

Basis Statement

Chapter 27 Rule

Standards for Timber Harvesting and Timber Harvesting Related Activities within Unorganized and Deorganized Areas of the State

Routine Technical Rule

19 February 2013



**Department of Agriculture, Conservation, and Forestry
Division of Forestry
Forest Policy & Management
22 State House Station
Augusta, ME 04333-0022**

Introduction

The statutory authority for this rule is 12 M.R.S. §8867-D and §8867-E, as enacted by the 125th Maine Legislature by Public Law 2011, chapter 599. The law requires the Commissioner of Conservation, through the Division of Forestry, aka the Maine Forest Service (MFS), to “administer and enforce the regulation of timber harvesting and timber harvesting activities and the construction, maintenance and repair of land management roads, water crossings and gravel pits of less than 5 acres in areas designated as protection districts and management districts” by the Land Use Planning Commission (Commission). The legislation directed that the rules must:

- A. Require a permit from the MFS for activities located within areas of special flood hazard as defined in the Commission’s rules;
- B. Include standards to protect outstanding river segments, historic, scenic, scientific, recreational and aesthetic resources in districts classified by the Commission for special protection and delineated on land use maps adopted under 12 M.R.S. §685-A (7-A); and
- C. Require review by and approval from the Commission for any activity in a protection district described in paragraph B that requires a permit.

Process involved in developing this rule

Following enactment of the public law directing the rulemaking, the department selected a senior staff person to draft the rule, which essentially involved a recodification of existing Commission standards under the authority of the MFS. As no changes to existing standards were contemplated, the MFS determined that an extensive public process was not necessary. The MFS consulted regularly with Commission staff as well as the state employee liaison with the Federal Emergency Management Agency regarding floodplain regulation.

The MFS released the draft rule for public comment in October 2012. No public hearing was scheduled, nor was one requested. The MFS received four sets of comments on this proposal; all were positive but suggested changes to better reflect the legislative direction.

Economic impact of the rule

Multiple sections of the law governing state rulemaking (5 M.R.S Chapter 375, subchapter 2) require agencies to conduct economic impact analyses of proposed rules, including, but not limited to, effects on small businesses, fiscal impact (on the state treasury), and any effects on municipalities and counties. Agencies may, within existing resources, also conduct a cost-benefit analysis of proposed rules.

The MFS has determined that the operation of this rule will not have a fiscal impact on the state treasury, municipalities, or counties. Over time, the MFS may realize some efficiencies in its administrative operations; however, these benefits cannot be quantified at this time.

Further, the MFS has determined that this rule will have no discernible impact on small businesses or the regulated community. The only change in the operation of existing

Commission standards will be that the MFS is now the agency charged with administering and enforcing the rule. By making the MFS the one-stop shop for timber harvesting regulations in the unorganized territory, the regulated community may realize some economic efficiencies. Over time, the MFS may implement administrative changes that result in additional efficiencies for the regulated community; however, these benefits cannot be quantified at this time.

The MFS has lost several enforcement related positions in recent years due to budget reductions. The positions lost include a Regional Enforcement Coordinator (Forester II) and Field Team Leader (Resource Manager) in Forest Policy & Management and ten Forest Ranger III positions in Forest Protection. The MFS may need to redirect staff priorities away from existing programs and initiatives to absorb additional enforcement work within existing resources.

Statements of fiscal impact

State government: The MFS will enforce this rule using existing resources and redirect staff priorities away from existing programs and initiatives.

Municipal and county government: This rule will not have a fiscal impact on municipalities or counties.

Impact on small businesses: This rule will not have a fiscal impact on small businesses, as it is simply a recodification of existing rules.

Information relied upon to develop the rule

The MFS drafted the rule based on existing Land Use Planning Commission standards (Chapter 10) and discussions with Commission staff knowledgeable of the standards. No other sources were consulted.

Comments about the rule

Introduction

As required by 5 MRSA § 8052 (5), the MFS has developed this written statement explaining the factual and policy basis for the rule. The MFS addresses the specific comments and concerns expressed about the proposed rule. The MFS further states its rationale for adopting any changes from the proposed rule, not adopting suggested changes, or drawing findings and recommendations that differ from those expressed about the proposed rule.

