.

A project undertaken pursuant to this section must be approved by the department. The department shall base its approval of a wetlands compensation project on the wetland management priorities identified by the department for the watershed or biophysical region in which the project is located. The department shall base its approval of a compensation project concerning one of the areas listed in subsection (C), (D), or (E) based upon the management priorities identified by the department for the type of habitat. The department may not approve a compensation project for unavoidable losses to any area listed in subsection 7 until the applicant has complied with all other applicable provisions of this article and all applicable rules adopted by the department pursuant to this article. For purposes of this section, "biophysical region" means a region with shared characteristics of climate, geology, soils and natural vegetation.

1. Location of project. A compensation project must be located on or adjacent to the project site, unless otherwise approved by the department. A compensation project must be located in the same watershed as the area ~~wetlands~~ affected by the activity unless

the department determines, based on regional hydrological or ecological priorities, that there is a scientific justification for locating the compensation project outside of the same watershed.

2. Approval of mitigation bank. A mitigation bank from which any credits are purchased must be approved by the department consistent with all applicable federal rules and regulations.

3. Compensation fee program. The department may develop a wetlands compensation fee program for the areas listed in subsection 7(A) and (B) in consultation with the State Planning Office, the United States Army Corps of Engineers and state and federal resource agencies, including the United States Fish and Wildlife Service and the United States Environmental Protection Agency. The department may develop a compensation fee program for the areas listed in subsection 7(C), (D) and (E) in consultation with the Department of Inland Fisheries and Wildlife.

A. The program may include the following:

(1) Identification of wetland management priorities on a watershed or biophysical region basis;

(1-A) Identification of management priorities for the areas listed in Subsection 7(C), (D) and (E);

(2) Identification of the types of ~~wetland~~ losses eligible for compensation under this subsection;

(3) Standards for compensation fee projects;

(4) Calculation of compensation fees based on the functions and values of the affected ~~wetlands~~ areas and the cost of compensation, taking into account the potential higher cost of compensation when a project is implemented at a later date; and

(5) Methods to evaluate the long-term effectiveness of compensation fee projects implemented under this subsection in meeting the ~~wetland~~ management priorities identified pursuant to subparagraph (1) and (2).

B. Any compensation fee may be paid into a ~~wetlands~~ compensation fund established by the department as provided in subparagraph (1) or to an organization authorized by the department as provided in subparagraph (2). A compensation project funded in whole or in part from compensation fees must be approved by the department.

(1) The department may establish a ~~wetlands~~ compensation funds for the purpose of receiving compensation fees, grants and other related income. A ~~The~~ wetlands compensation fund must be a fund dedicated to payment of costs and related expenses of ~~wetland~~ restoration, enhancement, preservation and creation projects. The department may make payments from the fund consistent with the purpose of the fund. Income received under this subsection must be deposited with the State Treasurer to the credit of the ~~wetlands~~ compensation fund and may be invested as provided by law. Interest on these investments must be credited to the ~~wetlands~~ compensation fund.

(2) The department may enter into an enforceable, written agreement with a public, quasi-public or municipal organization or a private, nonprofit organization for the protection of ~~wetlands and other~~ natural areas. Such an organization must demonstrate the ability to receive compensation fees, administer a ~~wetlands~~ compensation fund and ensure that compensation projects are implemented consistent with local, regional or state ~~wetland~~ management priorities ~~for the watershed in which the project is located~~. If compensation fees are provided to an authorized organization, the organization shall maintain records of expenditures and provide an annual summary report as requested by the department. If the authorized agency is a state agency other than the department, the agency shall establish a fund meeting the requirements specified in subparagraph (1). If the organization does not perform in accordance with this subsection or with the requirements of the written agreement, the department may revoke the organization's authority to conduct activities in accordance with this subsection.

Rules adopted pursuant to this subsection are routine technical rules under Title 5, chapter 375, subchapter 2-A.

4. Relationship to other provisions. The purchase of credits from a mitigation bank or the payment of a compensation fee in no way relieves the applicant of the requirement to comply with any other provision of this article, including, but not limited to, the requirement to avoid or minimize effects on wetlands and water quality to the greatest extent practicable under section 480-X.

5. Report; evaluation.

6. Repeal.

7. Areas and habitats. This section applies to activities following areas:

A. Freshwater wetlands;

B. Coastal wetlands;

C. Significant vernal pool habitat;

D. High and moderate value waterfowl and wading bird habitat, including nesting and feeding areas; and

E. Shorebird nesting, feeding and staging areas.

SUMMARY

This bill would expand the section of the Natural Resources Protection Act concerning compensation for unavoidable impacts to freshwater and coastal wetlands to also address compensation for unavoidable impacts to significant vernal pool habitat, high and moderate value waterfowl and wading bird habitat, and shorebird nesting, feeding, and staging areas.