

# MAINE STATE LEGISLATURE

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REPORT OF THE  
WETLANDS REGULATORY WORK GROUP ON  
STREAMLINING THE STATE AND  
FEDERAL WETLANDS PROGRAMS

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February 1, 1995

**Report of the Wetlands Regulatory Work Group on Streamlining the  
State and Federal Wetlands Programs**

**INTRODUCTION:**

In 1993, the Legislature issued a Resolve (Chapter 16) directing the Department of Environmental Protection (DEP) to develop a report "...examining the feasibility of an application to the Environmental Protection Agency to assume state authority over the permitting of wetlands." The Resolve also directed DEP to "examine the increased efficiencies and enhanced protection that could result from consolidating federal and state regulation of wetlands; any statutory or regulatory changes that would have to be made to the state's wetlands protection program; the staff and technical and financial resources that assumption of the federal program would require; and any other methods or options possible for reducing duplication and inefficiencies in the wetland permitting process." (See Appendix I for the Legislative Resolve.)

As directed by the Resolve, the DEP, with the State Planning Office (SPO), convened a work group, the Maine Wetlands Conservation Plan Regulatory Work Group, consisting of representatives from seven state agencies, two business interest groups and two environmental interest groups, with two federal agencies serving ex-officio. (See Appendix II for Work Group membership.) This group met regularly through the summer and fall of 1994, and worked towards a consensus on the issues and recommendations which follow.

**WETLANDS REGULATIONS: Current status and issues**

Wetlands regulation currently occurs at the federal level through Section 404 of the Clean Water Act (404 Program), administered by the U.S. Army Corps of Engineers (ACE) and the Environmental Protection Agency (EPA), and at the state level through the Natural Resources Protection Act (NRPA), administered by the Maine DEP. Although NRPA technically gives DEP statewide permitting authority, DEP generally does not process applications in the state's unorganized territories due to insufficient staff. In these areas, non-forested wetlands are regulated through zoning by the Land Use Regulation Commission (LURC). Some municipalities have ordinances regulating wetlands as well.

Federal Jurisdiction The 404 Program gives the federal agencies jurisdiction over virtually all wetlands, regardless of size and establishes a permit program to regulate activities in these wetlands. The Clean Water Act at 404(e) also allows for the issuance of general permits on a state, regional or national basis. Most of these general permits apply to general categories of activities such as bulkhead construction, rip rap placement etc. General permits can only authorize activities which have minimal individual or cumulative impact.

Additionally, the Corps may establish Programmatic General Permits (PGPs) with size thresholds appropriate for an individual state or State Programmatic General Permits (SPGP) based on a state's own comprehensive wetlands regulatory program.

Currently, ACE regulations establish forty different nationwide permits which contain different size thresholds, notification requirements and mitigation provisions. Several of the more commonly used nationwide permits have a reporting or notice requirement that must be met before use of the permit is authorized. Since 1991 the New England Division of the ACE limited the applicability of one of the most widely used general permits (nationwide permit #26) to filling less than one acre. Confusion often arises as to the applicability of particular nationwide permits including whether notice is required.

The ACE uses and SPGP in Maine, under which the Maine DEP provides the ACE with permit decisions. The ACE may then authorize work under the SPGP on the basis that the state has reviewed the project and has issued a permit, and that the environmental impacts are individually and cumulatively minimal.

Where individual permit applications are required, federal regulations prohibit avoidable or significant adverse impacts to wetlands and other waters. The ACE requires compensatory mitigation in cases where no alternative exists. The permitting program is run out of the Maine Project Office in Manchester with three staff, as well as the New England Division Office of the Army Corps in Waltham, Massachusetts.

State Jurisdiction The state NRPA program gives DEP jurisdiction, statewide, over all coastal wetlands, all freshwater wetlands contiguous to coastal wetlands and great ponds, all freshwater wetlands in floodplains of rivers and streams, and all other freshwater wetlands that are ten acres or more in size. Some minor activities can qualify for DEP's Permit by Rule (PBR) program; however, most projects involving any filling of a jurisdictional wetland require an individual permit from DEP. DEP has adopted rules (Chapter 310) which contain standards that applicants for wetland alterations must meet. These standards are similar in some respects to those used by the ACE, but also include some significant differences such as the adoption of a classification system that ranks wetlands and sets up standards for avoiding wetlands and compensating for wetland impacts based on the wetland's classification.

