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**REPORT TO THE MAINE LEGISLATURE'S
JOINT STANDING COMMITTEE ON NATURAL RESOURCES**

FRESHWATER WETLANDS PERMITTING UNDER THE
NATURAL RESOURCES PROTECTION ACT:

A PROGRAM REVIEW

FINAL REPORT

PURSUANT TO P.L. 1995, CHAPTER 460

MAINE DEPARTMENT OF ENVIRONMENTAL PROTECTION

JANUARY 1, 1998



STATE OF MAINE
DEPARTMENT OF ENVIRONMENTAL PROTECTION

ANGUS S. KING, JR.
GOVERNOR

EDWARD O. SULLIVAN
COMMISSIONER

January 27, 1998

Senator Sharon Treat, Senate Chair
Representative Steven Rowe, House Chair
Joint Standing Committee on Natural Resources
State House, Room 437
Augusta, ME 04333-0003

Dear Senator Treat, Representative Rowe and Members of the Natural Resources Committee:

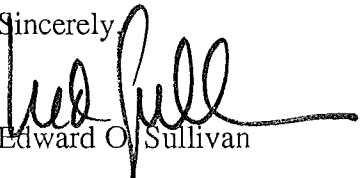
In accordance with P.L. 1995 Chapter 460 Section 10, the department is required to submit an final report by January 1, 1998, on the revised wetland regulatory program established by Section 480-X of the Natural Resources Protection Act. The report is to cover the time period from September 29, 1995 to October 1, 1997, and contain data on:

- the numbers of wetlands applications received;
- the amount and type of wetlands impacted;
- processing times;
- extent of permit compliance; and
- an overall assessment of the efficacy of the new program.

In addition, the department is to report on the efforts made, in conjunction with the State Planning Office, to coordinate with federal agencies in developing a more expedited process for larger freshwater wetland alteration projects as well as efforts to streamline the cranberry cultivation general permit process.

Attached is our final report as required by Chapter 460. This report includes narrative, a copy of Chapter 460 and a data sheet on the Tier Applications processed from September 29, 1995, to October 1, 1997.

My staff look forward to answering any questions you may have about the report or the program in general.

Sincerely

Edward O. Sullivan

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INTRODUCTION:

Chapter 460 of Public Laws 1995 contains a provision requiring the department to report on the newly created Tier review process for freshwater wetlands alterations. Section 10 of Chapter 460 requires that by January 1, 1998, the department shall provide a final report that provides information on:

- the number of applications submitted for review;
- the average processing time for each application;
- the amount and type of freshwater wetland altered;
- the extent of compliance with permit standards; and
- an assessment of the overall effectiveness of the program in terms of:
 - increased efficiency;
 - equivalent or enhanced protection of wetlands;
 - increased cost-effectiveness;
 - increased opportunity for public involvement in the regulatory process; and
 - whether the program is simpler and more easily understood than the prior regulatory program.

Additionally, the department is required to report on its efforts, in conjunction with the State Planning Office, to coordinate with other state and federal resource agencies to develop procedures and schedules that will expedite Tier 3 review to the extent practicable and to develop a streamlined cranberry cultivation general permit.

BACKGROUND:

The changes to the wetlands program, contained in P.L. 1995 Chapter 460, were made in response to recommendations from the Wetlands Regulatory Work Group (WRWG), a sub-group of Maine's Wetlands Conservation Plan Task Force. It consisted of State and Federal agency staff, and members from both business and environmental interest groups. Its initial job was to develop recommendations on the feasibility of applying to EPA to assume jurisdiction over federal wetlands regulation under Section 404 of the Clean Water Act, and to report on other options for reducing duplication and inefficiencies in the wetland permitting process, as directed by a 1993 Legislative Resolve.

The changes in the State's wetlands regulatory program contained in P.L. 1995 Chapter 460, effective September 29, 1995, include the following:

1. Wetlands of less than 10 acres in size are now regulated;
2. An exemption exists for alterations that affect less than 4,300 square feet (approx. 0.1 acre) of freshwater wetland, depending on the wetland's type or location;
3. An agricultural exemption similar to the Federal agricultural exemption was established; and

4. A 3-Tiered review process was established in order to streamline the review process for most activities affecting freshwater wetlands. The Tiers are as follows:

Tier 1: For projects affecting up to 15,000 square feet of wetland, where the wetland is not considered to be of special significance (defined under 38 MRSA Sec. 480-X(4)); maximum review time of 30 days; information requirements are simple (does not require professional assistance to complete).

Tier 2: For projects affecting between 15,000 square feet and 1 acre of wetland not of special significance; maximum review time of 60 days; if alteration is over 20,000 square feet, additional application requirements pertain (wetland functional assessment and possibly compensation).

