

DEPARTMENT OF ENVIRONMENTAL PROTECTION

Rulemaking Initiative:

Chapter 305 Permit By Rule, Section 20

“Activities In, On, or Over High or Moderate Value Inland Waterfowl and Wading Bird Habitat, or Shorebird nesting, Feeding, and Staging Areas”

Public Comments received at public hearing

December 1, 2011

	Name/Affiliation
[1]	Robert Duchesne, House Representative District 13 Richart Planning: “courtesy of GrowSmart Maine, Annual Mtg (dated 11-15-2011)
[2]	Parker S. Laite, Jr. President Maine Aggregate Association
[3]	Jon Olson, Executive Secretary Maine Farm Bureau Association
[4]	Avery Day, Pierce Atwood (on behalf of MEREDA) Letter from Frederic Licht MEREDA (dated 11-30-2011)
[5]	Rodney Kelshaw Maine Chapter Wildlife Society and Maine Assoc. Wetland Scientists
[6]	Nick Bennett, Staff Scientist Natural Resources Council of Maine
[7]	Alicia Heyburn, Brunswick
[8]	Chris Cabot, Portland
[9]	Susan Gallo, Maine Audubon Handout conservation guide “conserving Maine’s significant wildlife habitat waterfowl & wading birds” (Spring 2009)
[10]	Inland Fisheries and Wildlife – Resource References <ul style="list-style-type: none"> - Recommended Land Use Guidelines - Inland Waterfowl and Wading Bird Habitats - Bellrose, F.C. 1976. Ducks, geese and swans of North America. Stackpole Books, Harrisburg, PA. <ul style="list-style-type: none"> • The distance from open water to occupied natural nest cavities by wood ducks depends on the availability of cavities and forest cover type. Greater densities of trees around a wetland will provide more available nest cavities. - Boyd, L. 2001. Buffer Zones and Beyond: Wildlife use of Wetland Buffer Zones and their Protection under the Massachusetts Wetland Protection Act. University of Massachusetts. <ul style="list-style-type: none"> • An evaluation of wetland dependent species that are also dependent on the upland habitat adjacent to freshwater wetlands in MA showed that a 100 foot buffer (as provided by the MA Wetlands Protection Act) does not provide adequate protection. - Castelle, A.J. et al. 1994. Wetland and stream buffer size requirements – a review. Journal of Environmental Quality 23:878-882. <ul style="list-style-type: none"> • Larger buffers necessary for high value wetlands. • In order to provide for species diversity, buffers should approach 100 meters (328 feet). See Figure 1. • Species with specific needs that can only be met in adjacent upland buffer: wood

- ducks, great blue herons, pileated woodpeckers, osprey, etc.
- WA study: bird diversity, richness, relative abundance, breeding numbers were positively correlated with wetland buffer size.
- USFWS's Habitat Suitability Index models show buffers needed range from 3-106 meters (10 feet – 348 feet) depending on the species.
- Buffers limit easy access to wetland and block or decrease noise, light, odors, debris from reaching wetland.
- Buffers decrease noise level 3-fold.
- **Clark, R.G. and D. Shutler. 1999. Avian habitat selection: pattern from process in nest-site use by ducks? Ecology, 80(1), 1999, pp. 272-289.**
 - Looked at variables at nest sites (n=323) for 5 species of waterfowl, mean distance to water was 101 meters (331 feet).
- **Coulter, M. W., and W.R. Miller. 1968. Nesting biology of Black Ducks and Mallards in northern New England. Vermont Fish Game Dep. Bull. 68-2.**
 - The distance to water from black duck nests ranged from 0 to 1,300 feet.
- **DeGraaf, Richard M. and M. Yamasaki. 2001. New England Wildlife: habitat, natural history and distribution. University Press of New England, Hanover, NH**
 - Average distance from water for blue-winged teal nests was 840 feet.
 - American green-winged teal nests were usually found between 3 and 298 feet to the wetland edge.
- **DeLuca, W.V. et al. 2004. Influence of land use on the integrity of marsh bird communities of Chesapeake Bay, USA. Wetlands 24(4):837-847.**
 - Relatively low levels of disturbance (6% within 1,640 feet, 8.8% within 3,281 feet) caused a change in marsh bird community integrity.
 - Most other studies report thresholds near 10% and 20% disturbance in these same zones.
 - Road densities at local scales has negative effect on wetland bird assemblages.
 - Developed areas provide pathways for predators, leading to increased nest predation and decreased reproductive success.
 - Chemical pollutants and nutrients may reduce food resources of marsh birds.
- **Eadie, J.M., M.L. Mallory, and H.G. Lumsden. 1995. Common Goldeneye (*Bucephala clangula*). In The Birds of North America, No. 170 (A. Poole and F.Gill, eds.) The Academy of Natural Sciences, Philadelphia, and the American Ornithologists' Union, Washington, D.C.**
 - Common goldeneye nests in natural cavities are found at shoreline up to 4,265 feet from open water.
- **Environmental Law Institute. 2008. Planner's guide to wetland buffers for local governments. Environmental Law Institute, Washington, D.C.**
 - Wide, densely vegetated buffers better than narrow & sparsely vegetated buffers.
 - Appropriate buffer size depends on what level of function you want to provide for the wetland.
 - Buffers serve directly as habitat for wetland-dependent species that rely on upland habitat for critical stages of life-history.
 - Buffers screen human disturbance.
 - Buffers serve as corridors and provide connectivity.
 - Widths for birds range from 49 - > 5000 feet.
 - Wildlife protection buffers tend to be largest, ranging from 100 - >300 feet. Figure on page 10.
 - Many buffer ordinances are for wetlands in general (not necessarily high value wetlands) and range from 15-350 feet, with varying limitations as distance from

