

Basis Statement

Chapter 30 Rule

Prior Approval Process and Stop Work Orders

Major Substantive Rule - Provisional Adoption

30 September 2015



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

Introduction

The statutory authority for this rule is 12 M.R.S. §8869-A, as enacted by Public Law 2013, Chapter 412.

The law requires the Commissioner of Agriculture, Conservation and Forestry, through the Bureau of Forestry, aka the Maine Forest Service (MFS), “establish a prior approval process for harvesting trees by a person that has committed 2 violations of unlawful cutting of trees pursuant to Title 17, section 2510, subsection 1.”

Process involved in developing this rule

Following enactment of the law, a MFS senior staff person drafted rule. Because the statutory direction was clear, the MFS determined that an extensive public process was not necessary. The MFS consulted with the Attorney General’s Office prior to undertaking rulemaking.

The MFS released the draft rule for public comment in July 2015. A public hearing was conducted in July 2015. No one attended. The MFS received two sets of comments on this proposal.

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.

Further, the MFS has determined that this rule will have no discernible impact on small businesses or the regulated community. Only a small handful of loggers meet the criteria necessary to be regulated by this rule.

The MFS has lost several enforcement related positions in recent years due to budget reductions. The positions lost include 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 statutory direction. 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.

Response to Comments for Maine Forest Service Chapter 30 Rule, Prior Approval Process and Stop Work Orders

The following persons and organizations provided comments:

- (1)** Richard Morse, Professional Forestry Services, P.O. Box 118, South China, ME 04358
- (2)** Dana Doran, Executive Director, Professional Logging Contractors of Maine, P.O. Box 1036, Augusta, ME 04332
- (3)** Brian Souers, TreeLine, Inc. (logger), P.O. Box 127, Lincoln, ME 04457

In cases where multiple, similar comments were received, these comments were combined, and a single response was made.

Comment 1

I support this proposed Rule. However I think that the effective date should be January 1, 2016, rather than 2017. **(1)**

Response 1

The effective date was set at 01 January 2017 because the Legislature must review and approve the rule, and it will not do that until sometime between January and April of 2016. The suggested change was not made.

Comment 2

I think it would also be more clear for the lay public if you state that [title] 17 [section] 2510 is unlawful cutting of trees. Can you add this in parenthesis after the cite? **(1)**

Response 2

The suggested change has been made.

Comment 3

As written, the proposed rules contain very little in terms of due process protections for individuals who are potentially liable for their actions. Further, there is no statute of limitations, timeframe for which violations would be held against an individual, appeals process or review board included in the rules. If an individual violates Maine Statute Title 17, section 2510, subsection 1 on two occasions early in his or her career, this rule could be enforced for as long as the individual is in business and the individual would have no recourse or opportunity for appeal. This could have a devastating impact upon the individual over the course of their career and could lead to a loss of income and/or business. Individuals do make mistakes, even in the criminal justice system, and they should be afforded the opportunity for appeal, review and/or reinstatement in an appropriate amount of time. The PLC recommends that the rules include a three strikes provision rather than two, which is consistent with other areas of the penal code; a 10 year statute of limitations on offenses of Title 17, section 2510, subsection 1; an appeals process; and a formal appeals board which consists of a diversified group of representatives from the logging industry, as well as staff from the Forest Service, which is capable of adjudicating offenders as well as appeals. Since logging is not a licensed occupation in the State of Maine and many other occupations have a licensure board which reviews issues of conduct, loggers should also be provided with the same opportunity for defense and due process. **(2)**

Response 3

Many of the changes suggested above go well beyond the statutory direction. MFS does not have the resources to create the suggested review board. However, MFS has modified the rule to provide for a rolling five-year period during which violations of the unlawful cutting of trees statute would trigger the application of the rule. MFS believes this change will address the concerns expressed by the commenter. The change will need to be reviewed and approved by the Legislature.

Comment 4

The summary declares that this rule establishes standards for Maine Forest Service approval of timber harvesting activities by any person who has been convicted of two or more violations of Title 17, section 2510, subsection 1. However, Section 1, Part B., subsection 1 of the proposed rules designate that the rules will also apply for violations of other applicable laws, rules, and standards, which are enforced by the Maine Forest Service. Further, Section 5, Part A. states that a forest ranger, “may issue a stop-work order if the forest ranger has probable cause to believe that a person subject to this rule is violating any law or rule enforced by the bureau or has failed to comply with contract conditions.” This is an overreach of authority by the Forest Service where a stop work order can be issued for any violation of laws/rules enforced by the bureau, but may have nothing to do with Title 17, section 2510, subsection 1. If this rule is meant to reform conduct related to the illegal cutting of trees, then stop work orders should only be issued if there is reason to believe that there is further illegal cutting of trees which needs to be remedied. A person is not complying with this rule for violations of other enforceable laws/rules, therefore they should not be held to higher standard as a result.

The PLC recommends that the language in Section 1, Part B., subsection 2. should be removed and the language from Section 5, Part A. should be amended to read, "A forest ranger of the bureau's Forest Protection Division may issue a stop-work order if the forest ranger has probable cause to believe that a person subject to this rule is violating Title 17, section 2510, subsection 1 or has failed to comply with contract conditions." **(2)**

Response 4

The MFS agrees in part with the comment. However, MFS believes that the change suggested by the commenter is too narrow in scope. MFS believes that it is consistent with the legislative intent to include violations of any laws related to timber theft and trespass, and has modified the rule accordingly.

Comment 5

I think that anyone that who gets caught stealing timber more than once should lose their right to perform commercial harvests for a long time, five years or more. However, I am referring to real theft, meaning the purposeful stealing of timber for the sole benefit of the perpetrator.

The timber trespass laws go beyond pure theft. Many years ago, before I fully understood the timber trespass laws, I removed some trees on a right of way for the purpose of upgrading the road. As a result of not communicating properly with a camp owner who benefited from my efforts, 15 pine biomass trees cost me \$10,000. The camp owner got half of that. The rest the lawyers got. This was a case of the landowner realizing that the laws allowed her to extort money out of me.

This same thing can happen when land owners are irresponsible regarding maintaining their property lines. Then a logger comes along and does his best to establish where the lines are. If he makes a mistake, even if the land owners agreed on the line location, the logger still has a lot of liability. And again, the way the laws are written, a greedy or vindictive land owner can start a law suit very easily that will cost a logger \$30,000 plus to defend, so settling out of court a case that may likely go in the logger's favor for \$10,00 or \$15,000 is the most likely outcome.

These two types of situations should be separated from pure out right timber theft. Pure timber theft has nothing to do with right away issues or normal boundary line issues.

I am aware of several cases of loggers over the years simply harvesting an absentee landowner's woods with no intention of paying stumpage. That is theft and that operator should not be allowed to log anymore. **(3)**

Response 5

This suggestion is reasonable; however, the legislative direction is clear on the point regarding violations of the unlawful cutting of trees statute. The suggested change has not been made.