The Land Use Regulation Commission (LURC) oversees land use activities in wetlands in the unorganized areas of the state under its authority contained in 12 M.R.S.A. Section 681 and seq. LURC establishes its jurisdiction over non-forested wetlands 10 acres and greater through its Land Use Districts and Standards, Chapter 10. In LURC areas, regulated wetlands are defined in Chapter 10 and established on adopted Land Use Guidance Maps. Land use activities that are permissible without a permit, those requiring a permit, and those requiring special exceptions are described in detail in the standards for a LURC-regulated wetland. All other activities not listed are not permitted. As with ACE and NRPA regulations, most agricultural and forest management activities are exempt from permit requirements. LURC's map-based approach to wetland protection is consistent with its zoning of other natural resources that are safeguarded through protection subdistricts. Depending on the activity, applicants wishing to alter a mapped wetlands may not exceed land use standards covering soil erosion, sedimentation, and interruption of normal hydrology. Currently, LURC is updating its zoning maps with the latest information from the National Wetlands Inventory.

The current arrangement of the state and federal wetland programs has led to significant confusion for applicants, who, depending on the size of their project and the size of the wetland, may need no permit at all, a permit from only the DEP, a permit from only the ACE, permits from both agencies, and in some instances from LURC. In those cases where permits are needed from

both the DEP and the ACE, applicants face the cost of filing two application forms, and on some occasions must modify a project design which is satisfactory to one agency in order to satisfy the other. In many cases, some delay in the application process can be attributed to the requirement to get two separate permits. From a public perspective, a duplicate review process costs more money since professional staff are being paid at both the state and federal levels to perform essentially the same service of application review. While the state and federal programs do have some differences, for the most part their objectives are very similar.

The existing process will likely change regardless of actions taken by Maine. The Army Corps and federal resource agencies (EPA and the U.S. Fish and Wildlife Service) have recently made a decision to improve the way wetlands are regulated on the federal level in Maine. Briefly, the ACE must review and renew or replace the General Permits operating in Maine every five years. The current SPGP operating in Maine came up for review in 1993. At that time, and again in 1994, the ACE granted a one-year extension to the SPGP, but has proposed replacing the existing SPGP, including the nationwide permits, with a PGP that would operate somewhat independently of the state program. This PGP has several goals: simplify the Section 404 program; improve environmental protection; develop clear thresholds for review; rely on sound state decisions and use state standards and procedures where appropriate. Such a permit would make the program in Maine similar to that currently in place in New Hampshire and Massachusetts, which have been very successful at increasing predictability while reducing application times.

Under this proposal, the Nationwide Permits would be revoked. The ACE would then establish 3 tiers of project review. Tier 1 projects would be deemed to have minimal impact and would not require any notification to the ACE. Tier 2 projects would be screened by the ACE in consultation with other federal agencies (EPA, Fish and Wildlife Service, National Marine Fisheries). These projects would then either be authorized under the SPGP or would require individual permit review. Tier 3 projects, because of their greater impact, would automatically require an individual 404 permit.

Under ACE's original proposal, Tier 1 projects would include all those with an impact of less than 20,000 square feet (approximately 1/2 acre), Tier 2 projects would be those comprising from 20,000 square feet to 3 acres, and

Tier 3 projects would be those above 3 acres. However, after ACE released the originally proposed thresholds, the commenting federal resource agencies, EPA and the U.S. Fish and Wildlife Service, responded with strong objections to the 20,000 square feet threshold, based on their concern that a 20,000 square foot impact is not truly minimal. After taking into consideration the rationale for the lower threshold of these agencies, ACE then prepared to re-propose the PGP with 5,000 square feet as the lower threshold, but, at DEP's request, agreed to wait to re-propose to take into account the outcome of the deliberations of Maine's Regulatory Work Group.

