

# **Basis Statement**

## **Chapter 21 Rule**

### **Statewide Standards for Timber Harvesting and Related Activities in Shoreland Areas (Amendments)**

**Major Substantive Rule - Provisional Adoption**

**01 March 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. §8867-B, as enacted by Public Law 1999, chapter 695 and subsequent amendments, most recently Public Law 2013, chapter 405; and 38 M.R.S. §480-E-3, as enacted by Public Law 2011, chapter 599 and subsequent amendments, most recently Public Law 2013, chapter 570.

The law requires the Commissioner of Agriculture, Conservation and Forestry, through the Bureau of Forestry, aka the Maine Forest Service (MFS), “to establish performance standards for timber harvesting activities in areas adjacent to rivers, streams, ponds, wetlands and tidal waters. The rules must provide the maximum opportunity for flexibility that achieves the goal of protecting the public resources while minimizing the impact on private resources.” It also delegates permit granting authority under the Natural Resources Protection Act (NRPA) from the Department of Environmental Protection (DEP) to MFS. The 2013 amendments clarified that MFS’s authority to grant permits extended statewide.

## **Process involved in developing this rule**

Following enactment of the most recent amendments to the law, MFS selected a senior staff person to draft the amendments to the rule, which essentially involved a clarification of existing rules regarding permitting and revising crossing standards to be consistent with those of DEP. The MFS determined that an extensive public process was not necessary. The MFS consulted regularly with DEP staff and briefed key stakeholders prior to undertaking rulemaking.

The MFS released the draft rule for public comment in January 2015. Two public hearings were conducted in February 2015. No one attended. The MFS received four 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. 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 DEP standards will be that the MFS is now the agency charged with permitting stream crossings and any other protected natural resources identified in the NRPA. By making the MFS the one-stop shop for timber harvesting regulations statewide, 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. Additional positions have been proposed for elimination in the current budget proposal. 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 DEP standards (Chapter 305) and discussions with DEP 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.

## **Response to Comments for Maine Forest Service Chapter 21 Standards for Timber Harvesting and Related Activities in Shoreland Areas.**

The following persons and organizations provided comments:

- (1)** Jennifer Burns Gray, Maine Audubon Society, 20 Gilsland Farm Road, Falmouth, ME 04105
- (2)** Eliza Donoghue, Natural Resources Council of Maine, 3 Wade Street, Augusta, ME 04330
- (3)** Patrick Strauch, Maine Forest Products Council, 535 Civic Center Drive, Augusta, ME 04330
- (4)** Morten Moesswilde, Maine Forest Service, 536 Waldoboro Road, Jefferson, ME 04348

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

### **Comment 1**

One of the reasons we agreed to not oppose the transfer of permitting authority was the fact that the MFS has more people on the ground working with landowners on compliance with and enforcement of the standards. The Governor's proposed budget, if passed, would dramatically change this. The proposal substantially reduces the number of rangers and foresters conducting enforcement activities. This would have a significant impact upon compliance with the NRPA standards and would result in a significant disservice to Maine's protected natural resources and to Maine's citizens who value them. **(1, 2)**

### **Response 1**

The MFS feels that these comments are not germane to the rule making discussion and would be more appropriate for budget discussions at the Legislature.

### **Comment 2**

LD 1673 requires the MFS Chapter 21 rules to be consistent with the DEP standards. We understand that the DEP may be moving forward with proposed changes to its stream crossing standards as the result of extensive discussion over many years. It would be very unfortunate if the MFS failed to update its standards to reflect these changes, once they occur. We trust that the MFS would move forward to make the necessary changes to remain consistent with DEP as it is required by law to ensure consistency annually. Again, this was a very important issue to us last year. Alternatively, the MFS could propose standards now that are consistent with the proposed DEP standards. **(1)**

We understand that the DEP might be developing changes to its stream crossing standards in the near future. LD 1673 requires the MFS Chapter 21 rules to be consistent with DEP stands. Once these changes occur, we trust that MFS will once again update their standards. **(2)**

## **Response 2**

The enabling legislation requires MFS, in consultation with DEP, to “annually review standards for timber harvesting activities adopted by [MFS] to ensure that the standards afford a level of protection consistent with the goals of [NRPA and the Forest Practices Act].”

