

MAINE STATE LEGISLATURE

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117th MAINE LEGISLATURE

FIRST REGULAR SESSION-1995

Legislative Document

No. 1544

S.P. 570

In Senate, May 23, 1995

An Act to Streamline Permit Procedures for Freshwater Wetlands in the State.

Reference to the Committee on Natural Resources suggested and ordered printed.

A handwritten signature in cursive script that reads "May M. Ross".

MAY M. ROSS
Secretary of the Senate

Presented by Senator LORD of York. (GOVERNOR'S BILL).
Cosponsored by Representative GOULD of Greenville and
Senator: RUHLIN of Penobscot, Representatives: BERRY of Livermore, DAMREN of
Belgrade, GREENLAW of Standish, MARSHALL of Eliot, NICKERSON of Turner.

2 Be it enacted by the People of the State of Maine as follows:

4 Sec. 1. 38 MRSA §480-W is enacted to read:

6 **§480-W. Alterations of freshwater wetlands**

8 An application for the alteration of freshwater wetlands must be processed by the department using the review process described in this section.

10 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, including floodplain wetlands.

18 2. Three-tiered review process; tiers defined. An application for the alteration of freshwater wetlands must be reviewed in accordance with the following.

22 A. A Tier 1 activity involves a freshwater wetland alteration of 500 square feet up to 15,000 square feet and does not involve alteration of freshwater wetlands listed in subsection 4.

28 B. A Tier 2 activity involves a freshwater wetland alteration of 15,000 square feet up to one acre and does not involve alteration of freshwater wetlands listed in subsection 4 or 5.

32 C. A Tier 3 activity involves a freshwater wetland alteration of one acre or more or an alteration of a freshwater wetland listed in subsection 4 or 5.

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

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

48 Projects that qualify as Tier I or Tier 2 activities are not
50 required to meet the standards of section 480-D. Tier I or Tier

2 activities are presumed to not have significant environmental
3 impact due to the limited size of the project and their
4 compliance with the eligibility requirements.

5 **3. General requirements.** For projects that would alter
6 wetland hydrology, which may also alter stream flows or other
7 adjacent surface waters, the applicant must comply with the water
8 quality classification standards contained in section 465.

9 **A. If the application is for a Tier 1 or Tier 2 activity:**

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

14 (2) The area of the freshwater wetland to be altered
15 must be limited to the minimum amount necessary to
16 complete the project; and

17 (3) Erosion control measures must be used to prevent
18 sedimentation of great ponds, streams and other
19 protected natural resources. A 25-foot buffer strip
20 must be maintained between the activity and any river,
21 stream or brook.

22 **4. Projects not eligible for Tier 1 or Tier 2.** An activity
23 in one or more of the following freshwater wetlands is not
24 eligible to be processed as a Tier 1 or Tier 2 activity unless
25 the department determines that the activity will not negatively
26 affect the freshwater wetlands and other protected natural
27 resources present:

28 **A. Freshwater wetlands located within 250 feet of:**

29 (1) A coastal wetland; or

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

33 **B. Freshwater wetlands containing at least 20,000 square**
34 feet of aquatic vegetation, emergent marsh vegetation or
35 open water during most of the growing season in most years,
36 except for artificial ponds or impoundments;

37 **C. Freshwater wetlands that are inundated with floodwater**
38 during a 100-year flood event based on flood insurance maps
39 produced by the Federal Emergency Management Agency or other
40 site-specific information;

2 D. Freshwater wetlands containing significant wildlife
3 habitat; or

4
5 E. Peatlands dominated by shrubs, sedges and sphagnum moss
6 and usually having a saturated water regime, except that
7 applications proposing work in previously mined peatlands
8 may be considered.

10 The department shall inform the applicant within the review
11 period specified in subsection 6 or 7 if the proposed site does
12 not qualify for Tier 1 or Tier 2 processing and shall explain
13 permitting options if the applicant wishes to pursue the
14 project. The department is responsible for providing information
15 necessary to establish compliance with paragraphs D and E.

16
17 **5. Additional projects not eligible for Tier 2. An**
18 **activity in one or more of the following freshwater wetlands is**
19 **not eligible to be processed as a Tier 2 activity unless the**
20 **department determines that the activity will not negatively**
21 **affect the freshwater wetlands and other protected natural**
22 **resources present:**

24 A. Freshwater wetlands containing a natural community that
25 is imperiled in the State because of extreme rarity, which
26 is defined as 5 or fewer occurrences or very few remaining
27 acres, or some aspect of its biology making it especially
28 vulnerable to extirpation from the State, as defined by the
29 Natural Areas Program pursuant to Title 5, section 13076; or

