

MAINE STATE LEGISLATURE

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DATE: June 26, 1995

(Filing No. S- 336)

NATURAL RESOURCES

Reported by: Senator LORD of York for the Committee.

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STATE OF MAINE
SENATE
117TH LEGISLATURE
FIRST REGULAR SESSION

COMMITTEE AMENDMENT "A" to S.P. 570, L.D. 1544, Bill, "An Act to Streamline Permit Procedures for Freshwater Wetlands in the State"

Amend the bill by striking out everything after the enacting clause and before the statement of fact and inserting in its place the following:

Sec. 1. 38 MRSA §480-B, sub-§4, as amended by PL 1989, c. 430, §3, is further amended to read:

4. Freshwater wetlands. "Freshwater wetlands" means freshwater swamps, marshes, bogs and similar areas which that are:

A. Of 10 or more contiguous acres, or of less than 10 contiguous acres and adjacent to a surface water body, excluding any river, stream or brook, such that in a natural state, the combined surface area is in excess of 10 acres;

B. Inundated or saturated by surface or ground-water groundwater at a frequency and for a duration sufficient to support, and which under normal circumstances do support, a prevalence of wetland vegetation typically adapted for life in saturated soils; and

C. Not considered part of a great pond, coastal wetland, river, stream or brook.

These areas may contain small stream channels or inclusions of land that do not conform to the criteria of this subsection.

Sec. 2. 38 MRSA §480-B, sub-§9, as repealed and replaced by PL 1995, c. 92, §2, is amended to read:

9. **River, stream or brook.** "River, stream or brook" means a channel between defined banks and ~~associated flood plain wetlands~~. A channel is created by the action of surface water and has 2 or more of the following characteristics.

A. It is depicted as a solid or broken blue line on the most recent edition of the U.S. Geological Survey 7.5-minute series topographic map or, if that is not available, a 15-minute series topographic map.

B. It contains or is known to contain flowing water continuously for a period of at least 3 months of the year in most years.

C. The channel bed is primarily composed of mineral material such as sand and gravel, parent material or bedrock that has been deposited or scoured by water.

D. The channel contains aquatic animals such as fish, aquatic insects or mollusks in the water or, if no surface water is present, within the stream bed.

E. The channel contains aquatic vegetation and is essentially devoid of upland vegetation.

"River, stream or brook" does not mean a ditch or other drainage way constructed and maintained solely for the purpose of draining storm water or a grassy swale.

Sec. 3. 38 MRSA §480-B, sub-§10, as amended by PL 1993, c. 296, §1, is further amended to read:

10. Significant wildlife habitat. "Significant wildlife habitat" means the following areas to the extent that they have been mapped by the Department of Inland Fisheries and Wildlife or are within any other protected natural resource: habitat, as defined by the Department of Inland Fisheries and Wildlife, for species appearing on the official state or federal lists of endangered or threatened animal species; high and moderate value deer wintering areas and travel corridors as defined by the Department of Inland Fisheries and Wildlife; high and moderate value waterfowl and wading bird habitats, including nesting and feeding areas as defined by the Department of Inland Fisheries and Wildlife; critical spawning and nursery areas for Atlantic sea run salmon as defined by the Atlantic Sea Run Salmon Commission; and shorebird nesting, feeding and staging areas and seabird nesting islands as defined by the Department of Inland Fisheries and Wildlife; and significant vernal pools as defined and identified by the Department of Inland Fisheries and Wildlife. For purposes of this subsection, "identified" means

identified in a specific location by the Department of Inland Fisheries and Wildlife.

Sec. 4. 38 MRSA §480-C, sub-§1, as affected by PL 1989, c. 890, Pt. A, §40 and amended by Pt. B, §70, is repealed and the following enacted in its place:

1. Prohibition. A person may not perform or cause to be performed any activity listed in subsection 2 without first obtaining a permit from the department if the activity is located in, on or over any protected natural resource or is located adjacent to and operated in such a manner that material or soil may be washed into any of the following:

A. A coastal wetland, great pond, river, stream or brook or significant wildlife habitat contained within a freshwater wetland; or

B. Freshwater wetlands consisting of or containing:

(1) Under normal circumstances, at least 20,000 square feet of aquatic vegetation, emergent marsh vegetation or open water, except for artificial ponds or impoundments; or

(2) Peatlands dominated by shrubs, sedges and sphagnum moss.

A person may not perform or cause to be performed any activity in violation of the terms or conditions of a permit.