The MFS will review its standards with the Department of Environmental Protection on an annual basis as required.

## **Comment 3**

Page 15, sec. 11, B (4): We urge the MFS to reconsider the exception provision. Instead, the activities that are proposed to fall under the exception should be in the permit by rule. Otherwise, it will be difficult, if not impossible, to track these activities and ensure compliance with the standards. **(1)**

## **Response 3**

The exemption provision contained in § 11, B (4) is consistent with the exemption contained in NRPA (38 M.R.S. § 480 Q (2-D)). The exemption as detailed in Chapter 21 additionally requires that “iv. The Bureau is notified prior to the activity in accordance with § (11)(B)(6) of this rule.” The bureau will use this notification process to track and inspect projects to ensure compliance.

## **Comment 4**

Page 15, Sec. 11(B)(4)(a) It is unclear from our reading that a full permit is required when the PBR cannot be followed. This should be made clear here. **(1 and 2)**

## **Response 4**

The Bureau agrees with the comment and will clarify this in the rule.

## **Comment 5**

Section 11.B.4.b. first sentence should read “Crossings must conform to standards of this section TO (missing word) qualify for permit by rule.” We suggest that the following be added: “If the crossing does not conform to these standards an application for a full permit must be submitted per Section 11.B.4.a above.” **(1 and 2)**

## **Response 5**

The Bureau agrees with this comment and the rule has been amended as recommended.

## **Comment 6**

As mentioned in my memo prepared last legislative session describing the difference between the DEP and the MFS standards, DEP's erosion control standards provide significantly more detail. We urge MFS to provide more detailed requirements for erosion and sedimentation control in its rule.

DEP Chapter 305, sec. 10(C)(1):

- (1) The following measures must be taken to prevent erosion of soil or fill material from disturbed areas into the resource
  - (a) Staked hay bales or silt fence must be properly installed between the area of soil disturbance and the resource before the activity begins
  - (b) Hay bales or silt fence barriers must be maintained until the disturbed area is permanently stabilized
  - (c) Within 7 calendar days following the completion of any soil disturbance, and prior to any storm event, mulch must be spread on any exposed soils;
  - (d) All disturbed soils must be permanently stabilized; and
  - (e) Within 30 days of final stabilization of the site, any silt fence must be removed.

NOTE: For guidance on erosion and sedimentation controls, consult the Maine Erosion and Sediment Control BMPs, dated March 2003. This handbook and other references are available from the DEP. **(1 and 2)**

## **Response 6**

The Bureau feels that the requirements in § 11 (C)(1)(c)(i) and § 11 (D)(1)(b) that crossings are designed, constructed and maintained so that "sedimentation of surface waters is reasonably avoided" along with multiple references in the notes to the Bureau's publication, "Best Management Practices for Forestry: Protecting Maine's Water Quality" (2004) for guidance on what constitute reasonable measures is sufficient.

## **Comment 7**

On page 16, under the exception, we strongly urge the MFS to make clear under the description of "repair and maintenance" that slip lining is not allowed. Slip lining narrows the opening of the culvert thereby increasing velocity and scour and impeding fish passage. The rules should prohibit sliplining unless an applicant can prove it is absolutely necessary and should require a full permit to allow it. **(1 and 2)**

## **Response 7**

The exemption provision contained in § 11, B (4) is consistent with the exemption contained in NRPA (38 MRS § 480 Q (2-D)). Further, the MFS believes there is already sufficient protection in the exemption requirements, because if a slipline is not designed to achieve fish passage, it does not qualify for the exemption. "ii. The crossing does not block passage for fish in the protected natural resource area."