The MFS received four sets of written comments during the public comment period from the following parties: Land Use Planning Commission; Maine Audubon Society; Maine Forest Products Council; and, Natural Resources Council of Maine. Those comments are attached in their entirety to this basis statement.

The following responds to comments on particular sections of the rule.

General comments

COMMENT (2): In general, we found the rules difficult to use and quite confusing, particularly as they relate to timber harvesting, land management roads and crossings in P-RR and P-FW zones. We urge you to clarify those sections. Users of these rules will have to know which LUPC subdistrict their proposed activity is in. Therefore, it may be more user-friendly to consider organizing parts or all of the rules by subdistrict, rather than, or in addition to, by use/activity. As it is, an applicant who wants to undertake activities in any particular zone has to search through the entire document to figure out which provisions apply to them.

RESPONSE: This is a good suggestion, and we will consider it for a future rulemaking; however, limited time resources do not permit us to implement the suggestion at this time.

Section 4. Timber Harvesting Standards

COMMENT (2): 4(A) - A permit should be required for timber harvesting in P-RR subdistricts around standing waters (Management class 1 and 6 lakes) as well as those P-RR districts around trails and flowing waters when not in conformance with the standards set out. It is not clear why those were excluded. Likewise, permits should be required for harvesting in P-GP zones when not done according to standards. This is consistent with existing LUPC rules.

RESPONSE: Timber harvesting in P-RR subdistricts around standing waters is allowed without a permit subject to standards (Chapter 10.23(l)(3)(b)(1)). The standards are set forth in Section 4.

COMMENT (2): Permits for P-RR zones that protect standing waters, as well as P-RT, P-UA, and P-RR subdistricts protecting trails and flowing waters should be reviewed and

approved by the Commission. These P-RR zones also protect valuable recreational uses that the Commission, rather than the MFS, is more equipped to evaluate.

RESPONSE: The Legislative intent, and the understanding between the MFS and the Commission, is that the Commission will review and approve certain permits (timber harvesting in P-RT and P-UA subdistricts and P-RR subdistricts established to protect a trail or flowing water). The request goes beyond this intent and understanding.

COMMENT (2): It would also be useful to the public to further clarify exactly what standards the Commission will apply in its review. As written, the last sentence is confusing and sounds like a duplicate permit.

RESPONSE: The MFS will use similar criteria to the Commission's in administering Forestry Operations Permit applications. The last sentence does not imply that a duplicate permit is required; however, we have placed it as a separate subsection to be clear.

COMMENT (1): 4(B)(1) Allows the crossing of channels with a culvert or bridge according to the water crossing requirements of Section 5(C)(3) and (6). We request also requiring compliance with Section 5(C)(4) that also addresses water crossings. As you know, water crossings can impact water quality and fish and wildlife connectivity so it's very important that they be done well.

COMMENT (2): Section 4(B)(1) - In addition to Section 5(C)(3) and (6), we believe that skid trails and roads should also comply with the requirements of Section 5(C)(4) which applies specifically to crossings of unfrozen waters

RESPONSE: There was a reference error in the draft rule. The final rule references the requirements of Sections 5(C)(4) and (7), consistent with the requirements of Commission standards (analogous to 10.27(D)(2) and (5)).

COMMENT (2): Section 4(B)(2)(a) - P-RR zones also protect aesthetic and recreational values and should also be included in the zones in which clearcutting is not allowed within 50 feet of the normal high water line.

RESPONSE: The suggested change is consistent with Chapter 10.23(I)(3)(b)(1) and (3)(c)(10) and has been made.

COMMENT (3): Section 4,B,4 -- P-SL (Shoreland Protection Subdistrict): The draft MFS rules reference the standards for timber harvesting in P-SL subdistricts. The LUPC Chapter 10 rules reference the standards for timber harvesting in P-SL1 subdistricts.

RESPONSE: The change has been made.

Section 5. Land Management Roads and Water Crossings

COMMENT (1): 5(A). This section requires a permit for land management roads and water crossings within certain subdistricts. The list of subdistricts is too narrow and should be broadened to include all protection districts for all purposes including P-WL.