- wetland increases.
- IFW's IWWH 250 foot buffer is similar to #3 on page 11: Regulated buffer area with minimum non-disturbance area.
- **Erwin, R.M. 1989. Responses to human intruders by birds nesting in colonies: experimental results and management guidelines. Colonial Waterbirds 12(1):104-108.**
- Buffer distance recommendation for wading bird colonies = 100 meters (328 feet).
- **Findlay, C.S. and J. Houlahan. 1997. Anthropogenic correlates of species richness in southeastern Ontario wetlands. Conservation Biology 11(4):1000-1009.**
- Bird species richness declined with increased paved road density especially within 0-500 meters (1,640 feet).
 - Increases in paved road density within 500 meters (1,640 feet) would lead to 14% decline in bird species richness.
 - Road noise within 500-1000 meters (1,640 feet – 3,281 feet) of a forest fragment decreases bird habitat quality, affects dispersal, and reduces population density.
 - Ontario's wetland policy: buffer of 120 meters (394 feet), within which development is permitted if it doesn't result in loss of wetland functions.
 - Conclusion: 120 meters (394 feet) is not sufficient to protect wetland biodiversity.
- **Henning, B.M. and A.J. Remsburg. 2009. Lakeshore vegetation effects on avian and anuran Populations. The American Midland Naturalist 161(1):123-133.**
- Higher avian species richness where intact understory vegetation and with canopy coverage. *Abstract only.*
- **Klein, M.L. 1993. Waterbird behavioral responses to human disturbances. Wildlife Society Bulletin 21:31-39.**
- Evidence that human activity (mostly recreational) does disturb wading birds and may disrupt inter- and intra-specific relationships; and may reduce foraging opportunities and success.
 - No buffer distance suggested, but recommend not to approach birds on foot and to use blinds for observation.
- **Klein, M.L. et al. 1995. Effects of ecotourism on distribution of waterbirds in a wildlife refuge. Conservation Biology 9(6):1454-1465.**
- Resident waterbirds less sensitive to disturbance by visitor drive.
 - Migrant ducks usually remained >80 meters (262 feet) from the roadway, even when visitation was low.
 - Herons and egrets do not appear affected by visitation. Note: this study took place in Florida where these species are generally more habituated to humans.
- **Longcore, J. R., D.G. McAuley, G. R. Hepp, and J.M. Rhymer. 2000. American Black Duck (*Anas rubripes*). In the Birds of North American, No. 481 (A. Poole and F. Gill, Eds.) The Birds of North America, Inc., Philadelphia, PA.**
- The mean distance to water for black duck nests in Maine was 476 feet (n=28), and ranged from 0 to 3706 feet.
- **Robb, J.R., and T. A. Bookhout. 1995. Factors Influencing Wood Duck Use of Natural Cavities The Journal of Wildlife Management. Vol. 59. No. 2 pp. 372-383.**
- Wood duck nest success was greater for nests located at greater distances from water and was likely related to raccoon foraging behavior. The average distance of a cavity nest tree to water was 75 meters (246 feet), n = 34.
- **Rodgers, J.A., Jr. and H.T. Smith. 1995. Set-back distances to protect nesting bird colonies from human disturbance in Florida. Conservation Biology 9(1):89-99.**
- Buffer distance recommendation for wading bird colonies = 100 meters (328 feet).
- **Rodgers, J.A., Jr. and H.T. Smith. 1997. Buffer zone distances to protect foraging and loafing waterbirds from human disturbance in Florida. Wildlife Society**

Bulletin 25(1):139-145.

- Recommended buffer distances for foraging and loafing birds range from 82 – 107 meters (269 feet – 351 feet).
- **Rodgers, J.A., Jr. and S.T. Schwikert. 2002. Buffer-zone distances to protect foraging and loafing waterbirds from disturbances by personal watercraft and outboard-powered boats. Conservation Biology 16(1):216-224.**
 - Recommend buffer distances to prevent disturbance by personal watercraft & outboard motor boats ranged from 113 – 146 meters (371 feet – 479 feet).
 - Final conclusion of paper is ~180 meters (591 feet) buffers for wading birds such as great blue herons, great egrets, little blue herons, snowy egrets and tricolored herons.
- **Smith, L.A. and P. Chow-Fraser. 2010. Impacts of adjacent land use and isolation on marsh bird communities. Environmental Management 45(5): 1040-1051.**
 - Obligate marsh nesting birds prefer rural over urban wetlands.
 - Higher index of marsh bird community integrity in rural wetlands vs. urban wetlands.
 - Recommend urban land use is not the dominant land use within 1000 meters (3,281feet). *Abstract only.*
- **Watts, B.D. and D.S. Bradshaw. 1994. The influence of human disturbance on the location of great blue heron colonies in the lower Chesapeake Bay. Colonial Waterbirds 17(2):184-186.**
 - Great blue heron colonies in lower Chesapeake Bay, VA found to be in areas with lower density of human structures, secondary roads, and unimproved roads.
 - On average, distances between great blue heron colonies and disturbances was >581 meters (1,906 feet).
- **Werschkul, D.F. et al. 1976. Some effects of human activities on the Great Blue Heron in Oregon. The Wilson Bulletin 88(4):660-662.**
 - Active great blue heron nests were on average further away from nearest point of disturbance (219 meters {719 feet}) when compared to inactive nests (148 meters {486 feet}).
 - Conclusion: between 150 meters (492 feet) and 220 meters (722 feet) is preferred distance to buffer disturbance.

Waterfowl disturbance information, not necessarily related to breeding waterfowl:

- **Dahlgren, Robert B., and Carl E. Korschgen. 1992. Human disturbances of waterfowl: an annotated bibliography. U.S. Fish and Wildlife Service Resource Publication 188. Jamestown, ND: Northern Prairie Wildlife Research Center. Online. <http://www.npwrc.usgs.gov/resource/literatr/disturb/index.htm> (Version 16JUL1997).**
 - The bibliography contains annotations for 211 articles with information about effects of human disturbances on waterfowl

Shorebird References

Brown, S., Hickey, C. Harrington, B. and R. Gill. 2001. United States Shorebird Conservation Plan. 2nd ed. Manomet Center for Conservation Sciences, Manomet MA.

Burger, J. 1981. The effect of human activity on birds at a coastal bay. Biological Conservation 21:231-241.

Burger, J. and Gochfeld, M. 1991. Human activity influence and diurnal and nocturnal foraging of sanderlings (*Calidris alba*). Condor 93:259-265.

Burger, J. 1991. Coastal landscapes, coastal colonies and seabirds. Reviews in Aquatic Sciences 4(1):23-43.

Burger, J., Jeitner, C., Clark K. and Niles L. J. 2004. The effect of human activities on migrant shorebirds: successful adaptive management. *Environmental Conservation* 31 (4):283-288

Burton, N.H.K., Rehfish, M.M. and Clark, N. A. 2002. Impacts of disturbance from construction work on the densities and feeding behavior of waterbirds using the intertidal mudflats of Cardiff Bay, UK. *Environmental Management* 30(6):865-871.

Burton, N. H. K., Armitage, M. J. S., Musgrove, A. J. and Rehfish M. M. 2002. Impacts of man-made landscape features on numbers of estuarine waterbirds at low tide. *Environmental Management* Vol. 30 (6), pp. 857-864.

Colwell, M. A. 2010. Shorebird ecology, conservation, and management. University of California Press 328pp.

Helmets, D. L. 1992. Shorebird management manual. Manomet Center for Conservation Sciences. Manomet MA 58pp.

Pfister, C., Harrington, B. A., Lavine, M. 1992. The impact of human disturbance on shorebirds at a migration staging area. *Biological Conservation* 60:115-126.

Pfister, C., Kasprzyk, M. J., and B. A. Harrington. 1998. Body-fat levels and annual return in migrating semipalmated sandpipers. *The Auk* 115(4):904-915.

Rodgers, Jr., J.A. and Smith, H. T. 1997. Buffer zone distances to protect foraging and loafing waterbirds from human disturbance in Florida. *Wildlife Society Bulletin* 25(1):139-145.

