



STATE OF MAINE
DEPARTMENT OF ENVIRONMENTAL PROTECTION
17 STATE HOUSE STATION AUGUSTA, MAINE 04333-0017

BOARD ORDER

IN THE MATTER OF

TOWN OF TOPSHAM) NATURAL RESOURCES PROTECTION ACT
Topsham, Sagadahoc County)
VERNAL POOL) PARTIAL DELEGATION OF
SPECIAL AREA MANAGEMENT PLAN) PERMIT-GRANTING AUTHORITY
L-22864-06-B-A (approval)) FINDINGS OF FACT AND ORDER

Pursuant to the provisions of Title 38 M.R.S. §480-F, the Board of Environmental Protection has considered the application of the TOWN OF TOPSHAM for partial delegation of permit-granting authority under the Natural Resources Protection Act (NRPA) for impacts to vernal pools in the Town's Designated Development Area and other related materials on file and finds the following facts:

1. Authority Request. On February 8, 2018, the Town of Topsham (Town) filed an application requesting partial delegation of permit-granting authority pursuant to 38 M.R.S. §480-F for impacts to vernal pools in accordance with the Special Area Management Plan for Vernal Pools in Maine.

The Maine Vernal Pool Special Area Management Plan (Vernal Pool SAMP or SAMP) was approved by the U.S. Army Corps of Engineers, New England District in August of 2016, and by the Department of Environmental Protection (Department) Commissioner in September of 2016. The primary purpose of the Vernal Pool SAMP is to increase the compensation/mitigation options available to address proposed impacts to vernal pools by allowing a municipality to permit impacts to vernal pools in municipally designated development areas (DDA's) in exchange for compensation in municipally identified rural areas. Implementation of the Vernal Pool SAMP is intended to increase protection of the natural resource functions and values of vernal pools at the landscape scale while supporting municipal goals for growth.

2. Municipal Responsibilities under the Maine Vernal Pool Special Area Management Plan. The Vernal Pool SAMP establishes requirements that a municipality must meet to qualify for permit-granting authority for vernal pool impacts pursuant to the SAMP. These requirements are discussed below.
 - a. Adopt a Consistent Comprehensive Plan and Land Use Ordinance. The Vernal Pool SAMP, in §IV(A)(1), requires that, to obtain delegated authority from the Board to participate in this SAMP program, a municipality must have adopted a

comprehensive plan and land use ordinance that are found to be consistent with Maine's Growth Management Act.

The Town of Topsham submitted a letter dated September 14, 2006 from the former Maine State Planning Office stating that the Town of Topsham Comprehensive Plan 2005 as amended is consistent with the Maine Planning and Land Use Regulation Act (Title 30-A M.R.S. Chapter 187, Planning and Land Use Regulation), also known as the Maine Growth Management Act, and the Comprehensive Planning Criteria Rule (07-105 C.M.R., Chapter 208). The application includes excerpts from the Town's Zoning Ordinance, Site Plan Review Ordinance, and Subdivision of Land Ordinance which serve to implement the goals of its Comprehensive Plan. Based upon a review of these submissions, the Board finds that the Town of Topsham has developed a comprehensive plan and land use ordinances consistent with Maine's Planning and Land Use Regulation Act as required by the Vernal Pool SAMP.

- b. Identify Designated Development Area. The Vernal Pool SAMP, in § IV(A)(2), requires that a municipality identify a DDA. An area within the Town's Growth Area may only be designated as a DDA "if the area is zoned for moderate to high density development, will be infill in terms of developed area, is adjacent to existing development within the Growth Area, or is served by municipal sewer and water, adjacent to existing development and zoned for moderate or high density development." The map showing the DDA must be submitted to the Army Corps of Engineers (Corps) for approval.

The Town's Comprehensive Land Use Plan identifies growth and rural areas. The municipality has adopted a map showing the DDA within its Comprehensive Plan's identified growth area. This is the area for which the Town is requesting delegated authority to issue NRPA vernal pool permits in accordance with the Vernal Pool SAMP. In accordance with the SAMP, the town's DDA was submitted to the Corps and the Department for review and approval prior to its adoption as part of the Town's Zoning Ordinance. The DDA was adopted by the Town in May 2017 as part of its zoning ordinance, as §225-20.2 Vernal Pools Overlay District (VPO District). The Corps submitted a letter to the Department dated April 16, 2018 confirming that Topsham's DDA is acceptable to the Corps.

