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**Wetlands Regulation Under the
Natural Resources Protection Act:
Program Overview
cy 2002**



Prepared by the Maine Department of Environmental Protection,
Division of Land Resource Regulation



JOHN E. BALDACCI
GOVERNOR

BROOKE E. BARNES
ACTING COMMISSIONER

February 11, 2003

Senator John Martin, Senate Chair
Representative Theodore Koffman, House Chair
Joint Standing Committee on Natural Resources
State House, Room 437
Augusta, ME 04333-003

Re: Report to the Legislature on the wetlands compensation program under the Natural Resources Protection Act

Dear Senator Martin, Representative Koffman and Members of the Natural Resources Committee:

The Natural Resources Protection Act (NRPA), Section 480-Z(5), requires that the Department submit a report to your committee annually describing the amount of licensed freshwater and coastal wetland impacts and compensation. The information in the attached report pertains to approved projects in the calendar year 2002.

The creation of a compensation fee program has been of particular interest to the Legislature and Section 480-Z of the Natural Resources Protection Act required the department to develop an in-lieu fee program by October of 2002. You may recall that in last year's report, we detailed the efforts made by staff of both the Department and the State Planning Office to explore the feasibility of creating an in-lieu fee program in consultation with a steering committee including federal agencies, business and environmental interests. You may also recall that after a full analysis, it appeared that the implementation of a state-wide in-lieu fee program, which would apply to wetland alterations between 20,000 square feet and one acre, is not feasible at this time. The department recommended instead to assist local and regional efforts to establish compensation fee programs. By taking an active role assisting in the development of such local or regional programs, it is anticipated that compensation required for state-level permitting could be performed under the local or regional program.

Suggested amendments of Section 480-Z "Compensation" of the NRPA that would further the recommendations stated above have been developed for your consideration. These amendments, which are being submitted for the Legislature's approval as part of the Department omnibus bill, have been attached to this report. In part, the proposed amendments retain an option for the State to create a compensation fee program in the future, should it be warranted, and repeal the sunset provision of the "Compensation" section.

My staff look forward to answering any questions you have about this report and the regulatory program.

Sincerely,

Brooke E. Barnes
Acting Commissioner

**WETLANDS REGULATORY
PROGRAM OVERVIEW**
Department of Environmental Protection
State of Maine
cy 2002

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Preface

This report to the 121st Maine Legislature's Joint Standing Committee on Natural Resources is submitted in accordance with the Natural Resources Protection Act (NRPA), 38 M.R.S.A. Section 480-Z(5), which, in pertinent part, requires that the department report annually by February 1st on the amount and type of wetlands altered, associated impacts on wetland functions and values and the amount of compensation required by the department.

Introduction

Effective September 29, 1995, the Maine Legislature enacted amendments to the Natural Resources Protection Act (P.L. 1995, Chapter 460) in response to recommendations of a Wetlands Task Force established 2 years earlier.

The changes in the State's wetlands regulatory program included the following:

1. All freshwater wetlands, regardless of size, are now regulated;
2. An exemption was created for alterations that affect less than 4,300 square feet of freshwater wetland, depending on the wetland's type and location; and
3. A 3-tiered review process was established in order to streamline the application review process for most activities affecting freshwater wetlands.

The Tier Review Process

The changes in the State's wetlands regulatory program contained in P.L. 1995, Chapter 460, effective September 29, 1995, established a 3-Tiered review process in order to streamline the review process for most activities affecting freshwater wetlands. The Tiers are as follows:

- Tier 1: For projects affecting up to 15,000 square feet of wetland, where the wetland is not considered to be of special significance (defined under 38 M.R.S.A. Section 480-X(4)); a maximum 30-day review allowed; application form is simple (does not require professional assistance to complete); no compensation is required.
- Tier 2: For projects affecting between 15,000 square feet and 1 acre of wetland not of special significance; a maximum 60-day review allowed; if alteration is over 20,000 square feet, additional application requirements pertain (i.e. wetland functional assessment and compensation, if required).
- Tier 3: For projects affecting wetlands of special significance or affecting greater than 1 acre of wetland; a full review occurs (DEP rules allow up to 120 days for review); these projects are generally the most complex due to analysis of project alternatives and compensation requirements to mitigate for lost wetland functions.