Rodgers, Jr., J. A. and Schwikert, S. T. 2002. Buffer-zone distances to protect foraging and loafing waterbirds from disturbance by personal watercraft and outboard-powered boats. *Conservation Biology* 16 (1):216-224.

[11]	Lisa Hunt NC Hunt Lumber, owner of family farm, Newcastle
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[13]	Robert Bailey Retired carpenter, builder, code enforcement officer; Appleton
[14]	Jeff Wells, Ph.D. (ecology and ornithology) Gardiner
[15]	Nancy Prince Retired educator, writer; Wilton
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BASIS STATEMENT

Amendments to Chapter 305, Permit by Rule Standards

Section 20. Activities located in, on or over high or moderate value inland waterfowl and wading bird habitat, or shorebird nesting, feeding, and staging areas

History

- The proposed amendments to Chapter 305, Permit by Rule Standards (PBR), Section 20 are intended to allow new activities in moderate value inland waterfowl and wading bird habitats to be eligible for the permit by rule process. This effort was undertaken in response to P.L. 2011 Chapter 359 which directed the Department to "...allow an activity occurring in, on or over high and moderate value waterfowl and wading bird habitat to be eligible for permit rule." The proposed rules are major substantive rules as defined by 5 M.R.S.A. §8071.
- The Board of Environmental Protection (Board) held a public hearing on the proposed rules beginning on December 1, 2011. At the conclusion of the initial day of the hearing, the Board voted to continue the public hearing to provide opportunity for the Maine Department of Inland Fisheries and Wildlife (DIFW) to answer Board questions about the rules.
- The public hearing was continued on December 15, 2011. The comment period ended December 27, 2011 at 5:00 pm.
- The list of those commenting on the rule is contained in Appendix A of this Basis Statement.
- The list of reference materials submitted in support of testimony is also contained in Appendix A of this Basis Statement as Item #10.

Comments and Responses

Comments reflected below are grouped according to topic, and may be abbreviated and/or consolidated. In some cases, typographical or other minor errors in comments have been corrected. Additional amendments proposed in response to comments are shown in double underline and double strike. The list of commenters attached to this document as Appendix A includes corresponding numbers for identification in the responses to comments. WC before a number indicates written comments received. Single numbers refer to persons who testified at the hearing but did not submit written comments.

Comment #1: Clarification of Setback Requirement. One commenter supported the proposed rule as providing significant environmental protection and allowing only minimal intrusion into the 250-foot protective buffer. The commenter noted that sections C(6)(a-c) contain language that may be confusing by referring to a setback from the upland edge or forested wetland edge of the IWWH, which could be construed to mean an area entirely outside the habitat. High and moderate value IWWHs by definition

includes the 250 foot zone around the "wetland complex." The commenter proposed changing the reference in those rule sections to "wetland complex" rather than "waterfowl and wading bird habitat". (4)

Response: The Department agrees with the comment. The following changes were made:

Section C(6)(a):

- (a) New structures must be located a minimum of 100 feet landward of the upland edge or forested wetland edge of the inland wetland complex within the waterfowl and wading bird habitat;

Section C(6)(b):

- (b) Beyond 100 feet from the upland edge or forested wetland edge of the inland wetland complex within the waterfowl and wading bird habitat, no more than 20 % of the applicant's land within the habitat may be cleared or developed;

Section C(6)(c):

- (c) Within 100 feet of the upland edge or forested wetland edge of the inland wetland complex within the waterfowl and wading bird habitat, cutting and removal of vegetation is limited to those activities described in Paragraphs C(4)(a) and (b) of this section.

Comment #2: General Support for the Rule. One commenter stated that Maine's regulatory environment should embody several basic objectives: efficiency, consistency, clarity and fairness. Supporting the rule, the commenter noted that some people think the rule does not do enough and others think it goes too far, which usually means the right balance has been struck. (4)

Response: The Board agrees that the PBR process is an efficient and consistent process for applicants allowing for the timely approval of a variety of regulated activities while still maintaining protection for the state's natural resources. Adding new activities as eligible for PBR often raises concerns. In this case, the Legislature has directed the Department to do so.

Comment #3: Limitations on Activities. One commenter, opposed to the proposed rule, recalled the legislative intent to be focused on single family homes. He noted that the 250-foot habitat area is already a compromise, as the science would support a larger protected zone. He noted that some of DIFW's biologists were not engaged in the rule development and neither were members of the Maine Chapter of the Wildlife Society or Maine Association of Wetland Scientists, who had volunteered to take part. The commenter noted that the difference between moderate and high value is not great or properly distinguished under the current mapping: both types of habitat are valuable. If the rules go forward, there should be an accompanying effort to properly identify the values of the IWWHs. . The removal of 20% of the habitat on a large lot or on many

small lots around an IWWH could have significant negative effect. There should be a timing restriction so loud disruptions do not occur during breeding and nesting season. The commenter is not necessarily opposed to expedited permitting as long as the resource is not negatively impacted and the changes are based on sound science. (5)

Response: The legislative directive to undertake this rule-making effort did not limit the type of activities that should be eligible for PBR or require a stakeholder process in developing the rule. A number of commenters stated that the IWWH mapping effort does not adequately distinguish between high and moderate value but the Department is not authorized to instruct DIFW to reassess the ratings of IWWHs. While the 250-foot habitat area around wetland complexes may have been a compromise, evidence presented to the Board shows widely varying amount of use of upland areas around the wetland complex specific to bird species. The standard under the NRPA is that an approved project must not have an unreasonable impact; the law does not require a finding of no impact. Evidence in the record indicates that use of upland portions of the habitat varies with species. There is no clear threshold of disturbance at which the Board could find that development of the upland habitat would have an unreasonable impact on the habitat or would cause a habitat to cease to function. To further reduce potential effects on waterfowl and wading birds, the setback has been increased from 100 feet to 150 feet in Sections C(6)(a-c). To lessen the impact during the nesting and rearing season, the rule has been changed by adding new Section 20 B(6) and Section 20 C(6)(d) to require DIFW approval for any construction between April 15 and July 31. To address concerns regarding the impact of exterior lighting on inland waterfowl and wading birds, a note has been added to the rule at Section 20 A.(4) enabling the Department to request a lighting plan if necessary.