Sec. 5. 38 MRSA §480-Q, sub-§6, as enacted by PL 1987, c. 889, §2, is amended to read:

6. Agricultural activities. Draining Subject to other provisions of this article that govern other protected natural resources, altering a freshwater wetland for the purpose of growing agricultural products is exempt from the provisions of this article,--- This exemption applies only as long as the land is being used for growing agricultural products normal farming activities such as clearing of vegetation for agricultural purposes if the land topography is not altered, plowing, seeding, cultivating, minor drainage and harvesting, construction or maintenance of farm or livestock ponds or irrigation ditches, maintenance of drainage ditches and construction or maintenance of farm roads;

Sec. 6. 38 MRSA §480-Q, sub-§§17 and 18 are enacted to read:

17. Minor alterations in freshwater wetlands. Activities that alter less than 4,300 square feet of freshwater wetlands and that do not occur in, on or over another protected natural resource, except that any activity occurring within a shoreland zone regulated by a municipality pursuant to chapter 3, subchapter I, article 2-B is not exempt. An activity qualifies for exemption under this section only if the entire activity qualifies, including all phases of a multiphased project taken as a whole. Activities authorized or legally conducted prior to the effective date of this subsection are not considered in calculating the size of the alteration.

18. Service drops for telephone or electrical service. Vegetative clearing of a freshwater wetland for the installation of telephone or electrical service, if:

A. The line extension does not cross or run beneath a coastal wetland, river, stream or brook;

B. The placement of wires or installation of utility poles is located entirely upon the premises of the customer requesting service, upon a roadway right-of-way or, in the case of telephone service, on existing utility poles; and

C. The total length of the extension is less than 1,000 feet.

Sec. 7. 38 MRSA §480-X is enacted to read:

§480-X. Alterations of freshwater wetlands

An application for a permit to undertake activities altering freshwater wetlands must be processed by the department using the review process described in this section.

1. Application. This section does not apply to activities otherwise qualifying for reduced review procedures, such as permits by rule or general permits; activities exempt from review under another section of this article; or activities involving protected natural resources other than freshwater wetlands, such as great ponds, coastal wetlands and rivers, streams or brooks.

2. Three-tiered review process; tiers defined. Except as provided in subsection 1, an application for a permit to undertake activities altering freshwater wetlands must be reviewed in accordance with the following.

A. A Tier 1 review process applies to any activity that involves a freshwater wetland alteration up to 15,000 square feet and does not involve the alteration of freshwater wetlands listed in subsection 4.

2. B. A Tier 2 review process applies to any activity that
4 involves a freshwater wetland alteration of 15,000 square
6 feet up to one acre and does not involve the alteration of
8 freshwater wetlands listed in subsection 4 or 5.

10 C. A Tier 3 review process applies to any activity that
12 involves a freshwater wetland alteration of one acre or more
14 or an alteration of a freshwater wetland listed in
16 subsection 4 or 5.

18 If the project as a whole requires Tier 2 or Tier 3 review, then
20 any activity that is part of the overall project and involves a
22 regulated freshwater wetland alteration also requires the same
24 higher level of review, unless otherwise authorized by the
26 department.

28 In determining the amount of freshwater wetland to be altered,
30 all components of a project, including all phases of a
32 multiphased project, are treated together as constituting one
34 single and complete project. Activity authorized or legally
36 conducted prior to the effective date of this section is not
38 included.

40 The standards of section 480-D do not apply to projects that
42 qualify for Tier 1 or Tier 2 review, except that water quality
44 standards under section 480-D, subsection 5 apply to those
46 projects. Projects that meet the eligibility requirements for
48 Tier 1 or Tier 2 review and that satisfy the permitting
50 requirements set forth in subsection 3, 6 or 7, as applicable,
are presumed not to have significant environmental impact.

3. General requirements. A person undertaking an activity
for which a permit is processed pursuant to this section must
satisfy the requirements of this subsection.

A. An applicant for Tier 1 or Tier 2 review must meet the
following requirements.

(1) Alteration of freshwater wetland areas on the
property must be avoided to the extent feasible
considering cost, existing technology and logistics
based on the overall purpose of the project.

(2) The area of the freshwater wetland to be altered
must be limited to the minimum amount necessary to
complete the project.

(3) Erosion control measures must be used to prevent
sedimentation of protected natural resources. A

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25-foot buffer strip must be maintained between the activity and any river, stream or brook.