COMMENT (3): Section 5 --P-WL (Wetland Protection Subdistrict): This section of the MFS draft rules does not list the P-WL as a subdistrict that requires a permit for land management roads and water crossings. The LUPC Chapter 10 rules specify that in P-WL subdistricts a permit is required for “land management roads which are not in conformance with the standards of Section 10.27,D, or which will alter one acre or more of a P-WL1 or P-WL2 subdistrict.” The LUPC Chapter 10 rules also specify that in P-WL subdistricts a permit is required for “water crossings of minor flowing waters which are not in conformance with the standards of Section 10.27,D, and water crossings of tidal waters, bodies of standing water, and of major flowing waters.”

COMMENT (2): Section 5(A) - In addition to the subdistricts listed, permits should also be required for land management roads and water crossings for P-WL subdistricts. Permits should also be required for all P-RR zones, not just those protecting standing water, if a road or bridge is proposed within 1000 feet of the trail or flowing water. This is also important in order for the Commission to review all P-RR zones as directed in the last sentence of this section. If no permit is required by the MFS, the Commission will lose its opportunity to review.

RESPONSE: The change has been made for P-WL. Other omissions have also been corrected (see later). Expanding the list of subdistricts beyond those currently listed in Commission standards is beyond the scope of this rulemaking.

COMMENT (3): Section 5 - written notice: Chapter 10 of the LUPCs rules specifies that “written notice of all road and water crossing construction activities as provided in Section 10.27, D,9, above, shall be given to the Commission prior to the commencement of such activities. Such notice shall conform to the requirements of Section 10.16 and shall state the manner in which the water crossing size requirements of this section will be satisfied.” The MFS rules do not include similar language.

RESPONSE: The MFS existing harvest notification requirements address this issue; additional notification requirements are not necessary.

COMMENT (3): Section 5,B - Water Crossings in the P-RR (Recreation Protection Subdistrict): The MFS draft rules do not require a permit for water crossings in a P-RR subdistrict. The LUPC Chapter 10 rules require a permit for “water crossings of major flowing waters; water crossings of all flowing waters surrounded by a P-RR subdistrict established to protect such waters.

COMMENT (2): Section 5(B): P-RR zones need to be added to this section as well. Among other things, current LUPC rules require an alternatives analysis for roads and bridges proposed for P-RR zones (10.23(l)(3)(c)(4)(a)).

RESPONSE: Section 5(B) states, “Water Crossings on/for land management roads require a permit from the Division in P-SL1 subdistricts and in any subdistrict when crossing a body of standing water.” The Commission will retain its standards for review of such permits, so this change is not necessary.

COMMENT (2): Section (5)(C)(2): P-RR zones around standing waters are also currently subject to requirements that the road can be no closer than 1000 feet and must be discontinued or made impassible to two wheel drive vehicles... All of these requirements should be included in these rules. (10.23(3)(B)(2)(b)).

RESPONSE: The Commission will retain its standards for review of such permits, so this change is not necessary.

COMMENT (3): Section 5,C,8,a - USDA name change: This section references the “USDA Soil Conservation Service.” Chapter 10 of the LUPC’s rules also references the “USDA Soil Conservation Service”; however, the name of this agency has changed to the Natural Resources Conservation Service. The LUPC has not yet updated its rules to reflect this name change. The MFS may want to change their rules to reflect this name change.

RESPONSE: The change has been made.

COMMENT (1): 5(D): This section provides an opportunity for roads or water crossings to get a permit if the activity cannot meet the standards. We are very concerned about this section. The rest of Section 5 provides clear standards and this section provides an opportunity to avoid those standards with very little guidance. It needs to be removed. Otherwise, this seems to provide a large loophole to avoid meeting the standards.

RESPONSE: This section is consistent with language in the Commission’s standards (10.27(D)) and will not be changed.

COMMENT (4): 5(D): Please clarify that this does not mean we need to permit roads that already exist, or does it mean we have to permit roads that will be reconstructed? Road, bridge, and culvert maintenance activities should be allowed without a permit.

RESPONSE: This section only applies to roads and water crossings in P-WL1, P-WL2, P-SL1, P-SL2, P-FW, P-GP, P-GP2 and P-RR subdistricts, as set forth in the Commission’s rules, 10.27(D) and, for P-RR subdistricts, 10.23(I)(3)(b).