Comment #4: Limitations on Activities. Many comments received expressed concern that the rule would allow major development activities near moderate value inland waterfowl and wading bird habitat (IWWH) and urged the Board to limit PBR eligibility to single family homes or other minor development. Commenters noted that moderate value IWWHs make up 70% of the wetland area that the state protects as significant wildlife habitat and that these wetlands are essential to Maine's wildlife-related industries and therefore the economy. Commenters noted that many "moderate" value habitats are equally as valuable as wetlands rated as "high" value, only smaller in size. The commenters stated that Maine's current wetland protections are reasonable and based on sound science. Many also noted that wetlands provide valuable functions other than wildlife habitat and expressed concern that the proposed rule would allow development in the wetlands. Many described the proposed changes as allowing development to occur with no permit at all. They noted that the Department has approved all individual permit applications for activities in these habitats, and they urged the Board to limit permit by rule eligibility in this habitat. (WC -1, WC-2, WC-7, WC-9, WC-11, WC-12, WC-14, WC-16, WC-19, WC-23)

Response: In the law directing the Department to undertake this rulemaking, there was no direction given regarding the scope of projects eligible for PBR. While PBR is in the nature of a notification process, each notification is reviewed by Department staff to determine whether the project is eligible for PBR and can meet the standards. In addition, pursuant to Chapter 305 § 1(D), Department staff can exercise its discretionary

authority to require a full Natural Resources Protection Act (NRPA) permit application to be filed for any activity if it is felt the activity would not meet the standards of the NRPA, could lead to significant environmental impacts, or could adversely affect a resource of special concern. The Board recognizes the importance of wetlands to wildlife, water quality and the economy and the proposed rule will not allow significant direct impacts to wetland resources. The wetland areas designated as IWWHs were mapped with aerial photography and the presence of any particular bird species was not determined in the field. It seems reasonable to allow limited development within moderate value IWWHs provided an adequate setback is required, clearing of the upland areas beyond the setback is limited, and vegetation removal inside the setback is strictly limited, all of which is required by the proposed rule. To further reduce potential effects on waterfowl and wading birds, the setback has been increased from 100 feet to 150 feet in Sections C(6)(a-c). To lessen the impact during the nesting and rearing season, the rule has been changed by adding new Section 20 B(6) and Section 20 C(6)(d) to require DIFW approval for any construction between April 15 and July 31. To address concerns regarding the impact of exterior lighting on inland waterfowl and wading birds, a note has been added to the rule at Section 20 A.(4) enabling the Department to request a lighting plan if necessary.

Comment #5: Limitations on Activities. One commenter emphasized that the categorization of IWWH habitat as high versus moderate value is based on size and it is important to protect both types. The Department has not denied permit applications based on IWWHs. The PBR process is fine for small developments such as a single family home but is not appropriate for gas stations and subdivisions. This rule proposal is not consistent with the preamble to NRPA which states that the value of the state's natural resources should not be unduly degraded. The commenter could find no evidence that Department staff consulted with its own biologists and it was clear to him that the DIFW biologist consulted with in the development of the rule was discouraged by the proposed rule. The commenter recommended limiting the rule to allow one single family home per lot in existence as of 2008, the date of the most recent mapping of IWWHs. He also recommended that the Board put an acreage cap on the development allowed under PBR by limiting the size of the development to 20% of the landowner's property in the IWWH buffer or two acres, whichever is smaller. In supplemental testimony, the commenter noted that agriculture is not exempt in significant wildlife habitat under NRPA but that the farmer referred to in one person's testimony could have received a permit from the Department for some amount of alteration had he chosen to apply. It was felt that DIFW's testimony clearly referenced scientific literature indicating wetland buffers of 200 feet or more are necessary for waterfowl and that the Board should vote with the science. This commenter described his passion for waterfowl hunting and his investments in the sport, noting that waterfowl hunting contributes to the Maine economy. Migratory waterfowl hunting accounts for an input of about \$5.3 million into the economy and wildlife watching about \$856.5 million. IWWHs are also valuable to other wildlife such as deer and furbearers which are also important to the economy. The Board must balance individual development rights against what is good for the state's overall economic and ecological health. The proposed rules do not prevent gas stations and other large scale development in IWWHs. If as staff stated, it is highly unlikely a gas station would be built in such areas, then it would be proper to put a prohibition on such a

development in the rule. Gas stations create large amounts of traffic for long hours of the day and present a significant risk of a catastrophic spill to the wetland. The commenter recommends increasing the setback to 150 feet and requiring DIFW review of all PBRs. (6, WC-40)

Response: NRPA does not regulate subdivision activity per se but does review the cumulative impact to protected natural resources whenever a subdivision plan is submitted for review. Such plans are submitted when the Stormwater Management Law is triggered due to the amount of disturbed area or when the NRPA is triggered due to cumulative wetland impact. There are stringent siting, construction and operational criteria that must be met whenever a new gas station is proposed to be built; however, these do not include required setbacks of the magnitude the commenter requested from protected natural resources such as rivers, coastal wetlands and other significant wildlife habitats. Understanding the value of waterfowl hunting and wildlife observation to the economy, the Board concludes that the proposed rule represents a reasonable balance between individual development rights and the protection of the habitat. To further reduce potential effects on waterfowl and wading birds, the setback has been increased from 100 feet to 150 feet in Sections C(6)(a-c). To lessen the impact during the nesting and rearing season, the rule has been changed by adding new Section 20 B(6) and Section 20 C(6)(d) to require DIFW approval for any construction between April 15 and July 31. To address concerns regarding the impact of exterior lighting on inland waterfowl and wading birds, a note has been added to the rule at Section 20 A.(4) enabling the Department to request a lighting plan if necessary.

Comment #6: General Comment on Value of IWWH and Wetlands. Commenters noted the value of wetlands in general and noted half of the nation's original wetlands have been lost to degradation and development. The commenter noted that the Department has approved all individual applications in IWWHs and the existing process is not an impediment to development. One commenter urged the Board to limit the rule to allowing only single family homes. (12, WC-22)

Response: The proposed rule does not address or apply to impacts to wetlands. Only upland areas which are IWWH may be developed pursuant to the PBRs allowed under the proposed rule, and the setbacks required, as well as the strict limitation of vegetation removal within the setback, are considered generally adequate to protect the functions and values of the wetlands themselves. The Board is aware of the outcome of the Department's licensing efforts under the individual NRPA permit application process, however the Legislature directed the Department to propose a PBR rule allowing activities in IWWHs. Limiting this rule to single family homes only would be arbitrary as there are other activities that may result in less impact than a home, such as a small office where no pets are kept. Staff can use discretionary authority to require a full permit application if it is felt the activity would not meet the standards of the NRPA or could lead to significant environmental impacts. No change was made to limit the rule to certain types of activities.

Comment #7: General Comment on Value of IWWH and Wetlands. One commenter discussed the types of wading birds that utilize IWWHs and focused on great blue herons, noting that the loss of wetlands from draining, dredging and filling is the primary threat to birds like the heron. The commenter stated that scientists recommend no development within 900 feet of a heron rookery, but Maine law provides only a 250-foot buffer. Healthy wetlands maintain property values. Sound land use planning balances resource protection and economic growth so that over time we will maintain our quality of place. (7)

Response: The Board agrees that land use planning can balance resource protection and growth; however, the NRPA addresses specific resources and is not an overall land use planning statute. The proposed rule does not allow impacts to occur to wetlands. The wetlands that are part of any IWWH complex are separately protected as wetlands under the NRPA.