(4) The activity must comply with applicable water quality standards pursuant to section 480-D, subsection 5.

B. An applicant for Tier 1, Tier 2 or Tier 3 review for projects that would alter wetland hydrology and could also alter stream flows or other adjacent surface waters, must comply with the water quality classification standards contained in section 465.

4. Projects not eligible for Tier 1 or Tier 2 review. The following activities are not eligible for Tier 1 or Tier 2 review unless the department determines that the activity will not negatively affect the freshwater wetlands and other protected natural resources present:

A. Activities located within 250 feet of:

(1) A coastal wetland; or

(2) The normal high-water line, and within the same watershed, of any lake or pond classified as GPA under section 465-A;

B. Activities occurring in freshwater wetlands, other than artificial ponds or impoundments, containing under normal circumstances at least 20,000 square feet of aquatic vegetation, emergent marsh vegetation or open water;

C. Activities occurring in freshwater wetlands that are inundated with floodwater during a 100-year flood event based on flood insurance maps produced by the Federal Emergency Management Agency or other site-specific information;

D. Activities occurring in freshwater wetlands containing significant wildlife habitat that has been mapped, identified or defined, as required pursuant to section 480-B, subsection 10, at the time of the filing by the applicant;

E. Activities occurring in peatlands dominated by shrubs, sedges and sphagnum moss, except that applications proposing work in previously mined peatlands may be considered by the department for Tier 1 or Tier 2 review, as applicable; or

F. Activities occurring within 25 feet of a river, stream or brook.

The department shall inform the applicant in writing within the review period specified in subsection 6 or 7 if the proposed project does not qualify for Tier 1 or Tier 2 review processing and shall explain permitting options if the applicant wishes to pursue the project. The department is responsible for providing information necessary to establish whether the types of wetlands described in paragraphs D and E will be affected by the proposed activity. Unless the applicant knowingly or willfully provided incomplete or false information to the department, if the department does not notify the applicant that the proposed project does not qualify for Tier 1 or Tier 2 review, the project is deemed to be qualified for Tier 1 or Tier 2 review, as applicable.

5. Additional projects not eligible for Tier 2 review. An activity in freshwater wetlands containing a natural community that is imperiled (S1) or critically imperiled (S2), as defined by the Natural Areas Program pursuant to Title 5, section 13076 is not eligible for Tier 2 review unless the department determines that the activity will not negatively affect the freshwater wetlands and other protected natural resources present.

6. Application process for Tier 1 review activities. Applications for Tier 1 review are governed by this subsection.

A. The application must be sent by certified mail or hand-delivered to the department. The application must include:

(1) The application fee;

(2) The project location on a United States Geological Survey map;

(3) A description of the project, including a drawing showing the area of freshwater wetland to be filled or otherwise altered and areas of any marsh or open water within the freshwater wetland; and

(4) A signed statement averring that all of the requirements of subsection 3 will be met, that the activity will not occur in a wetland area described in subsection 4 and that a copy of the application has been submitted by the applicant for public display to the municipal office of the municipality in which the project will be located.

2 B. Work may not occur until 30 days after the department
4 receives a complete application, unless written approval is
6 issued sooner by the department. The department shall
8 notify the applicant in writing no later than 30 days after
10 the department receives a complete application if the
12 applicable requirements of this section have not been met.
14 If the department has not notified the applicant within the
16 30-day review period, a permit is deemed to be granted.

18 C. Fees for Tier 1 review may not exceed the following:

20 (1) For projects up to 5,000 square feet, \$35;

22 (2) For projects from 5,000 square feet up to 10,000
24 square feet, \$75; and

26 (3) For projects from 10,000 square feet up to 15,000
28 square feet, \$150.

30 7. Application process for Tier 2 review. Applications for
32 Tier 2 review are governed by this subsection.

