

PLEASE NOTE: Legislative Information **cannot** perform research, provide legal advice, or interpret Maine law. For legal assistance, please contact a qualified attorney.

Resolve, Regarding Legislative Review of Portions of Chapter 335: Significant Wildlife Habitat, a Major Substantive Rule of the Department of Environmental Protection

Emergency preamble. Whereas, acts and resolves of the Legislature do not become effective until 90 days after adjournment unless enacted as emergencies; and

Whereas, the Maine Revised Statutes, Title 5, chapter 375, subchapter 2-A requires legislative authorization before major substantive agency rules may be finally adopted by the agency; and

Whereas, the above-named major substantive rule has been submitted to the Legislature for review; and

Whereas, immediate enactment of this resolve is necessary to record the Legislature's position on final adoption of the rule; and

Whereas, in the judgment of the Legislature, these facts create an emergency within the meaning of the Constitution of Maine and require the following legislation as immediately necessary for the preservation of the public peace, health and safety; now, therefore, be it

Sec. 1 Adoption. Resolved: That final adoption of portions of Chapter 335: Significant Wildlife Habitat, a provisionally adopted major substantive rule of the Department of Environmental Protection that has been submitted to the Legislature for review pursuant to the Maine Revised Statutes, Title 5, chapter 375, subchapter 2-A, is authorized only if the rule is amended as follows:

1. Language is added to define the term "practicable" to mean available and feasible considering cost, existing technology and logistics based on the overall purpose of the project;

2. Language is amended to provide that the Department of Environmental Protection may require that construction activities occur during a time when impacts on protected habitats, wildlife, fisheries and aquatic life will be minimized;

3. Language is amended to remove from the rule the requirement that a preapplication and presubmission meeting and an individual permit under the natural resources protection laws under the Maine Revised Statutes, Title 38 are required for any activity that takes place in, on or over a significant wildlife habitat, or adjacent to a significant wildlife habitat contained within a freshwater wetland. A note must remain in the rules that activities requiring a permit are described in Title 38, section 480-C and that exemptions are described in Title 38, section 480-Q;

4. Language is amended to require a narrative describing whether a practicable alternative to an alteration exists that would be less damaging to the environment and what alternatives were considered during the project design;

5. Language is amended to require a narrative of the site description and impact instead of a report;

6. Language is added to indicate that maps of seabird nesting islands are available from either the Department of Environmental Protection or the Department of Inland Fisheries and Wildlife;

7. A notation is amended to provide that tracking studies of adult pool-breeding amphibians have shown that they can travel over 1/3 mile away from their breeding pool;

8. A notation is added to provide that more information on identifying vernal pools is available in the 2003 publication of the Maine Audubon Society titled "Maine Citizens' Guide to Locating and Documenting Vernal Pools" or in the Department of Environmental Protection's fact sheet titled "Locating and Documenting Significant Vernal Pools";

9. Language is added to provide that examples of vernal pool-dependent state-listed endangered or threatened species include, but are not limited to, Blanding's turtle, spotted turtles and boghaunter dragonflies;

10. A notation is added to provide that if additional rare indicator species are present, they are likely to be associated with a significant vernal pool from early spring through September and that additional rare indicator species include ribbon snakes, wood turtles and four-toed salamanders;

11. A notation is amended to provide that optimal times for counting egg masses of pool-breeding amphibians vary according to geographic location and weather;

12. Language is amended to provide that:

A. An individual may voluntarily submit documentation to the Department of Environmental Protection or the Department of Inland Fisheries and Wildlife regarding the significance of a vernal pool on that individual's property;

B. Documentation must be completed by an individual who has experience and training in either wetland ecology or wildlife ecology, and therefore has qualifications sufficient to identify and document a significant vernal pool, or the documentation must be field-verified by either the Department of Environmental Protection or the Department of Inland Fisheries and Wildlife prior to its inclusion on a geographic information system data layer maintained by either the Department of Inland Fisheries and Wildlife or the Department of Environmental Protection; and

C. A landowner will receive written confirmation of such documentation from the department;

13. Language is added regarding verification of significance that provides that:

A. A significant vernal pool documented on a geographic information system data layer maintained by either the Department of Inland Fisheries and Wildlife or the Department of Environmental Protection is eligible for removal from that data layer following verification by the Department of Inland Fisheries and Wildlife of 3 consecutive years of data demonstrating that a vernal pool no longer meets the criteria in the rules regarding abundance and rarity;

