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Resolve, Regarding Legislative Review of Portions of Chapter 587: In-stream Flow and Lake and Pond Water Levels, 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 587: In-stream Flow and Water Level Standards, 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 clarify that the rule establishes river and stream flow requirements and lake and pond water level requirements;
2. Throughout the rule, reference to "water flow plan" is changed to "alternative water flow" and "water level plan" is changed to "alternative water level";
3. In the summary it is provided that a water use that fails to comply with the requirements of the rule is subject to penalties pursuant to the Maine Revised Statutes, Title 38, section 349;
4. In section 1 a provision is added to make the rule apply to withdrawals or other activity or direct or indirect removal, diversion or use of the waters that causes the natural flow or water level to be altered for all nontidal fresh surface waters of the State;
5. In section 2 a provision is added to define "water user" to mean a person whose withdrawal or other activity or direct or indirect removal, diversion or use of the water by means of a structure or facility causes the natural flow or water level to be altered in any nontidal fresh surface waters of the State;
6. In section 1(D) new provisions are added relating to withdrawal certificates to provide:
 - A. That a withdrawal certificate must allow withdrawals up to the system design capacity of a community water system;

B. That considerations of economic and technical feasibility must include consideration of the water system's legislative charter or other authority, watershed protection benefits of the existing source and the financial viability of the water system, as long as the conditions and limitations of the certificate can be accomplished within the Public Utilities Commission's existing approved rate schedule of the system or do not in and of themselves cause a water system to request a rate increase of its customers;

C. That a water system is allowed to incorporate the cost of compliance with conditions of a certificate into the system's long-range capital plan;

D. That approval of withdrawal certificate conditions is required by the Department of Health and Human Services' drinking water program with technical assistance from the Office of the Public Advocate on economic issues; and

E. That the intent of the certificate process is to accommodate the needs of the water systems while striving to move towards achievement of water quality requirements;

7. In section 2(F) the definition of "system design capacity" is amended to add a provision that the amount of water that is available for water system purposes is expressed as annual withdrawal in total gallons per year;

8. In section 2(F) it is provided that existing system infrastructure includes water treatment and distribution facilities and other necessary structures;

9. Each reference to "groundwater extraction" is removed from the rule;

10. In section 5(A) language is added to the narrative requirements to provide that withdrawals or other activity or direct or indirect removal, diversion or use of Class A, B or C waters must maintain flows sufficient to protect all water quality standards;

11. In sections 5(B) and 5(C) language is added to provide that flow requirements established by the standard allowable alteration in Class A, B and C waters may not be less than the seasonal aquatic base flow, except when natural conditions alone cause those flows to be less;

12. In section 7 language is added to provide that the review of the alternative water flow or alternative water level by other state natural resource agencies and the public is a 30-day review and excludes reference to review by federal agencies;

13. In section 7(B) language is added providing that at the request of an applicant, the Department of Environmental Protection may conduct field evaluations sufficient to determine an alternative water flow or alternative water level;

14. In section 8(A) language is deleted specifying that flows or water levels may be established provided they are protective of all water quality standards, including all designated uses and characteristics of the water body;

15. In section 8(A) it is provided that amendments or modifications to an existing permit that do not alter the manner of use or the amount of the water withdrawal, as stated in the permit, do not require review under the rule;

16. In section 10(B) it is provided that an existing water system has 5 years from the date it is notified by the Department of Environmental Protection of noncompliance with the in-stream flow or water level requirements to obtain a water system withdrawal certificate and to enter into an agreement to take the necessary actions;

17. In section 12 it is provided that any activity altering the flow or water level that requires a new or reissued permit must be regulated according to the flow and water level requirements in the rule; and

18. Any technical changes to the rule necessary to accomplish the changes described in this resolve are made.

The Board of Environmental Protection is not required to hold hearings or undertake further proceedings prior to final adoption of the rule in accordance with this section.

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