30
31 B. Freshwater wetlands containing a natural community that
32 is imperiled in the State because of rarity, which is
33 defined as 6 to 20 occurrences or few remaining acres, or
34 other factors making it vulnerable to further decline, as
35 defined by the Natural Areas Program pursuant to Title 5,
36 section 13076;

37 **6. Application process for Tier 1 activities. Applications**
38 **for Tier 1 activities are governed by this subsection.**

39
40 A. The application must be sent by certified mail or
41 hand-delivered to the department. The application must
42 include:

43 (1) The application fee;

44
45 (2) The project location on a United States Geological
46 Survey map;

47
48

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

6 (4) A signed statement that all of the requirements of
7 subsections 3 and 4 will be met and that a copy of the
8 application has been submitted by the applicant for
9 public display to the municipal office of the
10 municipality in which the project will be located.

11 B. Work may not occur until 30 days after the department
12 receives an application, unless written approval is issued
13 sooner by the department. The department shall notify the
14 applicant in writing within the review period if the
15 department determines that the eligibility requirements have
16 not been met. If the department has not notified the
17 applicant within the 30-day review period, a permit is
18 deemed to be granted.

19 C. Fees for Tier 1 freshwater wetland alterations may not
20 exceed the following:

21 (1) For 500 square feet up to 5,000 square feet, \$50;

22 (2) For 5,000 square feet up to 10,000 square feet,
23 \$75; and

24 (3) For 10,000 square feet up to 15,000 square feet,
25 \$150.

26 **7. Application process for Tier 2 activities.** Applications
27 for Tier 2 activities are governed by this subsection.

28 A. An application form must be submitted, with the
29 application fee, to the department and include the following
30 information:

31 (1) Documentation that public notice has been provided
32 of the proposed project in accordance with department
33 rules;

34 (2) A United States Geological Survey map showing the
35 project location;

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

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

10 (5) A soil erosion and sedimentation control plan;

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

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

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

30 B. Work may not occur until 60 days after the department
32 has accepted an application for processing, unless written
34 approval is issued sooner by the department. The department
 shall notify the applicant in writing whether the
 eligibility requirements have been met.

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

40 **8. Application process for Tier 3 activities.** Applications
42 for Tier 3 activities are governed by this subsection.

44 A. An application form must be submitted to the department
46 that contains all the information required for Tier 2
 projects, plus additional information determined by the
 department to be necessary to meet the requirements of
48 section 480-D and rules adopted by the department.

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

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

8
10 **Sec. 2. 38 MRSA §480-B, sub-§4**, as amended by PL 1989, c. 430,
§3, is further amended to read:

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

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

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

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

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

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

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

2 and Wildlife; and significant vernal pools as defined by the
Department of Inland Fisheries and Wildlife.

4 **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
6 following enacted in its place:

8 **1. Prohibition.** A person may not perform nor cause to be
9 performed any activity listed in subsection 2 without first
10 obtaining a permit from the department if the activity is located
11 in, on or over any protected natural resource or is located
12 adjacent to and operated in such a manner that material or soil
13 may be washed into any of the following:

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

18 B. Freshwater wetlands consisting of or containing:

20 (1) A natural community that is critically imperiled
21 in the State because of extreme rarity, which is
22 defined as 5 or fewer occurrences or very few remaining
23 acres, or some aspect of its biology making it
24 especially vulnerable to extirpation from the State, as
25 established by the Natural Areas Program pursuant to
26 Title 5, section 13076;

28 (2) A natural community that is imperiled in the State
29 because of rarity, which is defined as 6 to 20
30 occurrences or few remaining acres, or other factors
31 making it vulnerable to further decline, as established
32 by the Natural Areas Program pursuant to Title 5,
33 section 13076;

35 (3) At least 20,000 square feet of aquatic vegetation,
36 emergent marsh vegetation or open water during most of
37 the growing season in most years, except for artificial
38 ponds or impoundments; or

40 (4) Peatlands dominated by shrubs, sedges and sphagnum
41 moss and usually having a saturated water regime.

44 A person may not perform nor cause to be performed any activity
45 in violation of the terms or conditions of a permit.

46 **Sec. 5. 38 MRSA §480-Q, sub-§6**, as enacted by PL 1987, c. 809,
48 §2, is amended to read:

2 **6. Agricultural activities.** Draining Subject to other
3 provisions of this article that govern other protected natural
4 resources, altering a freshwater wetland for the purpose of
5 growing agricultural products is exempt from the provisions of
6 this article normal farming activities such as plowing, seeding,
7 cultivating, minor drainage and harvesting, construction or
8 maintenance of farm or livestock ponds or irrigation ditches,
9 maintenance of drainage ditches and construction or maintenance
10 of farm roads. This exemption applies only as long as the land
11 is being used for growing agricultural products;

12 **Sec. 6. 38 MRSA §480-Q, sub-§17** is enacted to read:

13 **17. Minor alterations in freshwater wetlands.** Alterations
14 of less than 500 square feet of freshwater wetlands, as long as
15 they are single and complete projects, including all phases of
16 multiphased projects. Activities authorized or conducted prior
17 to the effective date of this section are not considered in
18 calculating the size of the alteration. This subsection does not
19 apply to activities that are adjacent to another protected
20 natural resource. Activities adjacent to another protected
21 natural resource must meet the department's permit by rule
22 standards or other applicable department rules.