B. A written request to remove a significant vernal pool from the data layer must be submitted to both the Department of Inland Fisheries and Wildlife and the Department of Environmental Protection and include documentation made during the identification period by an individual who has experience and training in either wetland ecology or wildlife ecology and therefore has qualifications sufficient to identify and document the presence or absence of a significant vernal pool; and

C. A written department determination that a vernal pool is not significant remains valid regardless of time frame;

14. That section of the rule that deals with the department's providing a written field determination regarding the presence or absence of a significant vernal pool habitat is amended and included in the section of the rule dealing with when a permit is not required;

15. Language is added regarding habitat management standards for significant vernal pools that provides that if more than 25% of the critical terrestrial habitat has been previously developed, restoring a portion of that area through supplemental planting or regrowth of native forest species may be considered toward meeting the habitat management standards or toward standards for avoidance, minimization or compensation. The language must also provide that developed area includes disturbed areas excluding areas that are returned to a condition with the same drainage patterns and the same or improved cover type that existed prior to the disturbance. The language must also provide that to the greatest extent practicable, the following management practices must be followed within a significant vernal pool habitat:

- A. Cause no disturbance within the vernal pool depression;
- B. Maintain a minimum of 75% of the critical terrestrial habitat as unfragmented forest with at least a partly closed canopy of overstory trees to provide shade, deep litter and woody debris;
- C. Maintain or restore forest corridors connecting wetlands and significant vernal pools;
- D. Minimize forest floor disturbance; and
- E. Maintain native understory vegetation and downed woody debris;

16. Language is added to provide that:

- A. An activity occurring in, on, over or adjacent to a significant vernal pool or a potential significant vernal pool is eligible for permit by rule as described in the Department of Environmental Protection rule, chapter 305, section 19, provided that the habitat management standards are met;
- B. An applicant submitting a permit-by-rule notification is not required to provide a seasonal assessment of significance;
- C. Submission of a permit-by-rule notification does not negate an applicant's ability to submit subsequent documentation to verify or negate application of the section of the rule dealing with significant vernal pools provided that documentation is completed during the identification period by an individual who has experience and training in either wetland ecology or wildlife ecology;
- D. Geographic information system data points specific to permit by rule will be uploaded to the geographic information system data layer maintained by the Department of Inland Fisheries and Wildlife only following submission and verification of such documentation by the Department of Environmental Protection or the Department of Inland Fisheries and Wildlife; and
- E. The permit-by-rule provisions do not apply to an activity that is not or will not be in compliance with the terms and conditions of a permit issued under the site location of development law, the storm water management law or the natural resources protection law;

17. Language is added to include the following circumstances under which a permit is not required for activities in, on, over or adjacent to a significant vernal pool:

RESOLVE Chapter 183122nd Maine State Legislature
Resolve, Regarding Legislative Review of Portions of Chapter 335: Significant Wildlife
Habitat, a Major Substantive Rule of the Department of Environmental Protection

A. If, upon request from a landowner, the Department of Environmental Protection staff provides a written field determination or advisory opinion regarding the presence or absence of a significant vernal pool, a landowner acting on that determination or advisory opinion by carrying out an activity subsequently found to be in violation is not required to obtain a permit for that activity and will not be subject to enforcement action if jurisdiction or a penalty would be based solely on that activity; and

B. Construction of overhead communications and electric lines, poles, guy anchors and related overhead infrastructure located within a public or private right-of-way, within 25 feet of the edge of the road right-of-way or within an existing clearing created for a public or private road does not require a permit provided that poles are not placed within a significant vernal pool depression;

18. Language is added to provide that the provisions of the rule regarding activities in, on, over or adjacent to a significant vernal pool may not be enforced or implemented until September 1, 2007;

19. Language is added to provide that high- and moderate-value waterfowl and wading bird habitats subject to the rules are depicted on a geographic information system data layer maintained by the Department of Inland Fisheries and Wildlife and are available from either the Department of Inland Fisheries and Wildlife or the Department of Environmental Protection;

20. Language is added regarding the verification of habitat value for high- and moderate-value waterfowl and wading bird habitat that provides that:

A. An individual may voluntarily submit documentation to the Department of Environmental Protection or the Department of Inland Fisheries and Wildlife regarding the value of a waterfowl and wading bird habitat on that individual's property;

