

Maine Forest Service Interpretations of the Statewide Standards for Timber Harvesting and Related Activities in Shoreland Areas

(38 M.R.S. §438B & MFS Rules Chapter 21)

These interpretations take into account the full context, meaning, and intent of the Statewide Standards for Timber Harvesting and Related Activities in Shoreland Areas (SWS), the associated Maine Forest Service (MFS) Rules, and the interpretations themselves, and must be used within that context.

General questions:

1. Will there be a cost for permits or will the SWS use permit by rule?

Answer: The fees for permits for permanent stream crossings and related activities are set forth in MFS Chapter 29 Rule, Fee Schedule. The permit-by rule (PBR) fee currently is \$74. There may also be fees required to obtain permits from other agencies (e.g. the LUPC, DEP, Army Corp, DIFW) or for activities requiring a permit under other MFS rules.

2. If the critical mass of municipalities required by statute is not met, will there be multiple sets of shoreland zoning rules?

Answer: Yes.

3. Will the remaining municipalities that have not acted come under statewide standards once the statutory critical mass of municipalities is reached?

Answer: No.

4. When can the outcome-based option be used?

Answer: Outcome based options may be used when they provide equal or better protection of the shoreland area and the adjacent waters than the rule and MFS has approved the proposal.

5. When is a variance permitted?

Answer: A variance may be permitted in limited instances in which compliance with the standards in the rule is not possible and the applicant meets the criteria below.

Specifically, a successful applicant for a variance must demonstrate that:

- a. Strict compliance with the regulations or standards would, because of unique conditions of topography, access, location, shape, size, or other physical features of the site or forest condition, cause unusual hardship or extraordinary difficulties;
- b. The unusual hardship or extraordinary difficulties claimed as a ground for the variance have not been created by the owner or a predecessor in title;
- c. The proposed use meets the purpose and intent of statewide standards; and
- d. The public interest is otherwise served.

6. Does watershed area outside the state of Maine count toward the acreage thresholds for 300 acres, 25 square miles etc.?

Answer: Yes

7. Who is the responsible party for compliance with SWS?

Answer: The responsible party is that person (or entity) responsible for activities within the shoreland area that is regulated by the Chapter 21 rules. Ultimately the landowner is

responsible for actions taken on their property, but the MFS will determine through due diligence who will be held responsible for corrective actions to bring activities into compliance.

Section 4. Definitions

8. If a stream with a 75-foot shoreland area flows into a waterbody that does not meet the definition of a great pond and flows out again what is the buffer width around the waterbody?

Answer: In this case the waterbody is considered part of the stream and the 75-foot buffer will continue around the waterbody. In cases where the waterbody through which a stream flows has a larger required shoreland area than the stream, the more restrictive standards in the rule will apply to that waterbody.

9. For the purpose of determining the normal high-water line, what are the criteria for identifying a forested wetland?

Answer: Forested wetland means a freshwater wetland dominated by woody vegetation that is at least 20 feet tall. Woody vegetation present on the site must consist of either:

- a. acceptable growing stock trees over 4.5 inches DBH comprising more than 30 square feet per acre basal area; or,
- b. at least 300 acceptable growing stock trees per acre at least 20 feet tall.

Trees must be windfirm (Height/diameter ratio ≤ 80) and well distributed across the site.

Section 5. Shoreline Integrity and Sedimentation

10. Are harvesting equipment tracks (depressions in the ground) that do not expose mineral allowed within the shoreland areas?

Answer: Depressions are allowed in shoreland areas so long as sediment and concentrated runoff do not enter the waterbody and shoreline integrity is not disrupted. See Chapter 21 §§9(C) and 4(F).

Chapter 21 § 9(C) provides: “**DESIGN, CONSTRUCTION, AND CLOSEOUT.** Skid trails and yards must be designed and constructed to prevent sediment and concentrated water runoff from entering a water body. Upon termination of their use, skid trails and yards must be stabilized.”

The activity should not cause sediment or concentrated water runoff (the latter being more likely) to enter a water body.