Based on the Department's review of the location of the DDA and the approval by the Corps, the Board finds that the Town of Topsham has specified a Designated Development Area consistent with the requirements of the Vernal Pool SAMP.

- c. Adopt a Vernal Pool SAMP Ordinance or Modify an Existing Ordinance. The Vernal Pool SAMP, in §IV(A)(3), requires a municipality to adopt ordinance language that allows it to participate in the Vernal Pool SAMP. The ordinance must include, among other things, a mechanism for assessment and collection of vernal pool mitigation fees and retention of a Third Party to hold mitigation funds and undertake vernal pool conservation projects.

Topsham's application, in Section I, Exhibit 3, includes amendments to the Town's Zoning, Site Plan Review, and Subdivision Ordinances adopting the Vernal Pools Overlay District which identifies the DDA and authorizes the collection and transfer of fees to a Third Party for vernal pool conservation projects.

Based upon a review of these submissions, the Board finds that the Town of Topsham has amended its zoning and land use ordinances to incorporate and implement these requirements of the Vernal Pool SAMP.

- d. Adopt Fee Mechanism. Section IV(A)(4) of the Vernal Pool SAMP requires that the municipality provide for the assessment of a fee equal to 40% of the difference between the appraised value of the property proposed for development as its value would be currently impacted by restrictions on development due to the existence of a vernal pool and the value under the hypothetical condition that the development potential of the property would no longer be impacted by the vernal pool(s). A municipality may opt to adopt a minimum fee if the programmatic conservation goal of two pools plus 70 acres of terrestrial amphibian post-breeding habitat for each impacted pool cannot be met with the differential fee mechanism. The VP SAMP also provides for an applicant to choose to undertake development of a vernal pool compensation project (permittee responsible mitigation) instead of paying a fee.

The Town's Zoning Ordinance, §225-20.2 Vernal Pool Overlay District, subsection (E)(1), Vernal Pool Mitigation Fee, as set forth in the Town's application, establishes a fee mechanism consistent with the Vernal Pool SAMP and includes the option of permittee responsible mitigation in lieu of payment of the fee.

The Board finds that the vernal pool mitigation fee and mechanisms for assessment and transfer of funds incorporated in the Town's Vernal Pool Overlay District (§225-20.2(E)) meet this requirement of the Vernal Pool SAMP.

- e. Identify Third Party to Hold Funds and Undertake Vernal Pool Conservation Projects. Section IV(A)(5) of the Vernal Pool SAMP requires a municipality to enter an agreement with a non-profit land conservation organization as the Third Party entity that will hold mitigation funds and undertake vernal pool conservation projects in accordance with the Vernal Pool SAMP.

The Town submitted a copy of a document entitled "Agreement between the Town of Topsham and the Brunswick-Topsham Land Trust, Inc. Acting as the Third Party in the Implementation of the Topsham, Maine Vernal Pool Special Area Management Plan" signed by the President of the Land Trust on December 15, 2017 and the Topsham Town Manager on January 30, 2018. The agreement specifies the roles and responsibilities of each party. The agreement includes, among other things, the requirements for the mitigation fund; criteria for the identification, prioritization, and approval of potential vernal pool conservation projects; requirements for monitoring

projects; provisions for allocation of funds; timetable for conservation activities; financial controls and reporting; provisions for costs incurred by the Brunswick-Topsham Land Trust (Land Trust); and requirements for program review. The agreement appends the following documents: Maine VP SAMP, the Maine VP Conservation Criteria, the Maine VP SAMP Site Checklist, and the Maine VP SAMP Model Easement.

The Board finds that the Agreement between the Town of Topsham and the Land Trust meets the requirements specified in the Vernal Pool SAMP for a Third Party entity to hold mitigation funds and undertake vernal pool conservation projects.

- f. Identify Vernal Pool Conservation Opportunities. The Vernal Pool SAMP, in § IV(A)6), requires that the Maine Vernal Pool Conservation Criteria set forth in Appendix 2 of the Vernal Pool SAMP be applied to all known pools in the municipality's designated Rural Area to create a baseline vernal pool conservation suitability assessment.