Tier 3: For projects affecting wetlands of special significance or affecting greater than 1 acre of wetland; a full review occurs (department rules allow up to 120 days for review; these projects are generally the most complex due to analysis of project alternatives and compensation requirements to mitigate for lost wetland functions).

Concurrent with the changes in the State's program, the U.S. Army Corps of Engineers (ACE) adopted changes to its wetlands regulatory program to align closely with Maine's new program. The ACE instituted a Programmatic General Permit program (PGP), also effective on September 29, 1995, in which review thresholds similar to those of the State's were established. In so doing, the ACE has agreed to accept applications filed with the department for its review and to meet the State's mandated processing times on most projects.

APPLICATION DATA:

For your information, a complete breakdown of application data is included as Appendix A.

The department has received 330 Tier 1 & 2 applications between September 29, 1995, and October 1, 1997, for a total area of impact of approximately 91 acres. The breakdown of impact area on various wetland types is as follows:

	<u>Tier 1</u>	<u>Tier 2</u>	<u>Total</u>
Emergent	0.78 acres	0.00 acres	0.78 acres
Forested	17.88 "	12.34 "	30.22 "
Open Water	0.23 "	0.00 "	0.23 "
Scrub/shrub	5.15 "	2.99 "	8.14 "
Wet Meadows	3.31 "	1.60 "	4.91 "
"Mixed"	26.99 "	15.27 "	42.26 "
Other	3.25 "	1.31 "	4.56 "
TOTAL	57.59 "	33.51 "	91.09 "

Tier 1 applications were processed in an average time of 25.71 days. Tier 2 applications were processed in an average time of about 40 days.

Twenty eight Tier 2 projects exceeded 20,000 square feet impacting a total of approximately 21 acres. Almost 90 acres in compensation was approved to mitigate for these impacts (see Appendix A for breakdown by compensation type).

Over the same time period, 65 Tier 3 or full, individual permit applications were received involving a total impact area of about 179 acres. Approximately 320 acres of compensation was approved to mitigate for these impacts (see Appendix A for breakdown by compensation type).

THE CURRENT REVIEW PROCESS:

Since the start of the new state and federal regulatory programs in the fall of 1995, the department and ACE established a schedule for inter-agency screening of wetland alteration applications. These meetings occurred twice per month for Tier 1 projects, and once per month for Tier 2 and Tier 3 projects. Over the course of the first year, all review meetings eventually took the opportunity to review whatever applications were pending, regardless of the application type. For those projects deemed approveable, this translated into very quick turnaround times for certain applicants while still ensuring standards were being met.

In most cases, the department made its review decision on the day of the joint review meetings, regardless of whether the ACE or its review agencies (i.e. EPA, USF&WS, and the National Marine Fisheries Service (NMFS)) withheld approval pending the gathering of more information. For example, these federal review agencies had not previously been involved in the review of many projects affecting less than 1 acre. In a number of cases, they requested additional time, usually 10 days, before making a decision in order to visit the project site for purposes of being assured that an applicant had avoided and minimized to the extent practicable. In most cases, these projects were eventually given approval under the federal PGP although it was 2-3 weeks after state approval was granted. When this situation occurred where state approval was granted but not federal, the ACE did notify applicants of the delay and reminded them that federal approval had not yet been granted.

It is important to remember that the ACE still issues its own permits. Based on their process, approval of Tier 1 level projects comes straight from the Maine Project Office located in Manchester. For Tier 2 & 3 level projects, final approval comes from the ACE's Waltham, Massachusetts, regional office. While an applicant need only file one application, they must still receive two approvals.

The ACE has reviewed the first year of their new PGP program and feel that the new program is successful and efficient and that review of projects affecting less than 15,000 square feet will continue to be done with their federal review agencies. Department staff presence at the biweekly review meetings is no longer deemed efficient or effective. Instead, a new process of making department project managers available for conference calls on the federal review meeting dates

will begin in 1998. This will save time and travel expense as well as make the appropriate project manager available should questions arise.

PROGRAM ASSESSMENT:

Effectiveness/Efficiency

Given the biweekly review schedule, the current review process is very timely for applicants. The department uses a relatively simple letter to notify applicants of approval or denial. These steps make for a less rigid and involved process, which can be characterized as more efficient, requiring less staff time than the full application process.

The public's understanding of the process is relatively good. However, determining what is and isn't wetland is not well understood by the general public. The obvious, wet examples of freshwater wetland (e.g. marshes) are generally recognized but 'drier' examples, such as some meadows and forested wetlands, are not. While it appears the program is generally supported by the public, we have committed staff to assisting applicants in defining wetland edges and guiding them on project design based on the NRPA's standards. Where this kind of staff effort has been made, the actual application process runs very smoothly.