Comment #8: Forestry and Agriculture. Some commenters expressed concern about the impact of IWWH designations on forestry and agriculture. One commenter was concerned that a 500-foot strip of her land, which is a registered farm with the Maine Department of Agriculture, was restricted from development by the presence of a mapped IWWH. The commenter was apparently advised that all farming activities in this area must cease. One commenter stated that some of the significant wildlife habitat restrictions have greatly restricted loggers, farmers, contractors and private business owners. These commenters supported the rule change but stated that they would prefer that the proposed PBR allow activities within 75 feet of the upland edge of the wetland within the mapped IWWH. One commenter stated that the majority of landowners she deals with are struggling to keep going in this economy. (11, WC-4)

Response: Forestry management activities in significant wildlife habitats are specifically exempt under the NRPA unless maps of the habitats are adopted through rulemaking which has not taken place. Agriculture located in significant wildlife habitat is not specifically exempt but continued use of existing fields has been allowed by the Department. Clearing of trees to make new pasture or cropland is regulated and gave rise to some of the examples of the effect of IWWHs on agriculture in comments received. New agricultural activities can be allowed under the proposed rule provided the standards can be met. In addition, a person may submit an individual permit application to create new fields that are closer to the wetland than is allowed under the PBR standards or that involve more than the 20% development that the PBR standard allows.

Comment #9: Agriculture. One commenter supported the rule but encouraged expanding it to allow for reclamation of all abandoned farmland and removal of all vegetation outside the 100-foot setback. The commenter described a situation where one farmer could not expand fields to within 100 feet of an IWWH. He also described another farmer who raises cattle that has fields just 100 feet from the Piscataquis River. The commenter stated that birds feed and nest in the fields and that cattle scare coyotes making agricultural fields more beneficial as habitat than woodland. (3)

Response: In the first example provided by the commenter, it should be noted that the farmer was removing mature forest and IWWH without a permit to do so. While some

expansion of the fields into the IWWH may have been allowed by the Department after analysis under the NRPA permitting process, no permit application was submitted. In the second example, there was no information provided that the birds using the farmland are the species of birds typically using IWWHs. The Department is charged by the Legislature in Resolve 2011, Chapter 101 with assessing all the rules and laws affecting agriculture's ability to reclaim farmland and to report back to the Legislature in 2013. That effort may lead to law or rule changes related to relaxing requirements for agricultural activities in significant wildlife habitats or around other protected natural resources. No change was made.

Comment #10: Gravel Extraction. Several commenters supported the rule as a modest change and reasonable step to balance protection of natural resources and landowner use of property. A number of them stated that the proposal falls short of the legislative mandate by not including high value habitats as well. One commenter suggested decreasing the setback to 75 feet to be consistent with other wetland setbacks under PBR. One noted that Maine's sand and gravel resources are often located near rivers, streams and great ponds. Maine's aggregates are the foundation of all development and the commenter stated that without access to these resources, Maine's economy and way of life will be compromised. The commenters stated that no evidence was presented that the proposed rule would jeopardize waterfowl and wading birds. One commenter stated that the State has not documented the actual risk to the habitat from development nor defined how much or where habitat is actually needed by the wildlife. Some commenters think that overall the rule changes are a step in the right direction that will protect the environment but also allow businesses to invest in expansion and job creation. One commenter noted that given that Maine leads in the amount of acreage under conservation easements and third-party certification for forestry practices, the proposed allowance for 20% development outside the 100-foot setback seems minimal. (2, WC -13, WC-27, WC -29, WC-30, WC-31)

Response: Testimony was provided at the hearing that identified a number of bird species with low or declining populations that use IWWHs. The majority of comments and evidence provided to the Board show that the greater the setback from the wetland the less the impact to the waterfowl and wading birds. A number of other commenters support limiting the rule to moderate value habitat only. It should be noted that sand and gravel extraction can occur under the proposed PBR provided the standards are met and the mining activity is not otherwise limited under the Site Location of Development Act, Performance Standards for Excavations for Borrow, Clay Topsoil or Silt, or Performance Standards for Quarries (see 38 M.R.S. §480-GG). No change was made to also allow activities in high value IWWHs and no change was made to reduce the proposed setback for PBR eligibility from 100 feet to 75 feet.

Comment #11: General Comment on the Rule. One commenter stated that the trend of sprawl in Maine is putting increased development pressure on natural resources in our rural areas. He stated further, that with increased numbers of divorced and separated people, it takes more residential units to house the same number of people. Also, increased pressure on our rural resources is occurring because Maine leads the nation in

the percentage of vacation homes and retiring baby boomers do not have to locate in urban areas. As development occurs this way, it is important to use care and discipline or there will be continued loss of natural public values that contribute to Maine's vitality and economy. The commenter stated that the directive to undertake this rulemaking was unanimously approved by the Legislature and he was unsure of any directive limiting the rule to certain types of development. It was noted that most permitting under the NRPA requires an effort to avoid and minimize impacts on the applicant's part, but the proposed rule does not contain such a requirement. The risk of an occasional unreasonable impact in certain cases is acceptable to this commenter in return for simplicity, speed and predictability. He expressed concern that high-traffic commercial developments, subdivisions and development of 20% of a hundred acre lot versus 20% of a two acre lot may not be appropriate for the PBR process. It is more important to have DIFW involvement for larger or more intrusive types of development. Commercial or non-residential development may have different impacts such as high traffic and security lighting. Subdivision could lead to an unreasonable impact if each lot develops 20% strung out along the wetland. The commenter stated that limiting the rule to activities in moderate value habitat was correct, but the current screening maps identifying these habitats are not totally accurate and that DIFW involvement in the review process could determine if the rating should actually be high or even low value. The commenter felt a timing restriction for construction is not as important for waterfowl habitats as it is for shorebird habitats, and it may not allow a landowner to properly construct and stabilize a project before spring runoff of the following year. It is impractical to craft a PBR rule that accounts for all waterfowl and wading bird species using IWWHs. DIFW involvement in the review process is important when deciding the limitations to PBR's use. It is important that the rule be workable, but that the Department retain the ability to require a full permit when impacts may be too great. (1, WC-34)

Response: The Board agrees that there was no directive limiting the proposed rule to only certain types of development and that it would not be possible to craft a rule that results in no impact to all of the various types of waterfowl and wading birds that may utilize these habitats. The effects of sprawl are understood but there are many impacts that result from it beyond those to natural resources and a larger mechanism is needed to deal with its effects than project-by-project permitting under the NRPA. It is not practical to involve DIFW in the review of individual PBRs during the 14-day review period. The Board declines to put an acreage cap on the 20% development standard because there is no clear threshold of disturbance at which the Board could find that development of the upland habitat would have an unreasonable impact on the habitat or would cause a habitat to cease to function. To further reduce potential effects on waterfowl and wading birds, the setback has been increased from 100 feet to 150 feet in Sections C(6)(a-c). To lessen the impact during the nesting and rearing season, the rule has been changed by adding new Section 20 B(6) and Section 20 C(6)(d) to require DIFW approval for any construction between April 15 and July 31. To address concerns regarding the impact of exterior lighting on inland waterfowl and wading birds, a note has been added to the rule at Section 20 A.(4) enabling the Department to request a lighting plan if necessary.