Concurrent with the changes in the State's jurisdiction and regulatory program, the U.S. Army Corps of Engineers (ACE) adopted changes to its wetlands regulatory program to align with the State's Tier review process in order to allow "one stop permitting" to occur in most instances. The ACE issued a Programmatic General Permit, also effective on September 29, 1995, in which similar review thresholds to those adopted by the State were established. In so doing, the ACE agreed to accept applications filed with the Maine DEP for its review and to meet the State's mandated processing times on most projects.

Freshwater Wetland Types

For tracking purposes, the department categorizes freshwater wetland as follows:

- Open water: open water areas within wetlands, usually less than 6 feet deep.
- Emergent: commonly referred to a marshes; common plants include reeds and cattails.
- Scrub-shrub: contains low growing woody plants such as speckled alder and winterberry; may or may not have standing water.
- Forested: areas dominated by trees at least 20 feet in height.
- Wet meadow: areas dominated by herbaceous plants such as sedges and rushes but seldom flooded.
- Peatland: dominated by sphagnum moss and low growing ericaceous shrubs such as leather leaf and sheep laurel.
- Other/mixed: areas not clearly dominated by one type of vegetation or with mixed types of vegetation categories.

Coastal Wetland Types

For tracking purposes, the department categorizes coastal wetland as either intertidal –those areas subject to the tidal cycle every 12 hours- or subtidal – those areas below the low tide line.

As such, the department recognizes 5 types of coastal wetland:

- Intertidal – vegetated: includes salt marshes and areas covered with rock weed.
- Intertidal – mudflat: area contains fine sediments, usually on a shallow slope.
- Intertidal – other: areas not fitting the above, typically containing rocks/ledge.
- Subtidal – aquatic bed: typically vegetated areas such as eel grass and kelp beds
- Subtidal – other: areas not vegetated

Compensation Types

There are 4 types of physical compensation allowed in the regulatory program: creation, enhancement, restoration and preservation.

- Creation – this involves making a wetland where one didn't exist before. Such projects are often expensive and risky to undertake.
- Enhancement – this activity increases the net value of a wetland. It may include efforts such as the planting of vegetation beneficial to wildlife, improving buffers in and around remaining wetland or increasing the amount of standing water for amphibians or waterfowl.
- Restoration – this involves returning a disturbed or altered wetland to its previous or better condition. Such efforts may include fill removal, replanting of vegetation, regrading and reestablishing ground or surface water flows.
- Preservation – This involves utilizing protection measures, such as conservation easements and deed covenants, to maintain a wetland area and/or associated upland areas in their natural or undeveloped condition

In some cases, it is appropriate for an applicant to propose, or be required to perform, more than one type of compensation. For example, in order to offset the loss of functions and values of some wetlands, it may be necessary to enhance remaining wetland areas on the property as well as preserve the surrounding upland.

Freshwater wetlands: Impacts/Compensation

Attached are three tables (Appendices A, B and B-2) illustrating the amount of licensed impacts to freshwater wetlands and the total amount of compensation provided in calendar year 2002. Impacts are broken down by Tier review level and by the wetland type (Appendix A). The impact amounts are further broken down into how much filling occurred versus other types of alterations such as clearing vegetation or dredging. While filling results in the permanent loss of wetland area, other types of alterations result in the conversion of one type of wetland to another. In many cases, these conversions do not result in any significant loss of wetland function or value.

The appended tables show that nearly half of the licensed freshwater wetland impacts (49.7%) occur in either “forested” or “other/mixed” types of wetlands. In 2002, 141 permits were issued for freshwater wetland alterations during the reporting period. The majority of applications (76.6%) are reviewed at the Tier 1 level, which does not require compensation. Projects reviewed under the Tier 1 process result in approximately 36% of the total acreage amount of impacts. Slightly less than half of wetland impact (46%) is associated with projects reviewed under the Tier 3, or full permit, review process.

Of the 51 acres of impact approved, about 40 acres are lost through filling activities. More than half of that amount, approximately 25 acres, occurs in wetlands not considered of “special significance” such as forested and wet meadow areas. Also, given law and rule parameters, only about 20 acres of impact is eligible for compensation.

Preservation is often a major component in compensation used to offset impacts (Appendix B). It is important to remember that under department rules, preservation is typically required at an 8:1 ratio to the impact: for every acre impacted, a minimum of 8 acres is preserved. All of the compensation shown in Appendix B results from 10 projects. The so-called “Augusta Third Bridge” being built by the Maine Department of Transportation involves substantial impacts but also includes a large compensation package. Nearly 9 acres of emergent, forested and scrub-shrub wetland is impacted. However, more than 10 acres of wet meadow restoration will occur as well as a preservation package involving almost 1600 acres of upland, which is strategically tied in with the existing Alonzo Garcelon Wildlife Management Area.