34 A. An application form must be submitted, with the
36 application fee, to the department and include the following
38 information:

40 (1) Documentation that public notice has been provided
42 of the proposed project in accordance with department
44 rules;

46 (2) A United States Geological Survey map showing the
48 project location;

50 (3) Written certification by a knowledgeable
professional experienced in wetland science that the
project will not alter, or cause to be altered, a
wetland described in subsection 4 or 5;

(4) A top view drawing of the entire project,
including existing and proposed fill, excavation, roads
and structures; cross-sectional drawings of any fill or
excavated areas; delineation of the wetland boundaries
and calculated area of freshwater wetlands affected;
description of existing vegetation on the project site;
identification of any surface water bodies within 100
feet of the proposed alteration; and a drawing of the
25-foot buffer strip between the project and any river,
stream or brook;

(5) A soil erosion and sedimentation control plan;

2 (6) For work in previously mined peatlands,
4 information on the past mining activity, including the
6 approximate dates of the mining activity, the area and
8 depth to which peat has been excavated from the site,
 any restoration work on the site and the current
 condition of the site;

10 (7) A statement describing why the project can not be
12 located completely in upland areas and any alternatives
14 that exist for the project that would either avoid or
 minimize the amount of proposed freshwater wetland
 alteration; and

16 (8) A plan for compensating for lost functions and
18 values of the freshwater wetland when required by, and
 in accordance with, rules adopted by the department.

20 B. Work may not occur until 60 days after the department
22 has received a complete application for processing, unless
24 written approval is issued sooner by the department. The
26 department shall notify the applicant in writing within 60
 days of the department's receipt of a complete application
 whether the applicable requirements of this section have
 been met. If the department has not notified the applicant
 within the 60-day review period, a permit is deemed to be
 granted.

28 C. Fees for Tier 2 review must be set in accordance with
30 the department's fee schedule for freshwater wetland
32 alterations under the natural resources protection laws.

34 8. Application process for Tier 3 review. Applications for
 Tier 3 review are governed by this subsection.

36 A. An application form must be submitted to the department
38 that contains all the information required for Tier 2
40 review, in addition to any information determined by the
 department to be necessary to meet the requirements of
 section 480-D and rules adopted by the department.

42 B. Written approval from the department is required before
44 work may begin.

46 C. Fees for Tier 3 review are set in accordance with the
48 department's fee schedule for freshwater wetland alterations
 under the natural resources protection laws.

50 Sec. 8. 38 MRSA §490-D, sub-§5-A, as enacted by PL 1995, c.
 287, §11, is amended to read:

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**ENVIRONMENTAL PROTECTION,
DEPARTMENT OF**

Maine Environmental Protection Fund

All Other \$13,037 \$17,383

Allocates funds to cover the increased costs of administering changes in the wetlands permitting process.

Sec. 10. Evaluation period. From the effective date of this Act to October 1, 1997, the Department of Environmental Protection shall monitor the effectiveness of the regulatory program established in the Maine Revised Statutes, Title 38, section 480-X. The department shall provide an interim report by February 1, 1997 and a final report by January 1, 1998 to the joint standing committee of the Legislature having jurisdiction over natural resource matters. The reports must include information on the number of applications submitted for review, the average amount of time required to process each application, the amount and type of freshwater wetlands 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 freshwater wetlands, increased cost-effectiveness and opportunity for public involvement in the regulatory process, as well as whether the program is simpler and more easily understood than wetlands regulation was before the program was put in place. The reports must include recommendations on any changes needed to the program, including any resource needs or new application review periods based on this information.

In addition, the Department of Environmental Protection, in conjunction with the State Planning Office, shall coordinate with the United States Army Corps of Engineers and state and federal resource agencies, including the United States Fish and Wildlife Service, to develop procedures and schedules that will expedite Tier 3 review to the extent practicable and to develop a streamlined cranberry cultivation general permit. A report of the department's coordination efforts must be submitted to the Legislature with the evaluation reports.

By January 1, 1996, the Department of Environmental Protection shall supply to the joint standing committee of the Legislature having jurisdiction over natural resource matters copies of all rules adopted or proposed to be adopted pursuant to this Act, including all rules concerning mitigation.

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By February 1, 1996, the Department of Environmental Protection shall provide to the joint standing committee of the Legislature having jurisdiction over natural resource matters a report that discusses the effects the tier thresholds established under the Maine Revised Statutes, Title 38, section 480-X on the structure of any programmatic general permit issued by the United States Army Corps of Engineers and whether greater streamlining of the permitting process could be obtained through changes in the tier thresholds. The report must also include a thorough critique of this entire Act, including identification of any provisions that need further clarification or otherwise require amendment in order to achieve a fully streamlined process. The report must include draft legislation to achieve any recommended changes.

Sec. 11. Committee authorized to report out legislation. The joint standing committee of the Legislature having jurisdiction over natural resource matters may report out legislation concerning wetlands regulation to the Second Regular Session of the 117th Legislature or the First Regular Session of the 118th Legislature.