Comment #12: General Support for the Rule. One commenter described how significant wildlife habitats became regulated, noting that because the original mapping of IWWHs was poor the process was repeated. Although the maps were better after re-mapping, the effort still fell short in his opinion. Some towns then relied on the maps for purposes of creating resource protection districts in the shoreland zone, which generally prohibits the building of structures. During the last legislative session, this commenter learned that these habitats were not being protected for endangered and threatened species and were mapped without knowledge of whether the birds occupied the area. He stated that the rule should provide some limited opportunity for development under the PBR process and that it should be for more than just house lots. It was stated that the proposed rule represents a conservative attempt to meet the Legislature's intent and, in order for the Legislature to have sufficient time to act on these rules, the Board must act on January 5, 2012. (WC-35)

Response: The Board appreciates the history of the mapping and regulation of IWWHs and the need to base habitat designations on the best available data. The Board also appreciates the legislative directive to allow for some development in these habitats under the PBR process. The proposed rule allows for a modest amount of development in moderate value IWWH that should not result in unreasonable impact to the resource.

Comment #13: Alternatives Analysis. One commenter noted that while the proposed changes will ease the burden on Department staff and developers, it is more important to consider what is best for the waterfowl and wading birds. The proposed rule contains no protective mechanism to keep development out of the habitat when there are alternatives. The commenter recommended there should be a "no practical alternative" submission to justify the proposed impact and that the PBR should be limited to single family homes or small-scale development. Similar limitations can be found elsewhere in Chapter 305 Permit by Rule Standards. (8)

Response: Only one other section of Chapter 305 includes a requirement to demonstrate no practical alternative and that is for activities within 75 feet of water resources protected under the NRPA. The primary purpose of that section of the rule is to maintain vegetated conditions and limit soil disturbance to protect water quality. The setback contained in the proposed rule is adequate to protect water quality. A demonstration of avoidance and minimization is not a standard easily achieved by applicants in a PBR process nor is it easily assessed by the Department within the 14 day PBR review period. Thus the Board finds that it is not appropriate for this type of PBR. A regulation allowing for a PBR should contain clear standards for applicants to determine a project's eligibility. The Board finds that the proposed rule is clear and predictable and activities conducted in compliance with the rule will not have an unreasonable impact on the IWWH. No change was made.

Comment #14: Value of Wetlands. One commenter noted that wetlands, particularly smaller ones spread out across the landscape, are valuable for many reasons beyond being habitat for waterfowl. The loss of wetlands across the country was also noted. All activities will impact these wetlands regardless of size or type. The current licensing process has Mainers talking to Mainers about how to minimize their activity's effect on

wildlife, neighbors and community. The existing permitting process seems to be a balanced approach. The proposed rule goes too far in allowing impacts to these resources. We should follow science and minimize our impacts. (14)

Response: The proposed rule attempts to minimize impacts by allowing a modest amount of development activity. A number of commenters stated that the current licensing and review process for activities in IWWHs works, but the Legislature directed the Department to develop PBR rules for some activities in these habitats. The evidence in the record shows no clear threshold of disturbance at which the Board could find that development of the upland habitat would have an unreasonable impact on the habitat or would cause a habitat to cease to function. To further reduce potential effects on waterfowl and wading birds, the setback has been increased from 100 feet to 150 feet in Sections C(6)(a-c). To lessen the impact during the nesting and rearing season, the rule has been changed by adding new Section 20 B(6) and Section 20 C(6)(d) to require DIFW approval for any construction between April 15 and July 31. To address concerns regarding the impact of exterior lighting on inland waterfowl and wading birds, a note has been added to the rule at Section 20 A.(4) enabling the Department to request a lighting plan if necessary.

Comment #15: General Opposition to the Rule. One commenter noted that DIFW guidelines for reviewing development in IWWHs requires an avoidance/minimization demonstration which the proposed rule does not. Based on his prior employment as a DIFW biologist, he stated that the current 250-foot habitat area is a political compromise for regulatory purposes and that the science shows buffers should be much larger in many cases, even up to a quarter of a mile. All development will have an impact, maybe not on an individual scale but in the cumulative sense. Wildlife is a public trust resource belonging to everybody. This commenter recommended maintaining the current regulatory framework. However, if a PBR process is required, then the rule should contain a restriction on the timing of construction and a demonstration of no reasonable alternative. The commenter stated that it is reasonable to ask landowners to avoid and minimize impacts to a public trust resource. Development within an IWWH will diminish the quality and quantity of habitat and the individual and cumulative effects on wildlife is a cost that will be borne by the public. In striking a balance between a landowner's rights and the state's role in protecting wildlife, Maine's land use laws use a regulatory formula of first avoidance, then minimization of impacts, and finally compensation for impacts. The current permitting process should be maintained. If a PBR process must be allowed, it should: a) be limited to single family homes on lots in existence in 2008; b) not allow if the landowner has an alternative outside of the habitat; c) require DIFW biologists to make a determination if avoidance is possible or reasonable; d) limit the development allowed to 20% of the landowner's property within the habitat or two acres, whichever is less; e) include a timing restriction; and f) increase the setback to 150 feet. (WC-41).

Response: The DIFW guidelines pertaining to development in IWWHs are scientific guidelines for the use of DIFW staff and Department staff as a reference in evaluating applications and they are not regulations. Requiring avoidance and minimization is not a predictable standard for applicants to meet and not appropriate for this type of PBR, which has a 14 day review period. While numerous commenters stated that activities

within IWWHs will have a negative impact, the standard under the NRPA is that an approved activity may not have an unreasonable impact; the standard does not limit PBR activities to those which will have no impact. The Board agrees that wildlife is an important and valuable public resource, but an appropriate balance must be achieved when restricting an individual's ability to develop his or her land while providing for the protection of our wildlife resources. The proposed rule allows a modest amount of development to occur while still providing habitat and buffering for breeding and nesting birds. To further reduce potential effects on waterfowl and wading birds, the setback has been increased from 100 feet to 150 feet in Sections C(6)(a-c). To lessen the impact during the nesting and rearing season, the rule has been changed by adding new Section 20 B(6) and Section 20 C(6)(d) to require DIFW approval for any construction between April 15 and July 31. To address concerns regarding the impact of exterior lighting on inland waterfowl and wading birds, a note has been added to the rule at Section 20 A.(4) enabling the Department to request a lighting plan if necessary.