### **Comment 8**

We notice throughout the rule that the word “unreasonably” is added. For example, on page 17, C(1)(C)(iii) is being proposed to read, “fish passage is not unreasonably impeded” and this is not consistent with the DEP rule and therefore should not be added. **(1 and 2)**

### **Response 8**

The MFS agrees. The rule has been changed to reflect this comment.

### **Comment 9**

In regard to bridge and culvert sizing, we appreciate the increase from 2 ½ times to 3 times the cross-sectional area is consistent with the current DEP standard. However, the current common knowledge is that the size should be 1.2 bankfull width to ensure passage for fish and other aquatic organisms. As mentioned above, DEP is moving ahead with proposed changes to its standards to require 1.2 bankfull width. We strongly encourage the MFS do so as well. **(1 and 2)**

### **Response 9**

The cross sectional area sizing standard as proposed is consistent with the current DEP rules and will be retained. Regarding future updates to DEP standards please see **Comment and Response 2.**

### **Comment 10**

In reconciling the differences between NRPA water crossing standards and standards in Chapter 21 we note the following:

C. SKID TRAIL CROSSINGS; 2. Bridge and Culvert sizing:

Section a. is revised to reconcile the differences between the Land Use Regulation specifications and DEP specifications. We recommend that the 10 year frequency water flows or 2 1/2 times the cross sectional area of a stream channel are sufficient for statewide standards. Particularly since voluntary Stream Smart principles that are being used provide a more scientific and practical options that can be applied beyond the minimum standards set in rule. **(3)**

### **Response 10**

Leaving the sizing standard at 2 ½ cross sectional area would result in a standard that is less protective of the resource than current NRPA Permit by Rule Standards. This would conflict with the enabling legislation. The cross sectional sizing standard as proposed will be retained.

## **Comment 11**

We are unable to find any mention of the Time of Year window for construction which is from July 15 through October 1. It's critical that this restriction be added. Any project during another time of year must get a permit from the Army Corp and special permission from DEP. See below from DEP Chapter 305 page 29-30 & 35:

- (3) A permit will be required from the US Army Corps of Engineers for the following types of projects:
  - (a) Any activity involving impacts (direct and secondary) to freshwater wetlands; or
  - (b) An activity within a river, stream or brook between October 2 and July 14. A copy of the PBR notification form and original photographs, not photocopies, should be submitted to the Corps of Engineers for these activities (US Army Corps of Engineers, 675 Western Avenue, Suite #3, Manchester, ME 04351. Tel. (207) 623-8367).
- (13) If the crossing involves trenching or disturbance of substrate in a river, stream or brook between October 2 and July 14, the activity must occur during the time period approved by the DEP. The approved time period may be the time period proposed by the applicant or an alternative time period approved by the DEP. An alternative time period will be required where it appears an unreasonable impact on water quality or fisheries may result at the point of crossing or immediately downstream of the crossing. The applicant will be notified by the DEP within 14 days if an alternative time period, other than the one proposed by the applicant, is required for constructing the crossing.

## **Response 11**

The language recited in (3) above is in a section titled "Notes." The Office of the Attorney General and the Secretary of State have long held the position that any material designated as a "Note" in agency rules was never intended to be judicially enforceable and is not properly considered a part of the rule. The Maine Administrative Procedures Act excludes from the definition of the word "rule" "[a]ny form, instruction or explanatory statement of policy that in itself is not traditionally enforceable, and that is intended solely as advice to assist persons in determining, exercising or complying with their legal rights, duties or privileges." [5 M.R.S. §8002(9)(B)(4)]

Further, silvicultural activities, including the construction of forest roads, are exempt from the permitting requirements of Section 404 of the Clean Water Act. Construction and maintenance of forest roads must adhere to Best Management Practices to qualify for the exemption. These practices are adequately addressed in the rule and in the Maine Forest Service publication "Best Management Practices for Forestry: Protecting Maine's Water Quality."

The standards in Chapter 11 of the rule provide adequate protection for waters and the organisms found in those waters; therefore, the suggested changes have not been made.