The Town of Topsham completed a town-wide municipal vernal pool mapping program. The process included interpretation of aerial photographs and field verification where landowner permission was received. Exhibit 5 of the application includes a map depicting the location of both field verified and potential vernal pools in the Town's growth area. It also shows the location of vernal pools in the rural area and specifies whether each meets, partially meets, or does not meet the Vernal Pool Conservation Criteria of the Vernal Pool SAMP.

The Board finds that the Town of Topsham has met the requirement to identify and assess the ecological value of the vernal pools located in its designated Rural Areas.

3. Criteria for Delegation of NRPA Permit-Granting Authority to Municipality. The statutory criteria for delegation of permit-granting authority to a municipality under the Natural Resources Protection Act are set forth in 38 M.R.S. §480-F. If the Board finds that all the criteria are met, the Board must grant the requested authority.
 - a. Establish a Planning Board and Board of Appeals. To receive permit-granting authority under the NRPA, a municipality must have a Planning Board and a Board of Appeals (38 M.R.S. §480-F(1)(A)).

The Town of Topsham's application includes references to its Planning Board and Board of Appeals, but does not provide information on their composition or function. Department staff gathered this information from the Town's website, including information on each board's authority, current membership, and meeting schedule.

The Board finds that the Town of Topsham has met this requirement for partial delegation of permit-granting authority under the NRPA.

- b. Comprehensive Plan and Land Use Ordinances / Consistency with the Maine Planning and Land Use Regulation Act. To receive permit-granting authority under the NRPA, a municipality must adopt a comprehensive plan and related land use ordinances that are determined to be consistent with the criteria set forth in Title 30-A, chapter 187, subchapter 2 (the Maine Planning and Land Use Regulation Act, or Act), and that are determined to be at least as stringent as the criteria set forth in 38 M.R.S. § 480-D of the NRPA (38 M.R. S. §480-F(1)(B)).

As discussed in Paragraph 2(a) of his Order, the Town of Topsham has adopted a Comprehensive Land Use Plan that has been determined by the former Maine State Planning Office to be consistent with the Act. The Town has also adopted Zoning, Site Plan Review, and Subdivision Ordinances consistent with its Comprehensive Plan. The process for amending the zoning and land use ordinances to implement the Vernal Pool SAMP included a public hearing before the Town's Planning Board, recommendation for adoption of the amendments by the Planning Board, placement of the proposed amendments on the Town Warrant, and adoption of the amendments at Town Meeting in May 2017.

The Board finds that the Town has adopted a comprehensive plan and land use ordinances consistent with the Maine Planning and Land Use Regulation Act.

- c. Comprehensive Plan and Land Use Ordinances / Consistency with NRPA Criteria.

To receive permit-granting authority under the NRPA, the Town's ordinances must be at least as stringent as the criteria set forth in 38 M.R.S. §480-D. Section II of the Town's application includes excerpts from its land use ordinances including Chapter 225-23 Erosion Control, Chapter 225-24 Stormwater Management, Chapter 225-25 Floodplain Management, and Chapter 175-8(R) Site Plan.

In signing the Maine Vernal Pool SAMP, the Department found, in effect, that delegation of permit-granting authority to a municipality pursuant to the Maine Vernal Pool SAMP would provide for natural resource protections equivalent to those provided by the Department under the NRPA and associated rules. Each of the NRPA 38 M.R.S. §480-D criteria is discussed below.

- (1) 38 M.R.S. §480-D(1). The activity will not unreasonably interfere with existing scenic, aesthetic, recreational, or navigational uses. The applicant states that the Town's DDA is already heavily developed and does not include any scenic, aesthetic, recreational, or navigational uses that would be impacted through use of the VP SAMP.

The Town's zoning map shows that the DDA is located primarily east of Interstate 295 near Exit 31 on both the north and south sides of Route 196. A review of the Town's zoning map indicates that the DDA is in areas currently zoned primarily for various business, commercial, industrial, and urban residential

uses. It also includes land west of Interstate 295 along Route 196 that is currently zoned for various business and commercial uses.