Comment #16: General Opposition to the Rule. One commenter stated that the current regulatory framework for activities in IWWHs took over a decade to be developed. The habitats that are mapped are the best of the best, representing only about one half of the state's wetlands. The current rules are flexible, allowing reasonable development to occur. This is demonstrated by the fact that the Department has not denied a permit based on impacts to IWWH. The commenter recommended limiting development under PBR to single family homes or small scale development, including a construction timing restriction, and adding a cap to the 20% development allowance of two acres. The commenter supported the PBR process in general but stated the current proposal does not meet the intent of PBR which is to allow activities that "... generally [have] less of an impact...than an activity requiring an individual permit." Reference was made to the DIFW guidelines that require avoiding and minimizing impacts and state that development such as multi-unit housing, commercial, governmental and institutional projects "...shall not occur within an IWWH". This commenter recommended a timing restriction and/or an increase of the setback to 150 feet. (9, WC-39)

Response: As stated above, DIFW's guidelines for IWWHs are guidelines and not regulations. The evidence does not support setting an acreage cap rather than a limit based upon a percentage of the lot that is within the habitat. To further reduce potential effects on waterfowl and wading birds, the setback has been increased from 100 feet to 150 feet in Sections C(6)(a-c). To lessen the impact during the nesting and rearing season, the rule has been changed by adding new Section 20 B(6) and Section 20 C(6)(d) to require DIFW approval for any construction between April 15 and July 31. To address concerns regarding the impact of exterior lighting on inland waterfowl and wading birds, a note has been added to the rule at Section 20 A.(4) enabling the Department to request a lighting plan if necessary.

Comment #17: General Opposition to the Rule. One commenter stated that Maine's existing rules protecting wetlands already contain large loopholes and the Department should not consider loosening the rules. The commenter described a Department approval for a 6-lot subdivision adjacent to the St. George River that contained about

60% wetland in which the Department did not consider the environmental impact of individual lot development, only the subdivision road. The commenter objects to the proposed rule changes. (WC-6)

Response: The example cited by the commenter involves a subdivision that triggered review under both the Stormwater Management Law and the NRPA. The Stormwater Management Law specifically exempts development on individual lots. The Department requires subdividers to define building locations, avoiding and minimizing wetland impacts to the extent practicable, and requires permits under the NRPA as necessary. The Legislature directed the Department to allow activities to be eligible for PBR in IWWHs so some form of the proposed rule must go forward.

Comment #18: General Support for the Rule. One commenter commented that the proposed rule strikes an appropriate balance between property rights and environmental protection and commended the Department on its efforts. The members of the Maine Association of Realtors commonly express concern about the lack of flexibility in permitting and the inability to develop land within IWWHs under the current regulatory framework, and this proposal would improve that situation. (WC-8)

Response: The Board believes the proposed rule allows an amount of development that will not have an unreasonable impact on the wildlife using the IWWHs. The rule also provides a predictable, efficient process for applicants that allows for some flexibility in designing a project specific to the landowners' needs.

Comment #19: General Opposition to Rule. Several commenters were opposed to any change in the existing rule. One stated that he was responsible for increasing the setback from 100 feet to 300 feet for wetlands in Pennsylvania. Another pointed to studies showing the benefits of 100 to 300 foot buffers around nesting and feeding birds so they can devote maximum effort to feeding and less time being vigilant for predators. Birds are important to the economy, belong to all of us, and should not be lost to the whims of land developers. High and moderate value IWWHs must be conserved for generations to come; when it is lost, it is gone forever. One commenter argued that even single family homes should go through a full permitting process to minimize the impacts. Some commenters noted that wetlands are especially important, acting as sponges and providing erosion protection and groundwater recharge. Some commenters stated that tourism relies heavily on our natural resources. One person noted that the proposed rule allows too much disturbance and an attempt to exclude public participation in the expedited application review. Until science justifies a weakening of the law, the proposed rule should not be approved. (13, WC-5, WC-15, WC-17, WC-18, WC-20, WC-21, WC-24, WC-25, WC-36, WC-37, WC-38)

Response: The proposed rule does not allow for any direct wetland impact. It is understood, and mentioned by many commenters, that the state's wildlife is important to the economy through hunting, tourism and bird watching. However it should be noted that much of this activity occurs on private land. Balancing the ability of a landowner to develop his or her land while protecting our wildlife resources may help to ensure public access on private lands in the future. The Legislature directed the Department to allow activities in IWWHs under the PBR process, not to exclude public participation, but to

provide a simplified permitting process for some activities. Requiring a full NRPA permit review for all proposed activities within an IWWH is not responsive to the Legislature's directive.

Comment #20: General Opposition to the Rule. One commenter stated the proposed rule is counter to the Department's purpose because it will diminish the natural environment. The Department should be protecting Maine's environment, not working to destroy it. The proposal will result in increased destruction of wildlife habitat which will result in a negative fiscal impact by reducing tourism and wildlife watching. The proposal is bad public policy and contradicts the policies established by Governor Baldacci's Council on Maine's Quality of Place in that it does not preserve our open and natural landscapes. The proposed changes are an abuse of the PBR process. PBR was developed for relatively small projects during the economy of the 1980's and 1990's when keeping up with permitting demands was difficult. Today's economy is different and the proposed expansion of PBR use is not needed. This commenter questioned whether PBR is still needed, the effectiveness of the PBR program in protecting the environment, how often are PBR projects inspected, and the rate of compliance. The commenter asked what provisions will be made to ensure the environment is protected if PBR is expanded. The commenter asked the Board not to adopt the proposed PBR changes. (WC-26)

Response: The Legislature has authorized the use of a PBR process in the NRPA and it specifically directed the Department to allow activities in IWWHs under the PBR process. The Board agrees that preserving our open and natural landscapes is important in maintaining Maine's quality of place. Numerous past studies of compliance rates of PBR projects show that the compliance rates are as good as for projects receiving full NRPA permits, better than 80%. Additionally, many cases of non-compliance involve easily correctable situations, such as modifying or adding additional erosion controls. The Department has sought to inspect at least 10% of the roughly 2000 to 2500 PBR projects received per year, often focusing those inspections on a particular activity, such as stream crossings, or in a particular area, such as Atlantic salmon river watersheds. The PBR process remains a valuable tool providing a quick, straightforward, and cost effective permitting process for applicants as well as the Department. Given the interest in this proposed rule, the Department will commit to inspecting all approved PBRs for this activity just as it did with new allowances for cobble-trapping fences in coastal sand dunes.

Comment #21: Habitat Mapping. One commenter stated that he was unable to distinguish between high and moderate value IWWHs from the Department's website and so was unable to determine the reach and effect of the proposed rules. He also noted that his town contains many other wetlands that are not mapped as significant wildlife habitat but have value to the wildlife of the area and are susceptible to the impacts of development. The commenter further noted the value of the mudflats located in the town and that one failed septic system can close a flat for several years. He discouraged any loosening of protections for wetland areas. The commenter also noted the value of Maine's wetlands to the State's economy. The commenter stated that making single

family homes and minor development eligible for PBR may be appropriate as long as the standards truly protect the habitats. (WC-10)

Response: The Department is working to clarify the designation of IWWHs shown on the website by color-coding them based on their rating as moderate or high value. The proposed rule does not change the regulations for activities in and adjacent to coastal wetlands. In coastal waters, significant wildlife habitats designated as high and moderate value for waterfowl are called Tidal Waterfowl and Wading Bird Habitats. This proposed rule does not make activities in those habitats eligible for PBR.