## **REGULATORY WORK GROUP DELIBERATIONS: Goals for a Revised Regulatory Program**

The work group developed goals for a revised wetlands regulatory program in Maine, considering both state and federal involvement. These goals are:

1. increased efficiency;
2. equivalent or enhanced protection of wetlands;
3. increased cost effectiveness;
4. opportunity for equivalent or enhanced public involvement in the regulatory process; and
5. a simpler, more easily understood program overall.

## **Regulatory Options**

The Work Group considered four basic regulatory options:

1. Assume the 404 Program. Under this option, the state would issue one permit which would satisfy both state and 404 Program requirements. In most cases, no action would be taken by a federal agency. There are, however, provisions in the program that require federal review of certain kinds of projects, such as cases where Federally listed threatened or endangered species could be affected. Moreover, the program also would not apply to "navigable waters", which include all tidal waters and some inland waters. The ACE would continue to review applications in those areas. To qualify for assumption of the 404 Program, Maine must have a State-wide wetlands regulatory program that is deemed by EPA to be at least as stringent as the



404 Program. Among other things discussed under the evaluations, this option would require substantial changes in the way in which wetlands are regulated throughout the state, with the greatest change occurring for wetlands within the unorganized territories.

2. Revise the state's program to allow the ACE to adopt a comprehensive State Programmatic General Permit (SPGP). This option would work best if the state had the same regulatory jurisdiction as provided under the 404 Program, but would provide more flexibility than 404 assumption in that it would not have to apply State-wide. This would allow the state to continue to regulate wetlands in the unorganized territories in a manner separate from the rest of the state.

Under this option, one application would be sent to the DEP. DEP would take action, then forward the application with DEP's decision to the ACE. Depending on the size of the impact, the ACE would take no action, screen the decision with input from other federal agencies or require an individual 404 permit. Past experience with this program in the state of New Hampshire has shown that in almost all cases, projects that are approved by the state regulatory agency are authorized by the ACE under the SPGP authority within 30 days. For DEP-regulated areas, this option would eliminate the dual permitting situation for most applications, although dual permitting would continue in the unorganized territories.

3. Eliminate the state wetlands regulatory program. Under this option, wetlands permitting currently required under the NRPA would no longer be required. The state would still have authority under federal law (section 401 of the Clean Water Act) to issue or deny water quality certification for a project. This action would be based on the federal 404 application. Since there would not be a state program, the ACE would conduct its own review of all wetland applications having more than minimal impact.

4. Make no change in the state wetlands regulatory program. Under this option, the state under NRPA would continue to review some, but not all wetland impacts since the jurisdictional definitions between NRPA and the 404 Program would remain different, as they are now. Although there would be no change in the state program under this option, the ACE has already proposed a change in its operation of the 404 Program, as discussed earlier.

## Evaluation of Options

The Work Group considered a number of program issues in evaluating the regulatory options. Some of these issues included: the federal role in permit review; timeline for review process and decision; jurisdiction requirements; enforcement; program costs to the state and to applicants; the ability to differentiate between geographic regions of the state; and the flexibility to establish protection priorities.

**Assumption:** The Work Group does not consider assumption of the 404 Program to be viable in the short term for several reasons. First, Maine does not currently have a State-wide program as stringent as the 404 Program. To assume 404 authority, Maine would have to extend wetlands regulatory jurisdiction to all wetlands in the state, including those of less than 10 acres in size, and including those in unorganized territory. Most significantly from the perspective of the unorganized territories, regulation for these areas could no longer rely upon a map-based approach. This would result in a significant departure from the established approach for those areas. Maine would also have to increase its enforcement staff, since it would be extending its jurisdiction at the same time as the federal agencies are ceasing enforcement activity. With the anticipated increase in work load, DEP estimates that they would need an additional seven staff members to effectively run an assumed program, while LURC estimates four staff members would be required. federal funding is currently not provided to support state assumption of 404.