Section 6: Gravel Extraction Less Than Five Acres in Size

COMMENT (3): Section 6,A -- P-GP2 (Semi-Remote Lake Protection Subdistrict): The language under this section could be interpreted to mean that a gravel pit up to 5 acres in size is allowed with a permit within the P-GP2 subdistrict. Chapter 10 of the LUPCs rules specifies that only gravel pits affecting areas less than two acres in size are allowed in the P-GP2 subdistrict.

RESPONSE: The change has been made.

COMMENT (3): Section 6,A -- P-MA (Mountain Area Protection Subdistrict): This section lists the P-MA as a subdistrict where gravel pits less than five acres in size are allowed with a permit. Chapter 10 of the LUPC's rules specifies that gravel pits are not allowed in the P-MA subdistrict.

COMMENT (1): This section addresses gravel extraction for road purposes involving pits less than one acre in size. Our understanding is that this section currently addresses gravel pits less than one acre in size in a P-FW subdistrict. This should be made clear.

Also, we are concerned with section (b) that allows a gravel pit to move forward without the approval of the Department of Inland Fisheries and Wildlife in a FW protection subdistrict. We strongly encourage this paragraph be deleted.

In addition, section 6 is missing completely the section in current law 10.23, D (P-FW) that sets standards for gravel pits between one and five acres in size in a P-FW subdistrict. Under current law, this is a special exception and requires "the applicant to show by substantial evidence that (a) there is no alternative site which is both suitable to the proposed use and reasonably available to the applicant; (b) the use can be buffered from those other uses and resources within the subdistrict with which it is incompatible; and (c) such other conditions are met that the Commission may reasonably impose in accordance with the policies of the Comprehensive Land Use Plan." The draft rule needs to be amended to be consistent with current law.

COMMENT (2): Section 6 (A): This section includes P-MA zones where no gravel pits are allowed, and P-GP2 zones where gravel pits are limited to two acres. They should be dealt with separately.

RESPONSE: The rule has been modified to clearly reflect Commission standards that allow gravel pits for road purposes one acre or less in size in P-FW subdistricts, subject to certain requirements. The rule also has been modified to allow gravel pits for road purposes between one and five acres in size by special exception and subject to certain conditions. The reference to P-MA subdistricts, where pits are not allowed, has been removed.

COMMENT (2): Section 6 (B) - P-RP zones should be included in this section given that they are not included in any other section.

RESPONSE: Section 1 states that P-RP subdistricts will continue to be regulated by the Commission: “For land within a P-RP Subdistrict, sub-areas identified in the resource or concept plan as development areas will be regulated (in regards to timber harvesting, land management roads, water crossings on/for land management roads, and gravel extraction) by the Land Use Planning Commission as Development Subdistricts. Areas not so identified will be regulated by the Maine Forest Service according to the underlying protection and/or management subdistrict. Specific standards incorporated into the resource or concept plans will continue to apply until the expiration or revision of the related plan.”

COMMENT (3): Section 6,B,6 -- P-AL (Accessible Lake Protection Subdistrict): This section of the MFS draft rules establishes three additional requirements for gravel extraction for road purposes in the P-RR and P-RT subdistricts established to protect flowing waters. In the LUPC Chapter 10 rules the first two of these requirements are also applicable in the P-AL subdistrict. Specifically, the LUPC Chapter 10 rules allow with a permit “mineral extraction for road purposes less than five acres in size, provided that such activity: (a) is not visible from the body of standing water which the P-AL subdistrict was established to protect; and (b) avoids use of the P-AL subdistrict, except where necessary to provide gravel for land management operations where alternative sources are unavailable or impractical.”

RESPONSE: The change has been made.

COMMENT (2): Section 6(C): It is unclear that a permit is required for gravel pits greater than one acre in a P-FW zone. Permits should be required, and consultation with IF&W as set for in this section, at least, should be required. Current law only allows such pits by special exception permit, including three criteria set forth in 10.23(D)(3)(d). These criteria should continue to apply.