Comment #22: MDIFW supported the rule changes that limit activities to moderate value IWWH and incorporate some of MDIFW guidelines for IWWHs. It was noted that many of the birds utilizing these habitats are obligate wetland birds and others use the uplands around the wetland for nesting. In discussing DIFW's Land Use Guidelines for IWWHs, it was noted that while single family homes could be acceptable under the guidelines, provided an applicant avoided and minimized impacts, multi-family, commercial and other types of development would not be acceptable. Developments other than single family homes have differing impacts and disturbances to the waterfowl and the commenter stated that such developments could be better located near roads and growth areas. The timing restrictions contained in the guidelines are primarily to allow the birds to bring a brood to the fledging state. Under the current regulatory scheme for reviewing subdivisions proposed for within an IWWH, DIFW biologists have worked with applicants to adjust the location of portions of the development but usually the developer can still develop the original number of lots proposed. Citing the State Wildlife Action Plan, it was noted that of 103 bird species of greatest conservation concern, about 20% are waterfowl and wading birds utilizing IWWHs. A number of the species named are endangered or of special concern. Larger buffers are important to waterfowl that nest in the uplands because many of the predators hunt along the wetland fringe. Buffers also provide protection from disturbance during waterfowl migration, when birds need to refuel. The evidence in the record does not demonstrate a threshold for the percentage of the upland buffer that may be compromised before a wetland would cease to function as good habitat. Regarding buffers and their effect on the water quality of wetlands, it was noted that many variables come into play but that 100 feet is generally sufficient. Regarding the issue of whether an acreage limitation should be set, it was stated that such limitations were not considered by DIFW when reviewing projects previously because an avoidance and minimization standard was utilized under the individual permit application process. It was noted some types of agricultural uses are allowed closer than 100 feet to the wetland, but that shoreland zoning ordinances may be stricter if zoned Resource Protection. DIFW's guidelines with respect to forestry activities basically mirror shoreland zoning restrictions. It was noted that a conflict may arise for forestry because these activities are exempt under NRPA but not under shoreland zoning. The quality of the buffer is important, and lighting at night can affect some bird species more than others. (17, 18)

Response: DIFW's comments in response to Board questions at the hearing were helpful to the Board's understanding of the evidence and the issues in this rulemaking. While the DIFW guidelines distinguish between single family homes and other development within

IWWH, the guidelines reflect DIFW policy and are not binding regulations. The Board finds that some commercial developments may have less impact on IWWH than a single family house. At least 80% of the habitat must be maintained as undeveloped. The standards also strictly limit the amount of vegetation removal within the setback area. The proposed rule would maintain adequate protection of the IWWH with the 20% limitation on development. To further reduce potential effects on waterfowl and wading birds, the setback has been increased from 100 feet to 150 feet in Sections C(6)(a-c). To lessen the impact during the nesting and rearing season, the rule has been changed by adding new Section 20 B(6) and Section 20 C(6)(d) to require DIFW approval for any construction between April 15 and July 31. To address concerns regarding the impact of exterior lighting on inland waterfowl and wading birds, a note has been added to the rule at Section 20 A.(4) enabling the Department to request a lighting plan if necessary.

Comment #23: Landowner Concerns / General Support for the Rule. One commenter supported the proposed rule stating that the number of laws and rules enacted over the years have had a negative impact on landowners' attitude toward stewardship of resources. He noted that landowners have more than just environmental rules to consider in land ownership. Tax laws also hinder landowners' ability to keep their land and transfer to family members. (16)

Response: Landowners expressed their concern regarding the effect of being zoned as a Resource Protection area under municipal shoreland zoning and being located within significant wildlife habitats defined under the NRPA in the last session of the Legislature. As a result, the Legislature directed the Department to remove the requirement in the Shoreland Zoning Guidelines that high and moderate value IWWHs be zoned as Resource Protection and to develop a PBR process for activities in these habitats.

Comment #24. Shoreland Zoning. Some commenters described the effect of municipal shoreland zoning on their land noting that moderate and high value IWWHs are designated as Resource Protection areas and no building is allowed. They stated that when their lands were originally purchased, they were not zoned as strictly and only a 75-foot setback was required. After the mapping of IWWHs occurred, the towns then zoned the areas as Resource Protection, increasing the setback to 250 feet from the wetland. Some commenters stated that had they known the development of their property would have been so restricted, they would never have bought it. They commented that a 75-foot setback is more than adequate to protect the resource and still allow use of their property. They support the proposed rule as an initial step but think that it could go further in allowing use of their land. (WC-3, WC-28)

Response: The Legislature recognized the strict limitation on building in areas designated as Resource Protection under municipal shoreland zoning and directed the Department to remove that requirement from Chapter 1000 of the Department's rules; State of Maine Guidelines for Municipal Shoreland Zoning. That rulemaking effort is underway and a public hearing is scheduled for January 17, 2012. Evidence supplied during this rulemaking indicates that a 75-foot setback for eligibility for the PBR process under the NRPA may be too little to adequately protect the wildlife using IWWHs. It should also be noted that any applicant may also submit an individual permit application for an activity that cannot meet the PBR standards. To further reduce potential effects on

waterfowl and wading birds, the setback has been increased from 100 feet to 150 feet in Sections C(6)(a-c). To lessen the impact during the nesting and rearing season, the rule has been changed by adding new Section 20 B(6) and Section 20 C(6)(d) to require DIFW approval for any construction between April 15 and July 31. To address concerns regarding the impact of exterior lighting on inland waterfowl and wading birds, a note has been added to the rule at Section 20 A.(4) enabling the Department to request a lighting plan if necessary.

Comment #25: Loons. One commenter talked about loons and their sensitivity to noise and other activities, asking the Board to carefully consider whether to allow new development in wetland areas. (15)

Response: Loons are not a species identified as using high or moderate value IWWH. Loons are not likely to be affected by these rule changes.

Comment#26: Vernal Pools. Some Commenters expressed concerns about Maine's policies protecting vernal pools, stating the 250-foot setback is unreasonable, and questioning why the setback is greater than required by some other New England states. (WC-32, WC-33, WC-42)

Response: The 250-foot critical terrestrial habitat regulated around significant vernal pools was established by rule in Chapter 335 Significant Wildlife Habitat in 2006 after Legislative approval. The proposed rule change to Chapter 305 Permit by Rule Standards would allow new activities in moderate value IWWH. There are no proposed amendments affecting the definition of a significant vernal pool.