Even if funds were available to increase staff, the state does not have an established track record in administering a program comparable to 404. Before EPA will grant approval for Maine to assume the 404 Program, the state must demonstrate that its state program will protect wetlands at least as well as the current 404 Program. To do this, the state must implement program changes, including the addition of staff to run the program and then evaluate the effectiveness of these changes. This issue does not rule out 404 assumption in the long term, but makes it difficult in the short term.

In addition, concerns with the long-term adequacy of protection under an assumed program were raised by Work Group members. The status of protections currently provided through the federal Endangered Species Act as

well as other existing protections would need to be established and resolved to gain consensus on assumption of the 404 program by all Work Group members.

Finally, even 404 assumption would not end the federal role as the main permitting agency in all Maine waters. Significant water bodies and their adjacent wetlands deemed “navigable waters” under federal statute cannot be included in the state’s regulatory authority were the state to assume the 404 program.

**Eliminate state program:** The option of having no state wetlands regulatory program would create a simpler, more easily understood process by reducing the number of permits needed. However, such an option would likely result in less protection of wetlands and increased delays for permit applicants. With only three staff currently available in Maine to run the 404 Program, the ACE will have to perform a substantive review of more applications, given that they would not be able to rely on the state’s review of certain projects. Assuming no additional staff would be provided to the ACE Maine Office, they would then have a choice of increasing the number of projects that do not get a substantive review, increasing the review processing time of applications, or a combination of these two (some decrease in number of projects reviewed and some increase in processing time). In any event, their ability to provide technical assistance and respond to questions would be severely hampered, which would likely lead to applicant frustration and a lower compliance rate with an obvious loss in overall wetland protection.

**No change to the state program:** The option of making no change to the state program would mean that we would continue to have separate regulatory thresholds for the state and federal processes. Many projects affecting wetlands that are less than 10 acres in size will be subject to federal, but not state review. Where both levels of regulation are involved, the concerns over duplicate reviews, with the possibility of different outcomes at each level, remain. Steps can be taken to promote good communication between the state and federal agencies. However, as long as there are two review processes, the potential for different outcomes remains.

**State Programmatic General Permit:** The option of revising the state’s program to allow the ACE to adopt a comprehensive State Programmatic

General Permit would make the jurisdictional definitions and thresholds of the two programs consistent. In so doing, the state would regulate projects based on the size of the impact, and not based on the size of the wetland. This means the state would look at more activities in smaller wetlands, but would forego the extensive review now provided to most smaller impacts in larger wetlands. Only one application form would be filed with the state, which would be suitable for use by both the state and federal agencies. The federal agencies would screen projects following the state's decision to ensure that the applicant's proposal and the state's decision are consistent with federal requirements. The state review would eliminate the need for substantive federal review in most cases, and the process would provide greater predictability to the applicant. This is the intent of an SPGP.

The comprehensive SPGP has been used successfully in New Hampshire, where it has significantly reduced both the total time required for application review and the need for federal involvement in the review process. The average federal agency review time has been reduced from 52 day to 14 days. Over two thousand projects have been authorized with a 25% reduction in individual permit review. It has created "one stop shopping" for permit applicants, who file only with the state regulatory agency. The vast majority of projects approved by the state are then either automatically approved or screened and authorized by the ACE within 30 days under the SPGP. The program has been well received in New Hampshire by applicants, regulatory staff and the public.

A comprehensive SPGP would be most effective if implemented State-wide. This would put the state in position to apply to assume the 404 Program at some point in the future if desired. However, with current staffing levels, the SPGP could be implemented only in the organized part of the state, where DEP could adapt to the changes in jurisdiction with its existing staff. In the unorganized territory, neither DEP nor LURC could effectively administer the revised program without additional staff. With no changes in the unorganized territory, the ACE would operate its Programmatic General Permit in those areas (see "no change" option). Over time, if the state chooses to allocate the resources to administer a more comprehensive wetlands program, the ACE could allow either LURC or DEP to take the lead in reviewing projects requiring 404 permits.