In some instances where applicants applied completely on their own, however, both state and federal staff have had trouble determining that an applicant has avoided and minimized to the extent practicable. For projects affecting up to 20,000 square feet, this is the primary issue involved in review. The current application requires, as Section 480-X(6) states, that a drawing need only show the area of freshwater wetland to be filled or otherwise altered. Without a broader perspective of the overall character of an applicant's property, it is difficult to tell if an applicant has, in fact, avoided filling wetland as they aver on the application form. This is also the major reason the federal review agencies have either wanted to visit a project site or require additional information from applicants about the nature and extent of freshwater wetland on their property.

A copy of the current application form has been attached for your information. To satisfy federal review criteria however, this application will be modified during January and February of 1998 to require more information about the presence of wetlands on an applicant's property and a brief narrative about how wetland impacts were avoided/minimized.

Equivalent/enhanced protection

Clearly, increased jurisdiction over all freshwater wetland areas can be considered enhanced protection of the resource. Prior to the NRPA's September 1995 revision and the ACE's implementation of the PGP, many wetland alterations were either not regulated at the State level if they occurred in wetlands less than 10 acres in size or not carefully scrutinized if affecting less than 1 acre of area under the federal PGP process. By applying a basic standard of requiring the public to first avoid the wetland impact to the extent practicable and then minimizing it, it is fair to say that protection of our freshwater wetland resources has been greatly enhanced.

As a result of the September 1995 NRPA amendments, Chapter 310 Wetland Protection Rules were also amended and took effect on July 4, 1996. In the rule, the department has maintained a criteria requiring a professional review of a wetlands functions and values as well as a requirement that lost and degraded functions and values, as reflected in the functional analysis, be compensated. In this sense, the new regulatory program is at least equivalent to the old.

Public involvement

To the extent that more wetland areas are regulated and that applicants are required to file copies of the application with municipalities (Tier 1) and provide public notice (Tier 2), there is more opportunity for public involvement. However, it should be noted that little public comment has been received which is not uncommon in our routine licensing efforts.

Compliance

Compliance with the new program is good and results from the department's use of all its compliance "tools": education & outreach; technical assistance; voluntary compliance; and formal enforcement.

In September 1995, the department, in conjunction with the ACE, held 4 joint public workshops across the state to introduce the public to the new state jurisdiction and licensing program as well as the new federal PGP. Since that time and during the time frame covered by this report, department staff have spoken at 69 different workshops, seminars, etc. to explain NRPA generally and at 15 events to discuss freshwater wetlands specifically. The audience has covered a diverse cross section of the public from the Small Woodlot Owners Association and the Campground Owners Association to Planning Associations and Codes Enforcement Officers Associations. Further, staff assisted in four 2-day workshops for Codes Enforcement Officers (CEOs) specifically aimed at delineating wetlands and identifying their functions and values. Staff also took part in another 4 workshops for CEOs where the freshwater wetland regulatory process was part of the agenda.

Additionally, the department has committed staff to assisting the general public, on-site, with determining the existence of freshwater wetlands, the program's parameters and licensing needs and concerns. Pre-application meetings, when licensing is needed, are offered to any applicant requesting one and a number of these are actually done on-site to the applicant's benefit. This type of "front loading" allows the actual licensing process to run smoothly and efficiently.

No formal enforcement action has been taken on a project approved under the Tier process to date. However, some formal enforcement has been necessary for wetland alterations performed without first receiving permits from the department. The biggest reason for the majority of unlicensed wetland alterations is the failure to recognize that freshwater wetlands exist on the project site. In most of these cases, the department works with the landowner informally to achieve compliance.

Twenty eight inspections were performed on Tier 1 and 2 projects. On completed projects, staff found 22 in compliance. Three projects were not started and the other 3 were determined to be

not in compliance because no or poorly installed erosion control measures a found. Because applicants often have been in contact with our staff before submitting an application, the level of compliance with the law is high.

PROGRAM IMPROVEMENTS:

Compensatory Mitigation

In 1997, the 118th Legislature enacted P.L. 1997, Chapter 101, An Act Concerning Compensation Under the Natural Resources Protection Laws. The law authorizes the DEP to establish a program providing for compensation of unavoidable wetland losses due to proposed alteration activities. 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. A compensation project must be approved by the Department, and that approval must be based on the wetland management priorities identified for the watershed in which the project is located. The law further requires that the Compensation Fee Program be developed in consultation with the State Planning Office and other state and federal agencies, and prohibits the department from approving a compensation project funded in whole or in part from compensation fees until the program has been agreed to by the federal resource agencies.

