

MAINE STATE LEGISLATURE

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128th MAINE LEGISLATURE

FIRST REGULAR SESSION-2017

Legislative Document

No. 1040

H.P. 729

House of Representatives, March 14, 2017

An Act Regarding Permitting under the Natural Resources Protection Act

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

A handwritten signature in cursive script that reads "Robert B. Hunt".

ROBERT B. HUNT
Clerk

Presented by Representative PICCHIOTTI of Fairfield.
Cosponsored by Representatives: LOCKMAN of Amherst, SHERMAN of Hodgdon,
TIMBERLAKE of Turner, WINSOR of Norway.

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

2 **Sec. 1. 38 MRSA §480-B, sub-§1-C** is enacted to read:

3 **1-C. Artificial turf.** "Artificial turf" means an artificial product manufactured from
4 synthetic material that simulates the appearance of natural turf, grass, sod or lawn.

5 **Sec. 2. 38 MRSA §480-B, sub-§5-B,** as enacted by PL 2011, c. 64, §2, is
6 amended to read:

7 **5-B. Impervious area.** "Impervious area" means an area that is a building, parking
8 lot, roadway or similar constructed area. "Impervious area" does not mean a deck,
9 artificial turf or a patio.

10 **Sec. 3. 38 MRSA §480-B, sub-§9,** as amended by PL 2001, c. 618, §1, is further
11 amended to read:

12 **9. River, stream or brook.** "River, stream or brook" means a channel between
13 defined banks. A channel is created by the action of surface water and has ~~2 or more~~ all
14 of the following characteristics.

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

18 B. It contains or is known to contain flowing water continuously for a period of at
19 least 6 months of the year in most years.

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

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

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

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

29 **Sec. 4. 38 MRSA §480-B, sub-§9-A, ¶B,** as amended by PL 2009, c. 295, §1
30 and PL 2011, c. 682, §38, is further amended to read:

31 B. "Significant groundwater well" does not include:

32 (1) A public water system as defined in Title 22, section 2601, subsection 8;
33 ~~except that "significant groundwater well" includes:~~

34 ~~(a) A public water system used solely to bottle water for sale; and~~

35 ~~(b) Any portion of a public water system that is:~~

36 ~~(i) Constructed on or after January 1, 2009;~~

- 1 (ii) ~~Used solely to bottle water for sale; and~~
- 2 (iii) ~~Not connected to another portion of the public water system through~~
- 3 ~~pipes intended to convey water.~~

4 ~~For purposes of this paragraph, a public water system that is used solely to bottle~~
5 ~~water for sale includes a public water system that bottles water for sale and may~~
6 ~~provide a de minimus amount of water for other purposes, such as employee or~~
7 ~~other use, as determined by the department;~~

- 8 (2) Individual home domestic supply;
- 9 (3) Agricultural use or storage;
- 10 (3-A) Dewatering of a mining operation;
- 11 (4) A development or part of a development requiring a permit pursuant to
- 12 article 6, article 7 or article 8-A; or
- 13 (5) A structure or development requiring a permit from the Maine Land Use
- 14 Planning Commission.

15 **Sec. 5. 38 MRSA §480-C, sub-§1**, as amended by PL 2001, c. 618, §2, is further
16 amended to read:

17 **1. Prohibition.** ~~A~~ Except as provided in section 480-E-2, a person may not
18 perform or cause to be performed any activity listed in subsection 2 without first
19 obtaining a permit from the department if the activity is located in, on or over any
20 protected natural resource or is located adjacent to any of the following:

- 21 A. A coastal wetland, great pond, river, stream or brook or significant wildlife
- 22 habitat contained within a freshwater wetland; or
- 23 B. Freshwater wetlands consisting of or containing:
 - 24 (1) Under normal circumstances, at least ~~20,000~~ 80,000 square feet of aquatic
 - 25 vegetation, emergent marsh vegetation or open water, except for artificial ponds
 - 26 or impoundments; or
 - 27 (2) Peatlands dominated by shrubs, sedges and sphagnum moss.