## CONCLUSIONS:

Given the current federal requirements the state would need to meet to assume the 404 wetlands permitting program, the SPGP offers the best method of meeting the Work Group's goals, at least in the short term. All members of the Work Group agreed that the SPGP met the goals it had set by consensus, including: 1) increased efficiency and cost-effectiveness of the permitting process ("streamlining"); 2) increasing simplicity in the permitting process; 3) providing equivalent or greater wetlands protection; 4) and providing equivalent or greater public involvement. The Work Group also agreed that the SPGP would put the state in a better position to pursue assumption of the 404 program in the future, should that be desired, since the state would have established a track record of managing a program similar to the 404 program.

Despite the recognized benefits of a comprehensive SPGP, the Work Group is not recommending that legislation be enacted to change the state program at this time. Several Work Group members felt that potential changes that may occur in the federal 404 program should delay any changes to the state program. These changes include the ACE's issuance of a new Programmatic General Permit for the State of Maine as discussed above, which would establish a new minimum size threshold for reviewing wetlands projects and would revoke existing Nationwide Permits. With the relevant federal agencies serving as members of the Work Group, the possibility existed of the Work Group's influencing the ACE's proposed minimum size threshold. However, the Work Group's business community members have stated their preference to wait until the ACE has established new 404 program thresholds before agreeing to appropriate thresholds for the state. Given the substantial progress made by the Work Group to date, it should continue to work on the details for implementing an SPGP in Maine, including appropriate review thresholds and review standards that will ensure that significant wetlands receive adequate protection. To this end, the Work Group should continue to work through the Wetlands Conservation Plan Task Force seek input from its other Work Groups. (See Appendix III for Conservation Plan Task Force membership.)

APPROVED

CHAPTER

JUN. 2 '93

16

STATE OF MAINE

BY GOVERNOR

RESOLVES

—  
 IN THE YEAR OF OUR LORD  
 NINETEEN HUNDRED AND NINETY-THREE  
 —

H.P. 609 - L.D. 824

**Resolve, to Direct the Department of Environmental Protection to Develop a Report Regarding the Feasibility of the State Applying to Assume Permitting Jurisdiction over Federal Wetlands**

**Sec. 1. Department of Environmental Protection duties. Resolved:** That no later than February 1, 1995, the Department of Environmental Protection, in cooperation with the State Planning Office, shall prepare and submit a report to the Joint Standing Committee on Energy and Natural Resources examining the feasibility of an application to the Environmental Protection Agency to assume state authority over the permitting of wetlands under the United States Clean Water Act, Section 404. The report must examine the increased efficiencies and enhanced protection that could result from consolidating federal and state regulation of wetlands; any statutory or regulatory changes that would have to be made to the State's wetlands protection program; the staff and technical and financial resources that assumption of the federal program would require; and any other methods or options possible for reducing duplication and inefficiencies in the wetland permitting process. The report must be accompanied by any proposed legislation that may be necessary to implement the report's recommendations; and be it further

**Sec. 2. Work group. Resolved:** That the Director of the Bureau of Land Quality Control, in cooperation with the State Planning Office, shall convene a working group consisting of a balanced representation of conservation and development interests, as well as federal and state agencies involved in the protection and regulation of wetlands. The working group must be consulted in all phases of the report's development and conclusions; and be it further

**Sec. 3. Staffing; contingency. Resolved:** That the responsibilities of the Department of Environmental Protection and the State Planning Office set forth in this resolve are contingent upon the State Planning Office receiving a federal grant to prepare a state wetland conservation plan and the establishment by this Legislature of a federally funded one-year project position at the State Planning Office. If that grant is received and that position is created, the State Planning Office shall provide staffing support to the Department of Environmental Protection to fulfill the requirements of this resolve; and be it further

**Sec. 4. Allocation. Resolved:** That the following funds are allocated from the Federal Expenditure Fund to carry out the purposes of this resolve.