23 **Sec. 7. Evaluation period.** From the effective date of this Act
24 to October 1, 1997, the Department of Environmental Protection
25 shall monitor the effectiveness of the regulatory program
26 established in the Maine Revised Statutes, Title 38, section
27 480-W and report to the Legislature by February 1997. The report
28 must include information on the number of applications submitted
29 for review, the average amount of time required to process each
30 application, the amount and type of freshwater wetlands altered
31 and an assessment of the overall effectiveness of the program in
32 terms of increased efficiency, equivalent or enhanced protection
33 of freshwater wetlands, increased cost-effectiveness, opportunity
34 for public involvement in the regulatory process, and a simpler,
35 more easily understood program overall. The report must include
36 recommendations on any changes needed to the program, including
37 any resource needs or new application review period based on this
38 information.

39 During this evaluation period, written approval from the
40 Department of Environmental Protection must be obtained before
41 work under Title 38, section 480-W, subsection 7 may begin.

42 In addition, the Department of Environmental Protection, in
43 conjunction with the State Planning Office, shall coordinate with
44 the United States Army Corps of Engineers and state and federal
45 resource agencies, including the United States Fish and Wildlife
46 Service, to develop procedures and schedules that will expedite

2 the processing of Tier 3 permit applications to the extent
3 practicable and to develop a streamlined cranberry cultivation
4 general permit. A report of the department's coordination
5 efforts must be submitted to the Legislature with the evaluation
6 report.

7 **Sec. 8. Application.** This Act:

8
9 1. Does not apply to an activity for which a permit was
10 required under the Maine Revised Statutes, Title 38, chapter 3,
11 subchapter I, article 5-A prior to the effective date of this Act;

12
13 2. Does not apply to an activity for which a permit was not
14 required under Title 38, chapter 3, subchapter I, article 5-A
15 prior to the effective date of this Act, but is required under
16 this Act if construction began prior to the effective date of
17 this Act; and

18
19 3. With the exception of those parts of this Act that amend
20 Title 38, section 480-Q, subsection 7 and enact Title 38, section
21 480-Q, subsection 17, does not apply to an activity performed or
22 caused to be performed on or after the effective date of this Act
23 if the person performing the activity, or causing the activity to
24 be performed, was in possession of applicable federal, state or
25 local licenses prior to the effective date of this Act.

26
27 **STATEMENT OF FACT**

28
29 30 The purpose of this bill is to provide the State with
31 "one-stop shopping" for wetlands permits and to simplify wetlands
32 permitting while providing protection to the State's most vital
33 wetland ecosystems.

34
35 This bill revises the State's freshwater wetlands regulatory
36 program to be more consistent with the federal program under
37 Section 404 of the federal Clean Water Act. The purpose of this
38 revision is to enable the State to develop a joint application
39 form with the United States Army Corps of Engineers and to take
40 the lead in the processing of applications for large projects and
41 to eliminate the confusion over which agency has jurisdiction
42 over a particular application.

43
44 The bill establishes a permit review process that allows for
45 expedited review of 30 days or less for projects having a wetland
46 impact of less than 15,000 square feet (Tier 1) and of 60 days or
47 less for projects having between 15,000 square feet and one acre
48 of wetland impact (Tier 2), unless significant wetland functions
49 would be affected. Applications for Tier 1 projects may be made
50 on abbreviated application forms and are not subject to wetland
mitigation requirements.

2 The bill eliminates the 10-acre size requirement for
isolated freshwater wetlands so that the state and federal
4 programs are consistent with regard to wetlands jurisdiction.

6 The bill eliminates the requirement for permits due to
alterations adjacent to freshwater wetlands, except for those
8 with significant functions that could be negatively affected by
such activity.

10 The bill amends the definition of "significant wildlife
12 habitat" to include "significant vernal pools" as defined by the
Department of Inland Fisheries and Wildlife.

14 The bill adds an exemption for any activity altering less
16 than 500 square feet of freshwater wetland.

18 The bill changes the exemption for agricultural activities
to be consistent with the federal exemptions for agriculture
20 under Section 404 of the federal Clean Water Act.