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

30 **Sec. 6. 38 MRSA §480-C, sub-§4**, as enacted by PL 2007, c. 399, §11, is
31 amended to read:

32 **4. Significant groundwater well.** ~~A~~ Except for the establishment or operation of a
33 significant groundwater well for a community public water system, a person may not
34 perform or cause to be performed the establishment or operation of a significant
35 groundwater well without first obtaining a permit from the department.

36 **Sec. 7. 38 MRSA §480-D, first ¶**, as amended by PL 2009, c. 615, Pt. E, §7, is
37 further amended to read:

1 The department shall grant a permit upon proper application and upon such terms as
2 it considers necessary to fulfill the purposes of this article. The department shall grant a
3 permit when it finds that the applicant has demonstrated that the proposed activity meets
4 the standards set forth in subsections 1 to 11, except that when an activity ~~requires a~~
5 ~~permit only because it~~ is located in, on or over a community public water system primary
6 protection area ~~the department shall issue a permit when it finds that~~ and does not
7 otherwise require a permit pursuant to section 480-C the applicant ~~has demonstrated~~ must
8 demonstrate that the proposed activity meets the standards set forth in subsections 2 and
9 5.

10 **Sec. 8. 38 MRSA §480-D, sub-§3**, as amended by PL 2011, c. 653, §15 and
11 affected by §33, is further amended to read:

12 **3. Harm to habitats; fisheries.** The activity will not unreasonably harm any
13 significant wildlife habitat, freshwater wetland plant habitat, threatened or endangered
14 plant habitat, aquatic or adjacent upland habitat, travel corridor, freshwater, estuarine or
15 marine fisheries or other aquatic life.

16 In determining whether mining, as defined in section 490-MM, subsection 11, will
17 comply with this subsection, the department shall review an analysis of alternatives
18 submitted by the applicant. For purposes of this subsection, a practicable alternative to
19 mining, as defined in section 490-MM, subsection 11, that is less damaging to the
20 environment is not considered to exist. The department may consider alternatives
21 associated with the activity, including alternative design and operational measures, in its
22 evaluation of whether the activity avoided and minimized impacts to the maximum extent
23 practicable.

24 In determining whether there is unreasonable harm to significant wildlife habitat, the
25 department may consider proposed mitigation if that mitigation does not diminish in the
26 vicinity of the proposed activity the overall value of significant wildlife habitat and
27 species utilization of the habitat and if there is no specific biological or physical feature
28 unique to the habitat that would be adversely affected by the proposed activity. For
29 purposes of this subsection, "mitigation" means any action taken or not taken to ~~avoid,~~
30 minimize, rectify, reduce, eliminate or compensate for any actual or potential adverse
31 impact on the significant wildlife habitat, including the following:

- 32 ~~A. Avoiding an impact altogether by not taking a certain action or parts of an action;~~
- 33 B. Minimizing an impact by limiting the magnitude, duration or location of an
34 activity or by controlling the timing of an activity;
- 35 C. Rectifying an impact by repairing, rehabilitating or restoring the affected
36 environment;
- 37 D. Reducing or eliminating an impact over time through preservation and
38 maintenance operations during the life of the project; or
- 39 E. Compensating for an impact by replacing the affected significant wildlife habitat.

40 **Sec. 9. 38 MRSA §480-E, sub-§2**, as amended by PL 2007, c. 353, §10, is
41 further amended to read:

1 **2. Water supply notification and review.** If the resource subject to alteration or the
2 underlying ground water is utilized by a community public water system as a source of
3 supply, the applicant for the permit shall, at the time of filing an application, forward a
4 copy of the application to the community public water system and the drinking water
5 program of the Department of Health and Human Services by ~~certified~~ mail and the
6 ~~department shall consider~~ Department of Health and Human Services and the community
7 public water system may provide any comments concerning the application ~~filed with the~~
8 ~~commissioner~~ within a reasonable period, as established by the commissioner.