	1993-94	1994-95
<b>EXECUTIVE DEPARTMENT</b>		
<b>State Planning Office</b>		
Positions- Other Count	(1.0)	(1.0)
Personal Services	29,420	9,807
All Other	26,830	8,943
Provides authorization and allocations for one Senior Planner position necessary to conduct required federal wetlands study.		
<b>EXECUTIVE DEPARTMENT</b>		
<b>TOTAL</b>	<u>\$56,250</u>	<u>\$18,750</u>

## Wetlands Regulatory Work Group -- January 1995

Jackie Sartoris  
 State Planning Office  
 State House Station 38  
 Augusta, Maine 04333  
 tel: 207-287-1494 fax: 287-6489

Don Witherill  
 Dept. of Environmental Protection  
 State House Station 17  
 Augusta, Maine 04333  
 tel: 207-287-7725 fax: 287-7826

Steve Timpano  
 Dept. of Inland Fisheries & Wildlife  
 State House Station 41  
 Augusta, Maine 04333  
 tel: 207-287-3286 fax: 287-6395

Brian Swan  
 Department of Marine Resources  
 State House Station 21  
 Augusta, Maine 04333  
 tel: 207-624-6550 fax: 624-6024

Bill Reid  
 Department of Transportation  
 State House Station 16  
 Augusta, Maine 04333  
 tel: 207-287-5735 fax: 287-2896

Henry Nichols  
 DOC/Land Use Regulation Commission  
 State House Station 22  
 Augusta, Maine 04333  
 tel: 207-287-2631 fax: 287-2400

John Harker  
 Department of Agriculture  
 State House Station 28  
 Augusta, Maine 04333  
 tel: 207-287-3871 fax: 287-7548

Beth Nagusky  
 Natural Resources Council of Maine  
 271 State Street  
 Augusta, Maine 04330  
 tel: 207-622-3101 fax: 622-4343

Cole Peters  
 Maine Association of Wetland Scientists  
 c/o Timpson and Peters  
 418 Maine Avenue (Farmingdale)  
 P.O. Box 150  
 Hallowell, Maine 04347  
 tel: 207-623-0053 fax: 623-2599

Doug Thompson  
 US EPA - Region I  
 JFK Federal Building  
 Boston, Massachusetts 02203  
 tel: 617-565-4422 fax: 617-565-4940

Todd Burrowes  
 Maine Audubon Society  
 Gilsland Farm  
 P.O. Box 6009  
 Falmouth, Maine 04105-6009  
 tel: 207-781-2330 fax: 207-781-6185

John Lortie  
 Maine Association of Wetland Scientists  
 c/o Woodlot Alternatives  
 122 Main Street, No. 3  
 Topsham, Maine 04086  
 tel: 207-729-1199 fax: 207-729-2715

Chris Godfrey  
 US Army Corps of Engineers  
 New England Division  
 424 Trapelo Road  
 Waltham, Massachusetts 02254  
 tel: 617-647-8673 fax: 617-647-8303

William E. Taylor  
 ME Chamber of Commerce and Industry  
 c/o Pierce, Atwood, Scribner, Allen,  
 Smith & Lancaster  
 One Monument Square  
 Portland, Maine 04101-1110  
 tel: 207-773-6411 fax: 207-773-3419

Alan B. Stearns  
 The Maine Alliance  
 120 Exchange Street  
 P.O. Box 189  
 Portland, Maine 04112  
 tel: 207-774-1001 fax: 207-775-6716

Deirdre M. O'Callaghan  
 The Maine Alliance  
 c/o Preti, Flaherty & Beliveau  
 Memorial Circle, Casco Bank Bldg.  
 P.O. Box 1058  
 Augusta, Maine 04332-1058  
 tel: 207-623-5167 fax: 623-2914

Interested Parties

Irene Belanger  
 Maine Association of Realtors  
 c/o Giroux & Perry Agency  
 21 Bangor Street  
 Augusta, Maine 04330  
 tel: 207-623-8481 fax: 623-8470

Rick Jones  
 Jones Associates  
 RFD 1, Box 3582  
 Poland Spring, Maine 04274  
 tel: 207-998-5242 fax: 207-998-4061





## STATE WETLANDS TASK FORCE -- January 1995

Jackie Sartoris  
 State Planning Office  
 State House Station 38  
 Augusta, Maine 04333  
 tel: 207-287-1494 fax: 287-6489

Don Witherill  
 Dept. of Environmental Protection  
 State House Station 17  
 Augusta, Maine 04333  
 tel: 207-287-7725 fax: 287-7826