B. Documentation must be completed by an individual who has experience and training in either wetland ecology or wildlife ecology, and therefore has qualifications sufficient to identify and document a high- or moderate-value waterfowl and wading bird habitat, or the documentation must be field-verified by the Department of Inland Fisheries and Wildlife;

C. Following review of the documentation, the Department of Inland Fisheries and Wildlife may modify the boundary of a high- or moderate-value waterfowl and wading bird habitat depicted on the applicable geographic information system data layer; and

D. A landowner will receive written confirmation of the documentation from the Department of Environmental Protection;

21. The section regarding department determinations of high- and moderate-value waterfowl and wading bird habitat in the provisionally adopted rule is deleted and replaced with a provision that provides that if, upon request from a landowner, the Department of Environmental Protection staff provides a written field determination or advisory opinion regarding the presence or absence of a high- or moderate-value waterfowl and wading bird habitat, a landowner acting on that determination or advisory opinion by carrying out an activity subsequently found to be in violation is not required to obtain a permit for that activity and will not be subject to enforcement action if jurisdiction or a penalty would be based solely on that activity;

22. Language is added to provide that high- and moderate-value shorebird habitats subject to the rule are depicted on a geographic information system data layer maintained by the Department of Inland Fisheries and Wildlife and available from either the Department of Inland Fisheries and Wildlife or the Department of Environmental Protection;

23. Language is added regarding the verification of habitat value for shorebird nesting, feeding and staging areas that provides that:

- A. An individual may voluntarily submit documentation to the Department of Environmental Protection or the Department of Inland Fisheries and Wildlife regarding the value of a shorebird nesting, feeding or staging area;
- B. Documentation must be completed by an individual who has experience and training in either wetland ecology or wildlife ecology, and therefore has qualifications sufficient to identify and document a high- or moderate-value shorebird nesting, feeding or staging area, or the documentation must be field-verified by the Department of Inland Fisheries and Wildlife;
- C. Following review of the documentation, the Department of Inland Fisheries and Wildlife may modify the boundary of a high- or moderate-value shorebird nesting, feeding or staging area depicted on the applicable geographic information system data layer; and
- D. A landowner will receive written confirmation of the documentation from the Department of Environmental Protection; and

24. The section regarding department determinations of shorebird nesting, feeding and staging areas in the provisionally adopted rule is deleted and replaced with a provision that provides that if, upon request from a landowner, the Department of Environmental Protection staff provides a written field determination or advisory opinion regarding the presence or absence of a high- or moderate-value shorebird nesting, feeding or staging area, a landowner acting on that determination or advisory opinion by carrying out an activity subsequently found to be in violation is not required to obtain a permit for that activity and will not be subject to enforcement action if jurisdiction or a penalty would be based solely on that activity; and be it further

Sec. 2 Implementation date; significant vernal pool habitat rule. Resolved: That the provisions regarding the regulation of activities in, on, over or adjacent to a significant vernal pool habitat in the rule authorized pursuant to this resolve may not be implemented prior to September 1, 2007. The Department of Environmental Protection may not require a permit for an activity that takes place in, on, over or adjacent to a significant vernal pool habitat pursuant to the Maine Revised Statutes, Title 38, chapter 3, subchapter 1, article 5-A prior to September 1, 2007; and be it further

Sec. 3 Report; significant wildlife habitat rules. Resolved: That, by January 1, 2009, the Department of Environmental Protection shall submit a report on the implementation of Chapter 335: Significant Wildlife Habitat Rules to the joint standing committee of the Legislature having jurisdiction over natural resources matters. The report must include, but is not limited to:

1. The number of field determinations requested under the rule and the number of field determinations completed;
2. The number of individual permit applications received under the rule and the department's response to and status of those applications;
3. The number of permit-by-rule notifications regarding significant vernal pool habitats received by the department;
4. The number of permit-by-rule notifications regarding significant vernal pool habitats that required individual permits;

5. The number and type of voluntary identifications of significant vernal pool habitats submitted to the department and the department's response to those voluntary identifications; and

6. Public education and outreach provided by the department; and be it further

Sec. 4 Authority to report out legislation. Resolved: That the joint standing committee of the Legislature having jurisdiction over natural resources matters may report out legislation relating to the significant wildlife habitat rules report submitted pursuant to section 3 of this resolve to the First Regular Session of the 124th Legislature.

Emergency clause. In view of the emergency cited in the preamble, this resolve takes effect when approved.