9 **Sec. 10. 38 MRSA §480-E-2**, as enacted by PL 2007, c. 353, §11, is amended to
10 read:

11 **§480-E-2. Delegation of review authority to the Department of Health and Human**
12 **Services or to a community public water system**

13 The commissioner may delegate review authority to determine whether an activity
14 that ~~requires a permit because it~~ is located within a community public water system
15 primary protection area meets the standards in section 480-D, subsections 2 and 5 if the
16 activity does not in whole or in part otherwise require a permit pursuant to section 480-C.
17 The commissioner may only delegate this review authority to the drinking water program
18 of the Department of Health and Human Services or to a community public water system
19 that demonstrates adequate technical capacity to perform the review. If review authority
20 is delegated, a permit from the department shall issue or deny the permit and retains is not
21 required and the department does not retain enforcement authority.

22 **Sec. 11. 38 MRSA §480-Q, sub-§2-D**, as enacted by PL 2011, c. 205, §3, is
23 amended to read:

24 **2-D. Existing crossings.** A permit is not required for the repair and maintenance of
25 an existing crossing or for the replacement of an existing crossing, including ancillary
26 crossing installation activities such as excavation and filling, in any protected natural
27 resource area, as long as:

- 28 A. Erosion control measures are taken to prevent sedimentation of the water;
- 29 B. The crossing does not block passage for fish in the protected natural resource
30 area; and
- 31 C. For replacement crossings of a river, stream or brook:
- 32 (1) The replacement crossing is designed, installed and maintained to match the
33 natural stream grade to avoid drops or perching; and
- 34 (2) As site conditions allow, crossing structures that are not open bottomed are
35 embedded in the stream bottom a minimum of one foot or at least 25% of the
36 culvert or other structure's diameter, whichever is greater, except that a crossing
37 structure does not have to be embedded more than 2 feet.

38 For purposes of this subsection, "repair and maintenance" includes but is not limited to
39 the riprapping of side slopes or culvert ends; removing debris and blockages within the
40 crossing structure and at its inlet and outlet; and installing or replacing culvert ends if less

1 than 50% of the crossing structure is being replaced. For purposes of this subsection,
2 "existing crossing" includes but is not limited to an existing water or sewer line, culvert
3 or natural gas pipeline.

4 **Sec. 12. 38 MRSA §480-Q, sub-§9**, as amended by PL 1989, c. 878, Pt. A, §111,
5 is further amended to read:

6 **9. Public works.** A permit is not required for emergency repair ~~or~~ normal
7 maintenance and repair or replacement of existing public works ~~which that~~ affect any
8 protected natural resource. An activity ~~which that~~ is exempt under this subsection ~~shall~~
9 must employ erosion control measures to prevent sedimentation of any surface water,
10 ~~shall~~ may not block fish passage in any water course and ~~shall~~ may not result in any
11 additional intrusion of the public works into the protected natural resource.—~~This~~
12 ~~exemption does not apply to any activity on an outstanding river segment as listed in~~
13 ~~section 480-P;~~

14 **Sec. 13. 38 MRSA §480-Q, sub-§17, ¶¶A to C**, as enacted by PL 1995, c. 575,
15 §1, are repealed.

16 **Sec. 14. 38 MRSA §480-Q, sub-§17, ¶D**, as enacted by PL 1995, c. 575, §1, is
17 amended to read:

18 D. The activity does not occur in a wetland normally consisting of or containing at
19 least ~~20,000~~ 80,000 square feet of open water, aquatic vegetation or emergent marsh
20 vegetation, except for artificial ponds or impoundments;

21 **Sec. 15. 38 MRSA §480-W, sub-§3**, as enacted by PL 2005, c. 548, §2, is
22 amended to read:

23 **3. Emergency action exemption.** Notwithstanding section 480-C, if the local code
24 enforcement officer, or a state-licensed professional engineer ~~or a state-certified geologist~~
25 determines that the integrity of a seawall, bulkhead, retaining wall or similar structure in a
26 coastal sand dune system is destroyed or threatened, the owner of property protected by
27 the seawall, bulkhead, retaining wall or similar structure may perform or cause to be
28 performed the following activities without obtaining a permit under this article:

29 A. Place riprap, sandbags or other heavy nonhazardous material to shore up the
30 threatened structure and leave the material in place until a project designed to repair
31 or replace the structure is permitted by the department. After such emergency action
32 is taken and within 5 working days after the imminent threat, the property owner
33 must provide written notice to the department of the date the emergency action was
34 taken and a description of the emergency action taken. Within 6 months following
35 placement of any material pursuant to this paragraph, the property owner must submit
36 to the department an application to repair or replace the structure. The material
37 placed pursuant to this paragraph must be removed within 18 months from the date a
38 permit is issued by the department; or

39 B. Make permanent repairs, to the extent necessary to alleviate the threat, to
40 strengthen the seawall, bulkhead, retaining wall or other structure, to widen the
41 footings or to secure the structure to the sand with tie-back anchors. A ~~state-certified~~

1 geologist, state-licensed professional engineer or other qualified professional must
2 make the determination that the actions taken by the property owner in accordance
3 with this section are only those actions necessary to alleviate the imminent threat and
4 do not include increasing the height or length of the structure.

5 If a local code enforcement officer, or state-licensed professional engineer ~~or state-~~
6 ~~certified geologist~~ fails to determine within 6 hours of initial contact by the property
7 owner whether the integrity of a structure is destroyed or threatened, the property owner
8 may proceed as if the local code enforcement officer, or state-licensed professional
9 engineer ~~or state-certified geologist~~ had determined that the integrity of the structure was
10 destroyed or threatened.

11 **Sec. 16. 38 MRSA §480-X, sub-§4, ¶B**, as enacted by PL 1995, c. 460, §7 and
12 affected by §12, is amended to read:

13 B. Activities occurring in freshwater wetlands, other than artificial ponds or
14 impoundments, containing under normal circumstances at least ~~20,000~~ 80,000 square
15 feet of aquatic vegetation, emergent marsh vegetation or open water;

16 **SUMMARY**

17 This bill amends the Natural Resources Protection Act in several ways.

18 1. It excludes artificial turf from the definition of "impervious area."

19 2. It amends the definition of "river, stream or brook" to provide that a channel must
20 have all 5 of the characteristics listed in the definition. Current law requires that a
21 channel must have at least 2 of the characteristics listed.

22 3. It amends the definition of "significant groundwater well" to provide that public
23 water systems are not significant groundwater wells.

24 4. It increases from 20,000 to 80,000 square feet the area of aquatic vegetation,
25 emergent marsh vegetation or open water that a freshwater wetland must contain before a
26 person is required to get a permit from the Department of Environmental Protection for
27 activities adjacent to the freshwater wetland.

28 5. It provides that a person is not required to obtain a Natural Resources Protection
29 Act permit from the Department of Environmental Protection for the establishment or
30 operation of a significant groundwater well for a community public water system.

31 6. For determining if an activity unreasonably harms habitats or fisheries, it amends
32 the definition of "mitigation" to provide that the Department of Environmental Protection
33 may not consider whether an adverse impact of an activity can be avoided.

34 7. It amends the notification and comment requirements when a resource is used by a
35 community public water system as a source of water supply.

36 8. It provides that the Department of Environmental Protection may only delegate
37 review authority to the Department of Health and Human Services, Drinking Water

1 Program or to a community public water system when an activity is located within a
2 community public water system primary protection area and the activity does not
3 otherwise require a Department of Environmental Protection permit under the Natural
4 Resources Protection Act. It also removes the requirement to obtain a permit from the
5 Department of Environmental Protection in such cases.

6 9. It includes existing water or sewer lines, culverts and natural gas pipelines in the
7 permit exemption for existing crossings.

8 10. It provides that a replacement of existing public works does not require a Natural
9 Resources Protection Act permit and it provides that the public works exemption applies
10 to outstanding river segments.

11 11. It amends the exemption for activities that alter less than 4,300 square feet of
12 freshwater wetlands.

13 12. It removes state-certified geologists from the list of professionals that may
14 determine whether the integrity of a seawall or similar structure in a coastal sand dune
15 system is destroyed or threatened for purposes of repairing the seawall or structure.

16 13. It amends the activities that are not eligible for Tier 1 or Tier 2 review when
17 altering freshwater wetlands.