The Board finds that the vernal pools located in the Town's DDA are not likely to have or retain high value scenic, aesthetic, or recreational uses given the location of the DDA and the existing and anticipated level of development in the area. The Board notes that the location of the Town's DDA was reviewed and approved by both the Department and the U.S. Army Corps of Engineers prior to its submission to the Board as part of the Town's application for delegation of permit-granting authority. The Board finds that impacts to vernal pools in the Town's DDA with protection of vernal pools in rural areas in accordance with the Vernal Pool SAMP will meet this criterion of the NRPA.

- (2) 38 M.R.S. §480-D(2). The activity will not cause unreasonable erosion of soil or sediment nor unreasonably inhibit the natural transfer of soil from the terrestrial to the marine or freshwater environment. The applicant states that because of their isolated nature and small size, impacts to vernal pools are unlikely to cause soil erosion or inhibit the transfer of sediment from the terrestrial to the marine or freshwater environment. However, the Town has submitted sections of the Town's Erosion Control and Stormwater Management Ordinances to demonstrate that its ordinances are as stringent as the NRPA standards.

Based on a review of the Town's Erosion Control and Stormwater Management ordinances, and the fact that the Department has delegated authority to the Town to review applications for permits under the Site location of Development Law and the Stormwater, the Board finds that the Town's ordinances are as stringent as this criterion of the NRPA.

- (3) 38 M.R.S. §480-D(3). The activity will not unreasonably harm any significant wildlife habitat; freshwater wetland plant habitat; threatened or endangered plant habitat; aquatic or adjacent upland habitat; travel corridor; freshwater, estuarine or marine fisheries; or other aquatic life. The applicant states that the Vernal Pool SAMP allows for impacts to vernal pools in the DDA in exchange for protection of high value vernal pool landscapes.

The Vernal Pool SAMP authorizes impacts to vernal pools in a municipality's DDA in exchange for preservation in perpetuity of high value vernal pools located in rural areas. Preservation of vernal pools in rural areas will compensate for the filling or other disturbance of vernal pools in the DDA with the goal of protecting two vernal pools and 70 acres of adjacent terrestrial habitat. The preservation of seventy acres in which a vernal pool is located represents the equivalent of a setback of approximately 1000 feet, which is larger than the 250-foot State zone of consultation. This compensation goal exceeds the minimum level of compensation for impacts to wetlands of 8:1 for preservation currently required by the Department's Chapter 310 Wetlands and Waterbodies Protection rule. The

Town's Site Plan Review and Subdivision Ordinances require an applicant that proposes to use the provisions of the Town's Vernal Pool Overlay District to mitigate impacts to vernal pools by providing evidence of payment of the vernal pool mitigation fee or evidence of completion of permittee-responsible mitigation activities.

In accordance with Section III(B) of the Vernal Pool SAMP and the terms of the Town's Vernal Pool Overlay District, the Vernal Pool SAMP cannot be used if the vernal pool to be impacted supports state or federal threatened or endangered species unless a determination of no effect or not likely to adversely affect is made by the U.S. Army Corps of Engineers in consultation with the U.S. Fish and Wildlife Service.

The Board finds that the Town's implementation of the Vernal Pool SAMP in its DDA will meet the NRPA criterion governing impacts to habitat and the other potentially applicable aspects of this criterion.

- (4) 38 M.R.S. §480-D(4). The activity will not unreasonably interfere with the natural flow of any surface or subsurface waters. The applicant states that vernal pools are not connected to other surface waters and that, due to their small size and ephemeral nature, the impact of vernal pools on the flow of subsurface waters is considered minimal.

The Board finds that impacts to vernal pools in the Town's DDA in accordance with the Vernal Pool SAMP will not unreasonably interfere with the natural flow of any surface or subsurface waters.

- (5) 38 M.R.S. §480-D(5). The activity will not violate any state water quality law, including those governing the classification of the State's waters. The applicant states that this standard is not applicable because vernal pools are not classified bodies of water.

The Board finds that impacts to vernal pools, which are not classified bodies of water, will not violate any State water quality law, including those governing the classification of the State's waters.

- (6) 38 M.R.S. §480-D(6). The activity will not unreasonably cause or increase the flooding of the alternation area or adjacent properties. The Town of Topsham has adopted a Floodplain Management ordinance that meets the standards of the National Flood Insurance Program; a copy of Chapter 225-25 Floodplain Management is included in Section II, Exhibit 8 of the application. Any development in specified flood hazard areas requires a permit from the Town, and the Vernal Pool SAMP does not impact this requirement. The Department has previously delegated permit-granting authority to the Town for the issuance of stormwater permits. The applicant states that, given the small size and limited

capacity of vernal pools to hold water, impacts to vernal pools in the DDA will have little to no effect on flooding.