Sections 7 and 8. Standards for Timber Harvesting and Related Activities in Shoreland Areas

11. Are roads and skid trails yards included in the area calculations for cleared openings?

Answer: The area of the road or skid trail is included in the calculations for cleared openings and volume removal. Cleared openings are openings in the forest canopy that exceed 2,500 square feet, measured from the drip edge of the remaining trees.

12. How do we know when clearing for development standards apply instead of Statewide Standards for Timber Harvesting?

Answer: At this time, the MFS will use the definition of timber harvesting located in DEP's Chapter 1000 Rule. Chapter 1000 discusses timber harvesting in §17. "The cutting or removal of trees in the shoreland zone on a lot that has less than 2 acres within the shoreland zone shall not be considered timber harvesting. Such cutting or removal of trees shall be regulated pursuant to clearing or removal of vegetation for activities other than timber harvesting."

13. How does MFS determine when the primary purpose of a timber harvest is not to sell or process forest products?

Answer: Although at first view a project might appear to be timber harvesting activity because it includes the removal of trees and the subsequent sale of forest products, the primary purpose of that activity might not be timber harvesting. Often, the primary purpose of the activity is conversion of the land to farm pasture, a site for growing agricultural crops, a site for the construction of a residential dwelling unit or a site for other development. The MFS will always attempt to determine the objectives of the landowner regarding the future activity that will occur on the parcel in deciding if the site will remain forest land or be converted to a different use. Except in cases where the landowner can demonstrate that a change in use is indisputable, the MFS will make its determination on a case by case basis based on site specific circumstances.

The MFS already determined that the creation/restoration of New England Cottontail habitat on an identified site did not have timber harvesting as its primary purpose. This is consistent with the Statewide Standards located at Chapter 21 of the MFS rules, because the area will be maintained as scrub/shrub, a habitat that is conducive to the propagation and survival of the New England Cottontail. The area in question was of such a small size that it could no longer be managed on a rotational basis to produce forest products.

14. Many coastal softwood stands in Eastern Maine are not in a windfirm condition before being harvested. How can a forester be expected to leave a windfirm stand when one did not exist in the first place?

Answer: If a windfirm stand cannot be established or retained a variance is needed.

15. Will the calendar on the 40% removal in any ten-year period start on January 1, 2013, or does cutting prior to the effective date of these standards count?

Answer: All harvesting in the 10 years prior to the forest operations notification filing date counts toward the removal threshold.

16. Question 1 - What is the definition of a cleared opening? Question 2 - How big is a cleared opening (1 tree, 2 trees or X square feet)?

Answer: A cleared opening is an opening in the forest canopy measured from the drip edges of the remaining trees that exceeds 2,500 square feet. Cutting a single tree will not create a cleared opening regardless of size. The residual stand must comply with all other provisions of SWS.

17. What is the definition of a well distributed stand?

Answer: A well distributed stand is one where each acre meets the shade and tree retention standards, including cleared openings. If all acres meet these standards, the stand will be considered well distributed. Sample plots will be used to determine passing or failing acres.

18. If a harvest is started before Jan. 1, 2013 but the harvester wants to change to the SWS after Jan. 1, 2013, does the harvester have to amend the FONs?

Answer: Yes, provided the municipality has adopted the statewide standards, the Forest Operations Notification must be amended, and the shade option indicated.

19. If there are multiple waterbodies on a harvest, can you choose more than one option for shade?

Answer: This is allowed under option 3, provided the MFS approves. A map must be included indicating which shade retention standard will be used on which waterbody.

20. FPA separation zones allow deadwood. Will the amount of acceptable vs. unacceptable growing stock be defined for the 60 FT² option?

Answer: Trees must be alive and meet the definition of acceptable growing stock located in the FPA rules at Ch. 20 §2(A)(1).

Acceptable growing stock means live trees of commercially valuable species that are not culls, are capable of developing into trees suitable for producing merchantable products, and which:

- a. Have survived at least two full growing seasons (April 1 through October 1);
- b. Do not lean more than 30 degrees from vertical;
- c. Do not have a broken, dead, or missing main stem;
- d. For trees 8 inches DBH or larger, have not suffered scrapes from timber harvesting that penetrate the cambium on more than one half of the stem circumference at any point on the tree;
- e. For trees less than 8 inches DBH, have not suffered scrapes from timber harvesting that penetrate the cambium on more than one third of the stem circumference at any point on the tree; and
- f. Have not suffered visible severing, mutilation, or exposure from timber harvesting of more than one third of the root spread.