To better reflect the typical mix and proportion of various compensation efforts, we have prepared another table of wetland compensation impacts that does not include numbers from the Augusta Third Bridge project (see Appendix B-2). Preservation still accounts for the majority of effort but creation, enhancement and particularly restoration did result in more than 5 acres of compensation. A number of these larger projects are also subject to the Site Location of Development Act or the Stormwater management Act. As such, they are required to control stormwater quantity and, in some cases, quality. When functions and values of a wetland are actually assessed, many have been found to only provide low to moderate stormwater

attenuation and nutrient uptake. Utilizing typical stormwater controls can mitigate for this functional loss in many cases.

To date, all compensation projects were implemented by the applicant. There are no mitigation banks established nor is there any established program for paying compensation fees. The department has approved a banking proposal by the Maine Department of Transportation that consists of excess compensation credits at sites where compensation was required. To date, no withdrawal of the excess compensation credits has occurred. However, given recent guidance by the federal government to look toward encouraging the development of banks, combining compensation requirements, etc., the department has met with different towns, business people and state agencies wishing to establish banks.

Coastal wetlands: Impacts/Compensation

Attached to this report are two tables (Appendices C and D) illustrating the total amount of impact to the various types of coastal wetland habitat as well as the compensation provided. All the impact and compensation reported in the tables results from projects reviewed under the full licensing process under the Natural Resources Protection Act.

Over the course of the reporting period, very little intertidal or subtidal habitat has been lost to filling. The majority of filling impacts result from water dependent structures (e.g. piers) and shoreline stabilization projects, such as riprap, that occupy the fringes of the intertidal zone in order to protect the upland and structures.

The majority of impact in coastal wetlands is from other types of alteration, not filling. Lobster pounds usually account for most of the altered intertidal habitat: dredges account for essentially all of the subtidal impacts. For example, one US Army Corps of Engineers dredge project in Milbridge involved 68 acres of alteration including the dredged area and the spoils disposal area. Since much of the impacts are either not considered permanent or merely occupy the coastal fringe area, such as riprap, compensation is not usually required.

Program Assessment

Prior to the amendments to the NRPA in 1995 and the ACE's implementation of the Programmatic General Permit (PGP), many freshwater wetland alterations were either not regulated at the State level if they occurred in wetlands less than 10 acres in size, or were not carefully scrutinized if affecting less than 1 acre under the Federal PGP process. By applying a standard of requiring the public to first avoid the wetland impact to the extent practicable and then minimizing that impact, the protection of the State's freshwater wetland resources has been greatly enhanced.

Coastal wetlands have been protected by comprehensive regulation since the early 1970s. Since June of 1990, when the department adopted Chapter 310 Wetlands Protection rules, projects in coastal wetlands have been subject to the avoidance and minimization criteria described in the paragraph above as well as compensation when required.

The department has committed to ongoing efforts to assist applicants in defining wetlands, providing guidance on project design and providing assistance on application requirements. The wetlands regulatory program is functioning very effectively, especially compared with the process in place prior to the change in the law. Judging by staff interactions with applicants, there appears to be a good understanding of the law within the regulated community.

Compensation Fee Program

In 1997 the Legislature enacted a further amendment to the NRPA authorizing the DEP to establish a program providing for compensation of unavoidable wetland losses due to proposed freshwater wetland alterations. The amendment allowed the DEP to require that compensation include the design, implementation and maintenance of a compensation project, or, in lieu of such a project, allowed an applicant to purchase credits from a mitigation bank or pay a compensation fee. The dual goals of a compensation fee program are to ease the burden on applicants by reducing the time-consuming search for acceptable compensation alternatives, as well as to improve the benefits to the environment by identifying priorities for wetland protection in a watershed approach. The law further required that a Compensation Fee Program be developed in consultation with the State Planning Office and other state and federal agencies.