RESPONSE: The rule has been clarified to indicate that pits may not exceed one acre in P-FW subdistricts unless a permit is granted by special exception.

COMMENT (1): 6(D). See my comments for Section 5(D) above: “This section provides an opportunity for roads or water crossings to get a permit if the activity cannot meet the standards. We are very concerned about this section. The rest of Section 5 provides clear standards and this section provides an opportunity to avoid those standards with very little guidance. It needs to be removed. Otherwise, this seems to provide a large loophole to avoid meeting the standards.”

RESPONSE: This section is consistent with language in the Commission’s standards (10.27(C)) and will not be changed.

COMMENT (2): This section fails to set out the criteria that will be used by the Division to evaluate applications for permits. At a minimum, these criteria should include those set out in 10.27(C)(2).

RESPONSE: MFS will use similar criteria to the Commission's in administering Forestry Operations Permit applications.

Section 8. Aesthetic, Recreational and Scenic Resources; Historic and Scientific Features

COMMENT (4): I am concerned that we are applying development standards to harvesting rules. This is a new precedent that seems an inappropriate interpretation of timber harvesting regulations as they previously existed in Chapter 10 land use standards.

I interpret the enabling statute to transfer authority to the Maine Forest Service for those harvesting activities currently under LUPC jurisdiction. Although the enabling statute states:

Section 5(2)B: Include standards to protect outstanding river segments, historic, scenic, scientific, recreational and aesthetic resources in districts classified by the Commission for special protection and delineated on land use maps adopted under section 685-A, subsection 7-A;

I don't believe these development standards in practice have been applied to timber harvesting operations and we are concerned that this interpretation will expand regulatory authority.

Beyond this primary concern, as Section 8 is currently written, it does not constrain these standards to "districts classified by the Commission for special protection." Please consider clarifying the intent of Section 8 so that these standards are not applied throughout all zones within the jurisdiction.

RESPONSE: The comment is correct as regards Section 8(A)(1-3), and (B) (aesthetics and historic and scientific features). This was a drafting error. Those subsections have been removed from the final draft. The text of Section 8(B)(4-5) (skid trail closeout) is consistent with LUPC timber harvesting standards for P-RR and P-RT subdistricts and has been moved to Section 4(A) and (C) and Section 5(C). Also, a section in LUPC timber harvesting standards regarding skid trail location in P-RR and P-RT zones was omitted in the original rule and has been added to Section 4(C).

Appendix 1. List of persons or organizations commenting on the draft rule.¹

- 1 - Jennifer Burns Gray, Maine Audubon Society
- 2 - Catherine Johnson, Natural Resources Council of Maine
- 3 - Nicholas Livesay, Land Use Planning Commission
- 4 - Patrick Strauch, Maine Forest Products Council

¹ Commenters are identified by number in the basis statement.

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Division of Forestry - 07 January 2013

Appendix 2. Notice of Agency Rule-making Proposal

AGENCY: Department of Agriculture, Conservation, and Forestry (Maine Forest Service)

RULE TITLE OR SUBJECT: Chapter 27 - Standards for Timber Harvesting and Timber Harvesting Related Activities within Unorganized and Deorganized Areas of the State

PROPOSED RULE NUMBER: LEAVE BLANK - ASSIGNED BY SECRETARY OF STATE):

CONCISE SUMMARY: This rule establishes the procedures for notifying the Department of Agriculture, Conservation and Forestry, Division of Forestry, of proposed timber harvesting activities and sets the standards for regulating those activities. The rule applies to all land within the unorganized and deorganized areas of the state classified by the Land Use Planning Commission as protection districts or managements districts pursuant to 12 M.R.S. §685-A(1).

THIS RULE WILL__ WILL NOT HAVE A FISCAL IMPACT ON MUNICIPALITIES.

STATUTORY AUTHORITY: 12 M.R.S. §§8867-D and 8867-E

SUBSTANTIVE STATE OR FEDERAL LAW BEING IMPLEMENTED (if different): N/A

PUBLIC HEARINGS: None anticipated

DEADLINE FOR COMMENTS: 5:00 p.m. local time, November 9, 2012

E-MAIL FOR OVERALL AGENCY RULE-MAKING LIAISON: mari.wells-eagar@maine.gov