### Comment 12

I would revise Section 3.B. Exclusion 1. To me it relies too much on the location of the principal structure, whereas the actual configuration of development could vary greatly. Any single structure or developed area could easily be wide enough, or have a wider footprint (yards, driveways, sheds, etc.) such that the “100 feet centered on the principal structure” could not cover the developed area.

I would suggest an approach combining a and b:

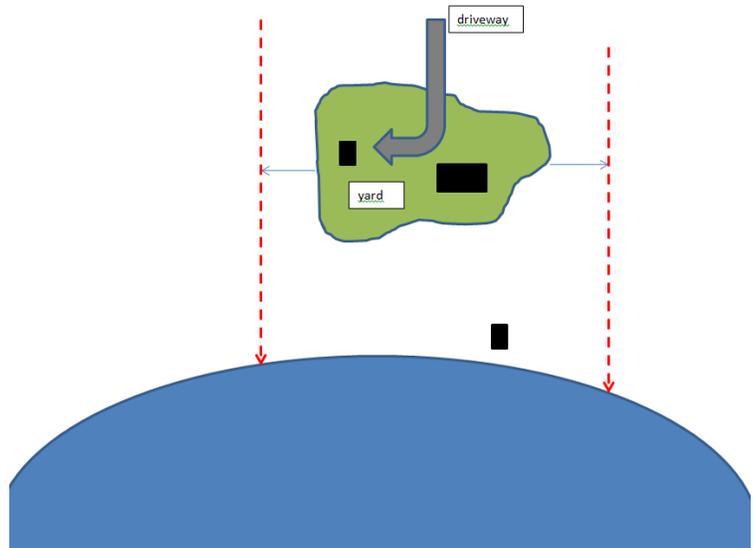
1. Removal of vegetation in proximity to an existing developed area. For purposes of this provision, “developed area” means a footprint encompassing structures, access roads (other than land management roads), and maintained non-forested areas, on a lot with shore frontage on any great pond, stream, pond, river, or freshwater or coastal wetland. “In proximity to” describes an envelope around a developed area, and includes all areas that:
  - a. are within 50 feet of the developed area,
  - b. are between the developed area and the water body,
  - c. occupy an area whose width in parallel with the shoreline extends 50 feet beyond each end of the footprint of the developed area at its widest point.

In no case shall the envelope in proximity to a developed area be less than 20,000 square feet or less than 100 feet along the shoreline.

To me this improves and simplifies interpretation of which portions of a shoreland area are excluded. See attached image as an example. (4)

### Response 12

The Bureau agrees that this improves the ease of applying the exclusion and has modified the rule as recommended.



### Comment 13

I would clarify exclusion 3 slightly. In the last sentence, “this rule” could be understood to mean the statewide timber harvesting standards. I had to read this a couple of times. (4)

### Response 13

The statement referenced in the comment is meant to indicate a violation of the Chapter 21 rule has occurred. We will reexamine the wording to be sure this is clear.

#### **Comment 14**

My primary question – what information is required in an individual permit or permit by rule application that provides enough information on which to base an approval or denial? What is “information required by the Bureau”? Do they actually have to describe in the permit/permit by rule how they are designing/building the crossing? At a minimum shouldn't they have to indicate:

- the type of road/trail;
- the type of structure being used;
- the opening size and stream cross-sectional area;
- whether fill is being used; and
- how the approaches will be treated?

Second, what is the process? Nothing here says how long we have to review the individual permits or PBR. When is a PBR valid? If it's approved by default, do we still have recourse if the crossing is improperly designed? And, if we are to look at sites with “proposed” crossings, for which permits have been submitted, we need more exact location info than any map can provide – lat/long, identified in the field with flagging, etc. Can we request/require a site meeting? **(4)**

#### **Response 14**

The same information that is currently required on DEP's Permit by Rule forms and Permit Applications will be required by the Bureau. Crossings not constructed to the standards detailed in the rule will be in violation of the rule and therefore potentially subject to enforcement action.