Sec. 12. Application. This Act:

1. Does not apply to an activity that occurred prior to the effective date of this Act and for which a permit was required under the Maine Revised Statutes, Title 38, chapter 3, subchapter I, article 5-A prior to the effective date of this Act;
2. Does not apply to an activity for which a permit was not required under the Maine Revised States, Title 38, chapter 3, subchapter I, article 5-A prior to the effective date of this Act, but is required under this Act if the activity began prior to the effective date of this Act; and
3. With the exception of those sections of this Act that amend the Maine Revised Statutes, Title 38, section 480-Q, subsection 6 and enact Title 38, section 480-Q, subsection 17, does not apply to an activity performed or caused to be performed on or after the effective date of this Act if the person performing the activity, or causing the activity to be performed, was in possession of applicable federal, state or local licenses prior to the effective date of this Act.'

Further amend the bill by inserting at the end before the statement of fact the following:

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FISCAL NOTE

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1995-96 **1996-97**

APPROPRIATIONS/ALLOCATIONS

Other Funds \$13,037 \$17,383

REVENUES

Other Funds \$13,037 \$17,383

Changes in the wetlands permitting process will increase permit fee collections. The estimated increases of dedicated revenue to the Maine Environmental Protection Fund within the Department of Environmental Protection are \$13,037 and \$17,383 in fiscal years 1995-96 and 1996-97, respectively. The department will require additional Maine Environmental Protection Fund allocations, which correspond to the revenue increases for fiscal years 1995-96 and 1996-97, respectively, for the additional costs of implementing the revised permitting process.

Changes in the wetlands permitting process may result in significantly increased workloads for the Department of Environmental Protection. Depending on the additional number of permits processed, the department may require and request additional General Fund appropriations in fiscal year 1996-97. The exact amounts can not be determined at this time.'

STATEMENT OF FACT

This amendment replaces the bill.

This amendment makes many technical changes to the bill to clarify the intent and scope of the bill. This amendment preserves the substance of the bill, which completely overhauls wetland regulation under the natural resources protection laws. The amendment preserves the 3-tiered permitting process for wetlands alteration. The amendment, however, makes the following substantive modifications to the bill:

- 1. It creates an exemption from the natural resources protection laws for projects that alter less than 4,300 square feet of wetland unless the projects occur in a shoreland zone regulated by a municipality under shoreland zoning laws or occur in another protected natural resource;

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2 2. It creates an exemption from the natural resources
3 protection laws for clearing of vegetation in freshwater wetlands
4 associated with telephone and electric service drops;

6 3. It expands the exemption from wetlands regulation for
7 agricultural activities to include clearing of vegetation for
8 agricultural purposes;

10 4. It requires the Department of Environmental Protection
11 to notify applicants for Tier 1 or Tier 2 review whether certain
12 types of sensitive wetland areas are located in the project area
13 that make the project ineligible for Tier 1 or Tier 2 review. If
14 the department fails to notify the applicant, the project is
15 deemed to be qualified for Tier 1 or Tier 2 review;

16 5. It requires the Department of Environmental Protection
17 to respond in writing within 60 days of the receipt of a complete
18 application under Tier 2 review. If the department fails to
19 respond in 60 days, a permit is deemed to be granted;

22 6. It requires the Department of Environmental Protection
23 to provide 2 reports on the success of the new wetlands
24 regulatory scheme to the joint standing committee of the
25 Legislature having jurisdiction over natural resource matters.
26 The first report is due February 1, 1997; the 2nd report is due
27 January 1, 1998. The department is also required to supply to
28 the committee by January 1, 1996 copies of all rules adopted on
29 wetland regulation, including rules regarding mitigation
30 requirements for wetland alteration;

32 7. It requires the Department of Environmental Protection
33 to provide a report on the new wetlands regulation by February 1,
34 1996 that critiques the provisions of this bill and identifies
35 any needed changes to the law;

36 8. It authorizes the joint standing committee of the
37 Legislature having jurisdiction over natural resource matters to
38 report out legislation on wetlands regulation to the Second
39 Regular Session of the 117th Legislature or the First Regular
40 Session of the 118th Legislature;

42 9. It specifies that floodplain wetlands are regulated under
43 this new wetland regulatory scheme; and

44 10. It eliminates the buffer strip requirement for gravel
45 pits located adjacent to freshwater wetlands that are not subject
46 to licensing as adjacent activities under the general wetlands
47 law.

48 11. It adds an allocation section and a fiscal note to the
49 bill.
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