As directed, the State Planning Office and Department of Environmental Protection reviewed the requirements of the compensation fee program as presented in Section 480-Z to assess the potential for success in achieving the goals established by the Legislature. The findings and recommendations of that effort were included in last year's Legislative report. To recap, based upon the current conditions with respect to wetland fill trends and the discussions with the advisory agencies, the Department of Environmental Protection and the State Planning Office made the following recommendations:

1. Development of a state-level compensation fund for permitted wetland alterations is not warranted given current market limitations; however, the option to create such a fund should be available for the future should those conditions change, just as mitigation banking remains an available option.
2. The quantity of wetland alterations occurring in the rapidly developing part of the state may present an adequate market for compensation funds at the regional or local level.
3. The state should support local initiatives to protect wetland resources and encourage consistency by providing a model ordinance, guidance on identifying local wetland priorities, and guidance on establishing compensation funds at the local and regional level.
4. Localities or regions that establish compensation funds tied to appropriately established priorities for compensation action should be able to have their goals considered within the state and federal processes on permit actions. If local priorities are developed, these targeted wetlands and uplands could be considered in state or federal permit actions for compensation.

DEP and SPO have developed statutory changes to NRPA Section 480-Z(3) to accomplish the above, as well as to strike the repeal clause. Staff will be bringing suggested statutory amendments to the Committee in the DEP's omnibus bill this session. A copy of those suggested amendments is attached as Appendix E.

APPENDIX A

Freshwater Wetland Impacts*
cy 2002

	Tier 1 (108 projects)	Tier 2 (17 projects)	Full NRPA (16 projects)	Total (141 projects)	% of total
Emergent	0.5 [0.22/0.28]	0.32 [0.32/0]	5.82 [5.82/0]	6.65 [6.37/0.28]	13.0%
Forested	9.39 [8.12/1.27]	3.21 [2.37/0.84]	5.73 [5.73/0]	18.33 [16.22/2.11]	35.9%
Open Water	0 [0/0]	0 [0/0]	8.0¹ [0.1/7.9]	8.0 [0.1/7.9]	15.7%
Other/mixed	3.21 [3.21/0]	3.59 [3.59/0]	0.26 [0.13/0.13]	7.06 [6.93/0.13]	13.8%
Peatland	0 [0/0]	0 [0/0]	0 [0/0]	0 [0/0]	0%
Scrub-shrub	2.04 [1.95/0.09]	1.71 [1.71/0]	3.73 [3.03/0.7]	6.77 [6.69/0.8]	13.3%
Wet Meadow	2.93 [2.93/0]	0.63 [0.63/0]	0 [0/0]	3.57 [3.57/0]	7.0%
Total	18.08 [16.44/1.64]	9.46 [8.62/0.84]	23.46 [14.72/8.74]	51.0 [39.88/11.22]	
% of total	35.5%	18.5%	46.0%		

* All amounts in ACRES

Numbers in [] specify acres of filled wetland vs. altered wetland. Altered wetland includes removing vegetation, dredging, flooding, etc.

¹ figure results from single project that temporarily dewatered wetland. Hydrology reestablished upon project completion.

APPENDIX B

**Freshwater Wetlands Compensation*
cy 2002**

	Creation	Enhancement	Preservation	Restoration	Total	% of total
Emergent	0.25	0.86	0	0	1.11	0.1%
Forested	0.34	0	15.20	0.75	16.30	1.0%
Open water	0.08	0	0.05	0	0.13	0 %
Other/mixed	1.28	0.52	26.26	0.13	28.19	1.7%
Peatland	0	0	0	0	0	0%
Scrub-shrub	0.19	0.50	5.58	0	6.27	0.4%
Upland	0	0.14	1,600.08	0	1,600.22	96.3%
Wet Meadow	0	0	0	10.00	10.00	0.6%
Total	2.14	2.01	1,647.18	10.89	1,662.22	
% of total	0.1%	0.1%	99.1%	0.7%		

*** all figures in ACRES**

Compensation amounts resulted from 10 projects in cy 2002

APPENDIX B-2

Freshwater Wetlands Compensation*
cy 2002
(Excludes Augusta Third Bridge project)

	Creation	Enhancement	Preservation	Restoration	Total	% of total
Emergent	0.25	0.86	0	0	1.11	2.1%
Forested	0.34	0	15.20	0.75	16.30	31.3%
Open water	0.08	0	0.05	0	0.13	0.2 %
Other/mixed	1.28	0.52	26.26	0.13	28.19	54.1%
Peatland	0	0	0	0	0	0%
Scrub-shrub	0.19	0.50	5.58	0	6.27	12%
Upland	0	0.14	0	0	0.14	0.3%
Wet Meadow	0	0	0	0	0	0%
Total	2.14	2.01	47.1	0.89	52.14	
% of total	4.1%	3.9%	90.3%	1.7%		