Steve Timpano  
 Dept. of Inland Fisheries & Wildlife  
 State House Station 41  
 Augusta, Maine 04333  
 tel: 207-287-3286 fax: 287-6395

Brian Swan  
 Department of Marine Resources  
 State House Station 21  
 Augusta, Maine 04333  
 tel: 207-624-6550 fax: 624-6024

Sue Gawler  
 DECD/Natural Areas Program  
 State House Station 130  
 Augusta, Maine 04333  
 tel: 207-624-6800 fax: 624-6810

Bill Reid  
 Department of Transportation  
 State House Station 16  
 Augusta, Maine 04333  
 tel: 207-287-5735 fax: 287-2896

Don Mansius  
 Department of Conservation  
 State House Station 22  
 Augusta, Maine 04333  
 tel: 207-287-4906 fax: 287-2400

Henry Nichols  
 DOC/Land Use Regulation Commission  
 State House Station 22  
 Augusta, Maine 04333  
 tel: 207-287-2631 fax: 287-2400

Carl Flora  
 Department of Agriculture  
 State House Station 28  
 Augusta, Maine 04333  
 tel: 207-287-3871 fax: 287-7548

Deirdre M. O'Callaghan  
 Maine Alliance  
 c/o Preti, Flaherty, Beliveau & Pachios  
 Memorial Circle, Casco Bank Bldg.  
 P.O. Box 1058  
 Augusta, Maine 04332-1058  
 tel: 207-623-5167 fax: 623-2914

Sarah Medina  
 Small Woodlot Owners Assoc. of Maine  
 c/o Seven Island  
 112 Broadway  
 P.O. Box 1168  
 Bangor, Maine 04402-1168  
 tel: 207-947-0541 fax: 945-5148

Sally Stockwell  
 Maine Audubon Society  
 118 U.S. Rte. 1  
 P.O. Box 6009  
 Falmouth, Maine 04105-6009  
 tel: 207-781-2330 fax: 781-6185

Charles Gadzik  
 Maine Forest Products Council  
 c/o Baskahegan  
 P.O. Box 84  
 Brookton, Maine 04413  
 tel. & fax: 207-448-2224

Barbara Vickery  
 The Nature Conservancy  
 Fort Andross, Suite 401  
 14 Maine Street  
 Brunswick, Maine 04011  
 tel: 207-729-5181 fax: 729-4118

Cole Peters  
 Maine Association of Wetland Scientists  
 c/o Timson and Peters  
 418 Maine Avenue (Farmingdale)  
 P.O. Box 150  
 Hallowell, Maine 04347  
 tel: 207-623-0053 fax: 623-2599

John Lortie  
 Maine Association of Wetland Scientists  
 c/o Woodlot Alternatives, Inc.  
 122 Main Street, Suite 3  
 Topsham, Maine 04086  
 tel: 207-729-1199 fax: 729-2715

Phil Poux, Regional Director  
 Ducks Unlimited  
 16 Pine Country Road  
 Saco, Maine 04072  
 tel. & fax: 207-929-4308

Christopher Hall  
 Maine Chamber of Commerce & Industry  
 126 Sewall Street  
 Augusta, Maine 04330  
 tel: 207-623-4568 fax: 622-7723

Matt Scott  
 Sportsman's Alliance of Maine  
 RFD 1, Box 428  
 Belgrade, Maine 04917  
 tel: 207-495-3409 fax: 622-1437

John Butts  
 Associated General Contractors  
 Whitten Road  
 P.O. Box N  
 Augusta, Maine 04330  
 tel: 207-622-4741 fax: 622-1625

Bruce Roope  
 Farm Bureau  
 169 Reach Road  
 Presque Isle, Maine 04769  
 tel: 207-764-5355 fax: n/a

Beth Nagusky  
 Natural Resources Council of Maine  
 271 State Street  
 Augusta, Maine 04330  
 tel: 207-622-3101 fax: 622-4343