In order to facilitate wetlands planning on a watershed scale and to facilitate the eventual establishment of the Compensation Fee Program, the Department has joined with the State Planning Office (SPO) and other state and federal resource agencies in the Casco Bay Wetlands Pilot Project. The project is being coordinated by SPO as part of their work in developing a State Wetlands Conservation Plan; it is being funded by EPA Wetlands Grant money. The project involves conducting an inventory of wetlands, according to the functions they provide, in the Casco Bay Watershed. This inventory will require field work in the spring and summer of 1998. Based on this inventory, the steering committee will consider wetland priorities within the watershed; e.g., in order to provide wetland habitat, are there areas of land that should be acquired or otherwise protected? Are there wetlands that could be restored to improve habitat or provide water quality treatment?

With the completion of the inventory work and identification of priorities, now projected for the fall of 1998, the Pilot Project will move its focus to developing the Compensation Fee Program in the Casco Bay Watershed. With state and federal agencies participating on the steering committee of the project, it is hoped that any issues will be identified and resolved early on.

If the Pilot Project is successful, the intent of the Department and State Planning Office is to extend the same approach to other watersheds of the State, with priority given to areas where development pressure is the greatest. EPA has also expressed interest in making this a pilot project in New England for tracking wetland impacts.

Cranberry General Permit

The department developed a new cranberry cultivation general permit during the spring of 1996 which was subsequently approved by the ACE as acceptable for use in applying for the federal cranberry general permit. The 'one-stop' application was approved by the Downeast RC&D Cranberry Work Group, a collection of industry stakeholders. However, ACE has rescinded its cranberry general permit, effective September 1997. Cranberry projects can still use the department's application but federal approval is subject to the normal PGP process.

RECOMMENDATIONS:

The few problems encountered so far under the new program mostly involve the need for additional information. For purposes of satisfying the federal agencies' review, not enough information is required in some cases under our Tier 1 application form. For a Tier 1 application, in accordance with section 480-X(6), an applicant only has to show the area to be filled on a drawing. There is no requirement for showing development area or otherwise demonstrating the need for the alteration.

However, both the department, pursuant to Section 480-X(3) of the NRPA, and the ACE require that wetlands be avoided and minimized to the extent practicable. The department is currently modifying the Tier 1 & 2 application and will add a requirement in the application form that building or development plans be included to demonstrate the need for the proposed alteration. Additionally, the application will explain the need for information about upland locations on the entire property by including narrative and plans showing wetland on all of an applicant's property. Professional delineation is still not required for Tier 1 review however.

It is not felt necessary to amend the NRPA in relation to this issue. No other issues have arisen needing legislative amendment either. No additional staffing needs have been identified. Review times are within the maximum allowed; no change is proposed. Due to the infrequent but sometimes necessary cancellations in the federal review meeting schedules, the full 30 or 60 day review period is sometimes necessary.

APPENDIX A

FRESHWATER WETLAND APPLICATION DATA

(9/29/95 - 10/1/97)

I. APPLICATION NUMBERS:

<u>TIER 1</u>	<u>TIER 2</u>	<u>TIER 2(>20,000 sq.ft.)</u>	<u>TOTAL</u>
273	57	28	330

II. IMPACT (ACRES):

<u>TIER 1</u>	<u>TIER 2</u>	<u>TIER 2(>20,000 sq.ft.)</u>	<u>TOTAL</u>
57.59	33.51	21.08	91.09

III. COMPENSATION (TIER 2):

<u>Restoration</u>	<u>Enhancement</u>	<u>Creation</u>	<u>Preservation</u>	<u>Total</u>
2.71	24.5	4.69	57.68	89.58

IV. TIER 3 (FULL) APPLICATIONS:

<u>Pending</u>	<u>Comp. Req.</u>	<u>No Comp. Req.</u>	<u>Other*</u>	<u>Total</u>	<u>Total Impact</u>
9	22	19	15	65	178.92

*Includes withdrawn, modification and condition compliance applications

V. COMPENSATION (TIER 3 or FULL APP.):

<u>Restoration</u>	<u>Enhancement</u>	<u>Creation</u>	<u>Preservation</u>	<u>Total</u>
18.39	21.33	18.52	261.94	320.18

VI. ADDITIONAL INFORMATION:

1. Of the total impact area allowed under Tier 3 applications, almost 80 acres is attributable to one large cranberry project in Washington Co..
2. Certain impacts involving clearing of tress or other vegetation (e.g. utility lines) often are not deemed an impact on functions and values, therefore, no compensation is required.
3. Other forms of compensating for functions/values losses are installing "wet" detention ponds, enhancing travel corridors, riparian zones and buffers which may not actually be in the wetland areas and may not be represented above.
4. Preservation numbers may include those areas restored, created or enhanced.