Based on a review of the Floodplain Management ordinance, and the fact that the Department has delegated authority to the Town to review applications for permits under the Stormwater Law, the Board finds that the Town's ordinances are as stringent as the flooding criterion of the NRPA.

- d. Financial, Technical and Legal Resources. Title 38 M.R.S. §480-F(1)(C) requires that a municipality requesting delegation of permit-granting authority demonstrate the financial, technical, and legal resources to adequately review and analyze permit applications and oversee and enforce permit requirements.

As stated above, the Town has a Planning Board and Board of Appeals to review and decide permit applications. The Town of Topsham states that the following municipal personnel will be responsible for reviewing applications under the Vernal Pool SAMP: the Director of Planning and Codes Enforcement, Assistant Planner, and the Code Enforcement Officer, all of which are full-time positions. The job specifications for each of these positions as well as the resumes of the persons currently serving in these positions are included in the application. The Town states that it retains the legal services of the law firm of Bernstein Shur on an ongoing basis. The Town also engages technical consultants as needed including Stantec for natural resource and environmental issues and T.Y. Lin for transportation issues. As further evidence of its capacity, the Town states that it currently has delegated authority from the Department for permitting under both the Site Location of Development Act and the Stormwater Law.

Based upon the job descriptions and the resumes of current planning and code enforcement personnel and the Town's ability to engage additional legal and technical staff as needed, the Board finds that the Town has the financial, technical and legal resources to review and analyze permit applications and enforce permit requirements as required by the NRPA.

- e. Notice to Commissioner. Title 38 M.R.S. §480-F(1)(D) requires that a municipality requesting delegation make provision by ordinance or rule for prompt notice to the Commissioner of Environmental Protection (Commissioner) of all applications received except for permit-by-rule; and prompt notice to the public of receipt of application and written notification to the applicant and Commissioner of issuance or denial of a permit, except for permits for which no public notice or written decision is required.

Exhibit 12 of the application includes excerpts from the Town's Chapter 175 Site Plan Review Ordinance and Chapter 191 Subdivision of Land Ordinance which state procedures for providing notice of hearings to abutters and the public, and for providing written notice to the applicant and persons requesting notification of

decisions on permit applications and appeal rights. The Vernal Pool SAMP and application form provide for notice to the Commissioner of applications received and permits issued.

The Board finds that the Town has demonstrated that it will publish notice of hearings on applications and provide written notice of decisions on applications to the applicant and interested public, as well as notice to the Department of applications received and permits issued.

- f. Application Form. Title 38 M.R.S. §480-F(1)(E) requires that the municipality provide an application form that is substantially the same as that provided by the Commissioner.

The Town's request for partial delegation includes a copy of the Town's Application for "Vernal Pool Impact in Vernal Pool Overlay District." The form provides information on the nature and location of the proposed development, the appraised value of the property with and without the potential restrictions on development due to the vernal pool(s), and the mitigation fee. Attachments to the application form are to include: development parcel location map; copy of appraisal; documentation of title, right or interest in the development parcel; and information on any permittee-responsible mitigation parcel. It also requires certification by the applicant that the proposed project meets the standards for use of the Vernal Pool SAMP.

The Board finds that the Town has designed an application form substantially the same as application forms used by the Department for reduced permitting in accordance with standards established in rule and, in this case, with the requirements set forth in the Vernal Pool SAMP.

- g. Code Enforcement Officer. Title 38 M.R.S. §480-F(1)(F) requires that the municipality appoint a code enforcement officer who is certified pursuant to 30-A M.R.S. §4451.

The Town has submitted the job description for the Town's code enforcement officer including roles and responsibilities, required education and qualifications, and preferred skills. The resume of the current code enforcement officer is included as well as a copy of his certification by the State of Maine Department of Economic and Community Development.

Based upon the job description and resume of the Town's Code Enforcement Officer, the Board finds that the Town has met this requirement for partial delegation of permit-granting authority under the NRPA.

