MEMORANDUM

TO: Board of Environmental Protection
FROM: Mike Mullen, Division of Land Resource Regulation
DATE: December 17, 2009
RE: Request Provisional Adoption: Amendments to Chapter 305, Permit by Rule Standards, Section 10 Stream crossings

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Statutory and Regulatory Reference: Chapter 305 Permit by Rule Standards ("PBR") are adopted pursuant to general statutory authority at 38 M.R.S.A. Section 341-D(1) and specific authority at 38 M.R.S.A. Section 480-H. In addition, Public Law 2009 Chapter 460 directed the Department to amend the stream crossing standards of this chapter, and made the amendments major substantive.

Status of process: Proposed amendments to Chapter 305 Section 10 were posted to hearing and public comment. A hearing was held on November 5, 2009. The public comment period ended at 5:00 p.m. on November 20, 2009. The department is requesting the Board's consideration of provisional adoption of the amendments today.

Description: Public Law 2009 Chapter 460 modified exemptions in the Natural Resources Protection Act (NRPA) relating to the maintenance and repair of stream crossings and the replacement of culverts. These exempt activities are now required to allow for passage of fish and "other aquatic organisms" and "achieve natural stream flow". The law required that the Department modify Chapter 305 Permit by Rule Standards (PBR) to require municipalities to achieve natural stream flow when repairing or maintaining stream crossings. Forest management activities are exempt from the provisions of Chapter 460.

The Department chose to apply the proposed crossing standards to all new stream crossings, regardless of who constructs them. By defining the term "natural stream flow", certain types of maintenance and repair activities, such as slip-lining, will not be exempt under the NRPA. However, a provision has been added in the rule that can allow such activities to proceed with the approval of the Departments of Inland Fisheries and Wildlife and Marine Resources. These rules will apply to all new crossings on all rivers, streams and brooks unless available data indicates the watercourse does not contain fish.

With a signoff from both the Departments of Inland Fisheries and Wildlife and Marine Resources, applicants will be allowed a waiver for certain repair/maintenance activities, and where certain standards are not to be met due to an existing fish passage barrier or where the spread of invasive species is undesirable. Drawings that depict the stream, its cross sectional area and the crossing structure to be used will now be required.

New crossings will be required to use structures of a width that is 1.2 times the bankfull width. Structures with bottoms, such as culverts, box culverts and pipe arches, will have to be set below the stream bed elevation such that they meet this requirement at the bankfull width elevation. Structures with bottoms will be required to have corrugations or other internal roughness: smooth-bore culverts will not be allowed. In some cases, such as on wider streams or where ledge is present, applicants will need to use open bottom structures such as bridges or open arches.

New definitions have been added for bankfull depth and width. The existing definition of cross sectional area has been modified to use these measurements rather than those obtained from the normal high water line. Definitions of "natural stream flow" and "water courses containing fish" have been added for the purpose of interpreting the statute and to support the rule standards.

Response to comments: Twenty two persons commented on the proposed rule. The Department's responses to those comments are included in the Basis Statement which is attached. The majority of commenters oppose the rule amendments due to the perceived costs associated with meeting the new standards. Many asserted that not enough time was spent assessing the full impact (and who is impacted) by the rule, that funding mechanisms should be explored or developed to assist people (municipalities in particular) with meeting the new standards, and that the process should be slowed down. A number of people also suggested prioritizing where culvert replacements should be required to meet the new standards, phasing in the standards, or providing for additional waivers from the standards.

Although Public Laws 2009 Chapter 460 allowed for provisionally adopted rules to be brought before it no later than 2011, the law amendments affecting crossing maintenance and culvert replacement became effective in September 2009. It is necessary to propose the rules and define certain terms, "natural stream flow" in particular, to avoid unintentional violations of the current law exemptions. It is beyond the scope of Public Laws 2009 Chapter 460 to develop or explore funding mechanisms for culvert replacements. Nor does the law allow for phasing in the standards over time. The Department stands by its position that the majority of new crossings and replaced crossings will require slightly larger or differently configured structures, but will not require that new bridges or spanning structures such as open arches to be used in order to meet the new rule standards. Costs associated with using a culvert 1-3 sizes larger than the one being replaced, which may be required in some instances, should not lead to the increase in costs of the magnitude expressed by commenters. It appears that many do not fully understand the rules and requirements, and are assuming that all replacement activities will require much larger structures or bridges, which is not the case. The Department recognizes the need for education and training on the new requirements and intends to provide it through new and existing training programs.

Only one minor change to the proposed rule was made in response to comments, which can be seen in the last comment response of the Basis Statement.

Department Recommendation: The department recommends that the Board provisionally adopt these amendments to Chapter 305 Section 10 Stream crossings.

Estimated Time of Presentation: Approximately 20 minutes.