Joan Irish  
 Congress of Lakes Association  
 39 River Bend Drive  
 P.O. Box 391  
 Yarmouth, Maine 04096  
 tel: 207-846-4271 fax: n/a

KF 5624 Z99 M22 1995  
Maine Wetlands Conservation Plan  
Regulatory Work Group  
Report of the Wetlands Regulatory  
Work Group on streamlining the  
state and federal wetlands  
programs

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Ex-officio Members

Doug Thompson  
U.S. EPA - Region I  
JFK Federal Building  
Boston, MA 02203  
tel: 617-565-4422 fax: 617-565-4940

Wende Mahaney  
U.S. Fish & Wildlife Service  
1033 South Main Street  
Old Town, Maine 04468  
tel: 207-827-5938 fax: 827-6099

Chris Godfrey  
U.S. Army Corps of Engineers  
New England Division  
424 Trapelo Road  
Waltham MA 02254  
tel: 617-647-8673 fax: 617-647-8303

Robert Wengrzynek  
U.S. Soil Conservation Service  
5 Godfrey Drive  
Orono, Maine 04473  
tel: 207-866-7249 fax: 866-7262

Others

William E. Taylor  
Pierce, Atwood, Scribner, Allen,  
Smith & Lancaster  
One Monument Square  
Portland, Maine 04101-1110  
tel: 207-773-6411 fax: 773-3419

Dave Musselman  
U.S. Soil Conservation Service  
5 Godfrey Drive  
Orono, Maine 04473  
tel: 207-866-7249 fax: 866-7262

Todd Burrowes  
Maine Audubon Society  
Gilsland Farm  
P.O. Box 6009  
Falmouth, Maine 04105-6009  
tel: 207-781-2330 fax: 781-6185

Martin Womer  
175 Vinal Street  
Rockport, Maine 04856-4848  
tel: 207-236-8082

Ann Gosline  
RR 1, Box 1670  
Litchfield, Maine 04350  
tel: 207-737-2775 fax: 737-2857

Linda Gifford, Esq.  
Maine Association of Realtors  
c/o Central Maine Title Company  
78 Winthrop Street  
P.O. Box 2306  
Augusta, Maine 04338-2306  
tel: 207-622-7505 or 3851 fax: 622-7507

Ken Young  
Maine Municipal Association  
60 Community Drive  
Augusta, Maine 04330  
tel: 207-623-8428 fax: 626-5947

Doug Burdick  
Dept. of Environmental Protection  
312 Canco Road  
Portland, Maine 04103  
tel: 207-822-6300 fax: 822-6303

Paul Lariviere  
Federal Highway Administration  
Federal Building, Room 614  
40 Western Avenue  
Augusta, Maine 04330  
tel: 207-622-8355 fax: 626-9133

Bill LaFlamme  
Dept. of Environmental Protection  
State House Station 17  
Augusta, Maine 04333-0017  
tel: 207-287-7726 fax: 287-7826

John Kurland  
National Marine Fisheries Service  
1 Blackburn Drive  
Gloucester, MA 01930  
tel:

Paul Super  
National Park Service  
Acadia National Park  
P.O. Box 177  
Bar Harbor, Maine 04609  
tel:

Craig Ten Broeck  
Department of Conservation  
State House Station 22  
Augusta, Maine 04333-0022  
tel: 207-287-2211 fax: 287-4900

Alan B. Stearns  
The Maine Alliance  
120 Exchange Street  
P.O. Box 189  
Portland, Maine 04112  
tel: 207-774-1001 fax: 775-6716

James List  
Wells Research Reserve  
RR 2, Box 806  
Wells, Maine 04090  
tel: 207-646-1555 fax: 646-6554

James Upham  
So. Maine Regional Planning Commission  
255 Main Street  
P.O. Box Q  
Sanford, Maine 04073  
tel: 207-324-2952 fax: 324-2958

Judy Bernstein  
Kennebunk Town Hall  
1 Summer Street  
Kennebunk, Maine 04043  
tel: 207-985-4601 fax: 985-4609

Agenda only

Dave Moyses  
S.W. Cole Engineering  
6 Liberty Drive  
Bangor, Maine 04401