BASED on the above findings of fact, the Board makes the following CONCLUSIONS:

1. The Town of Topsham has met the requirements for participation in the Maine Vernal Pool Special Area Management Plan dated August 2016.
2. The Town of Topsham has met the requirements for partial delegation of permit-granting authority pursuant to 38 M.R.S. §480-F for impacts to vernal pools in the Town's Designated Development Area in accordance with the Maine Vernal Pool SAMP.

THEREFORE, the Board APPROVES the application of the TOWN OF TOPSHAM for partial delegation of permit-granting authority under the NRPA for the issuance of permits pursuant to the Maine Vernal Pool Special Area Management Plan SUBJECT TO THE FOLLOWING CONDITIONS:

1. Signatory to Maine Vernal Pool SAMP. In accordance with Section IV(A)(8) of the Maine Vernal Pool SAMP, upon receipt of partial permit-granting authority, the Town of Topsham must become a signatory to the Maine Vernal Pool SAMP along with the U.S. Army Corps of Engineers and Maine DEP for implementation of the Vernal Pool SAMP at the municipal level. The Town must become a signatory prior to receipt of a fee from any applicant for impacts to vernal pools within the DDA and prior to issuance of an NRPA vernal pool permit. The Town must comply with all terms and conditions of the Maine Vernal Pool SAMP.
2. Notice to the Department of Applications and Permits Issued. In accordance with 38 M.R.S. § 480-F, except for permits-by-rule, the Town shall provide prompt notice to the Commissioner of all applications received for use of the Vernal Pool SAMP, and shall send a copy of each permit issued by the municipality with the associated application to the Commissioner immediately upon issuance of the permit, by registered mail. No permit issued by the Town pursuant to the Vernal Pool SAMP may become effective until 30 days after its receipt by the Commissioner unless approved by the Commissioner in less than 30 days.
3. Third Party Agreement. The Town shall notify the Department of any changes to the Third Party Agreement to ensure continuing compliance with the requirements of the Maine Vernal Pool SAMP.
4. Reporting Requirement. The Town of Topsham shall submit an annual report on the use of the Vernal Pool Overlay District to the Department and the U.S. Army Corps of Engineers within 90 days of the end of each fiscal year covering the prior fiscal year. The report shall document the number of times the mitigation provisions were utilized, the permittees' and projects' names, the permit/authorization numbers or other identifiers, the number and location of vernal pools within the Overlay District that were involved, the conservation projects undertaken with mitigation fees or through permittee-responsible mitigation activities, the financial accounting for all collected mitigation fees, and the

documentation of ongoing monitoring of properties conserved through the use of the mitigation fees. Documentation of monitoring visits to preserved pools shall include photos and a report describing the condition of each pool, the surrounding landscape, and other relevant factors.

5. Limit of Delegation. Delegation of permit-granting authority by this Order applies only to vernal pool impacts located within the Town of Topsham's Designated Development Area and the associated Vernal Pools Overlay District as the DDA and Overlay District exist on the date of this approval. The Town of Topsham shall submit to the Department within 14 days of adoption any changes or amendments to the Town's Vernal Pool Overlay District and associated ordinances.

6. Termination of Maine Vernal Pool SAMP. In accordance with Section IV(G) of the Maine Vernal Pool SAMP, delegation of permit-granting authority by this Order will terminate if the Department or the U.S. Army Corps of Engineers terminates the Maine Vernal Pool SAMP. Termination of the Maine Vernal Pool SAMP or a municipality's participation in the Maine Vernal Pool SAMP does not terminate the Third Party's responsibility for conservation in perpetuity of projects completed in part or in total with funds acquired through use of the Maine Vernal Pool SAMP.

THIS APPROVAL DOES NOT CONSTITUTE OR SUBSTITUTE FOR ANY OTHER REQUIRED STATE, FEDERAL, OR LOCAL APPROVALS NOR DOES IT VERIFY COMPLIANCE WITH ANY APPLICABLE SHORELAND ZONING ORDINANCES.

DONE AND DATED AT AUGUSTA, MAINE THIS 17th DAY OF May, 2018.

BOARD OF ENVIRONMENTAL PROTECTION

By: 

JAMES W. PARKER, CHAIR

PLEASE NOTE THE ATTACHED SHEET FOR GUIDANCE ON APPEAL PROCEDURES.