* all figures in ACRES

APPENDIX C

Coastal Wetlands Impacts*
cy 2002

	<u>Intertidal- Vegetated</u>	Intertidal- Mudflat	Intertidal- Other	Subtidal- Aquatic bed	Subtidal- Other	Total
Filled	0.02	0.01	0.19	0.0	0.0	0.22
Altered	0.0	0.04	0.31	1.40	87.96	89.71
Total	0.02 (1)	0.05 (2)	0.50 (16)	1.40 (2)	87.96 ¹ (5)	89.93 (26)

- All figures in acres. Numbers in () indicate the number of projects approved that result in the acreage figure shown.

¹ One US Army Corps of Engineers' dredge project resulted in 68 acres of impact: 52 acres of dredged area and 16 acres impacted as a result of dredge spoils disposal

APPENDIX D

Coastal Wetlands Compensation*

cy 2002

	Creation	Restoration	Enhancement	Preservation	Total
Intertidal-Vegetated	0	0	0	0	0
Intertidal-Mudflat	0	0	0	0	0
Intertidal-Other	0	0	0	0.2	0.2
Subtidal-Aquatic bed	0	0	0	0	0
Subtidal-Other	0	0.93	0	0	0.93
Total	0	0.93	0	0.2	0.95

* All figures in acres.

[NOTE: Only two project required compensation: one involved preservation of a tidal creek and riparian zone; the other restored cobble substrate after a marina dredge.]

APPENDIX E

Proposed NRPA amendments

Sec. 6. 38 MRSA §480-Z sub-§3, is amended to read:

3. Compensation fee program. The department ~~may shall~~ develop a compensation fee program in consultation with the State Planning Office, the United States Army Corps of Engineers and state and federal resource agencies, including the United States Fish and Wildlife Service and the United States Environmental Protection Agency.

A. The program ~~may must~~ include, ~~at a minimum,~~ the following:

- (1) Identification of wetland management priorities on a watershed basis;
 - (2) Identification of the types of wetland losses eligible for compensation under this subsection;
 - (3) Standards for compensation fee projects;
 - (4) Calculation of compensation fees based on the functions and values of the affected wetlands and the cost of compensation, taking into account the potential higher cost of compensation when a project is implemented at a later date; and
- (5) Methods to evaluate the long-term effectiveness of compensation fee projects implemented under this subsection in meeting the wetland management priorities identified pursuant to subparagraph (1).

B. Any compensation fee ~~may must~~ be paid into a wetlands compensation fund established by the department as provided in subparagraph (1) or to an organization authorized by the department as provided in ~~subparagraphs (1) and (2)~~. A compensation project funded in whole or in part from compensation fees must be approved by the department.

(1) The department may establish a wetlands compensation fund for the purpose of receiving compensation fees, grants and other related income. The wetlands compensation fund must be a fund dedicated to payment of costs and related expenses of wetland restoration, enhancement, preservation and creation projects. The department may make payments from the fund consistent with the purpose of the fund. Income received under this subsection must be deposited with the State Treasurer to the credit of the wetlands compensation fund and may be invested as provided by law. Interest on these investments must be credited to the wetlands compensation fund.

(2) The department may enter into an enforceable, written agreement with a public, quasi-public, or municipal organization, or a private, nonprofit

~~organization for dedicated to the protection of wetlands and other natural areas, for the purposes of~~ Such an organization shall demonstrate the ability to receive compensation fees, administering ~~the~~ a wetlands compensation fund and ensuring that compensation projects are implemented consistent with local, regional or state ~~the~~ wetland management priorities ~~identified by the department~~ for the watershed in which the project is located. If compensation fees are provided to an authorized organization, the organization shall maintain records of expenditures and provide an annual summary report as requested by ~~to~~ the department. If the authorized agency is a state agency other than the department, the agency shall establish a fund meeting the requirements specified in subparagraph (1). If the organization does not perform in accordance with this subsection or with the requirements of the written agreement, the department may revoke the organization's authority to conduct activities in accordance with this subsection. ~~If an organization's authorization is revoked, any funds remaining in the wetlands compensation fund must be provided to the department.~~

Rules adopted pursuant to this subsection are routine technical rules under Title 5, chapter 375, subchapter II-A.

Sec. 7. 38 MRSA §480-Z, sub-§5 is repealed.

Sec. 8. 38 MRSA §480-Z, sub-§6 is repealed.