21. Which areas of significant wildlife habitat are currently subject to a 250-foot zone?

Answer: Significant wildlife habitat is defined at 38 M.R.S. §480-B(10).

According to the statutory definition (see below for text) in order to be considered significant wildlife habitat, areas must have been mapped by DIFW and the maps must have been adopted by rule pursuant the Administrative Procedures Act (APA). At the current time, no significant wildlife habitat maps, except for sea bird nesting islands, have been adopted as rules in accordance with the rulemaking process set forth in the APA. Therefore, even ponds and wetlands identified by DIFW as significant wildlife habitat are currently not subject to statewide standards unless these areas happen to lie in an area that is in another shoreland area.

Under 38 M.R.S. §480-B(10) significant wildlife habitat means:

- A. The following areas to the extent that they have been mapped by the Department of Inland Fisheries and Wildlife or are within any other protected natural resource: habitat, as defined by the Department of Inland Fisheries and Wildlife, for species appearing on the official state or federal list of endangered or threatened animal species; high and moderate value deer wintering areas and travel corridors as defined by the Department of Inland Fisheries and Wildlife; seabird nesting islands as defined by the Department of Inland Fisheries and Wildlife; and critical spawning and nursery areas for Atlantic salmon as defined by the Department of Marine Resources; and
- B. Except for solely forest management activities, for which "significant wildlife habitat" is as defined and mapped in accordance with section 480-I by the Department of Inland Fisheries

and Wildlife, the following areas that are defined by the Department of Inland Fisheries and Wildlife and are in conformance with criteria adopted by the Department of Environmental Protection or are within any other protected natural resource:

- a. Significant vernal pool habitat;
- b. High and moderate value waterfowl and wading bird habitat, including nesting and feeding areas; and
- c. Shorebird nesting, feeding and staging areas.

In addition, 38 M.R.S. § 480-I(1) provides:

Identification by maps. The commissioner shall map areas meeting the definition of fragile mountain areas set forth in this article. The data developed under section 546-B may be used for mapping significant wildlife habitat. Maps of significant wildlife habitats that have been produced by the Department of Inland Fisheries and Wildlife must be adopted by rule pursuant to the Maine Administrative Procedure Act by the department if:

- a. The maps are of one or more of the types of areas listed in section 480-B, subsection 10, paragraph A; or
- b. The maps are of one or more of the types of areas listed in section 480-B, subsection 10, paragraph B and are for purposes of determining when a permit is required for forest management activities.

22. Question: If a harvest removes 40% of volume 3 years prior to SWS implementation, can you then use Option 2 to thin to 60 BA or apply for an Option 3 outcome-based method within that ten-year window?

Answer: No. Only one option can be used within any ten-year period.

Section 10. Land Management Road Construction and Maintenance Standards

23. If a road is extended does just the extension need to meet standards or does the entire road need to be brought into compliance?

Answer: The extension must comply. The remainder of the road if not conforming, providing it is not being enlarged, may continue to exist and be maintained. Also it is important to remember that these standards only apply to roads in the shoreland area.

**24. Existing nonconforming roads - when does maintenance rise to the level of enlargement?
Example brushing and re-ditching an old nonconforming road.**

Answer: Anything that enlarges the footprint of existing road and ditches is considered enlargement.

Section 11. Crossings of Water Bodies

25. Does the notification requirement and certification for permanent crossings and standards in the rule replace the requirement for a permit by rule from the DEP?

Answer: No. The Natural Resources Protection Act and DEP's Chapter 305 rule were amended in 2009, resulting in some differences between the MFS crossing standards and those for permit by rule. Because the DEP's standards are more stringent, its standards will apply until the

differences can be reconciled. Permanent crossings of NRPA-regulated resources will continue to require a permit by rule from MFS.

26. Is fish passage required for all water crossings? What about seasonal brooks or brooks that don't have fish?

Answer: If the landowner can document that the water body does not contain fish, then fish passage does not need to be maintained. Crossing structures still must not impound water and must maintain normal stream flows. Also see the exemption in §11(C)(5).

27. When installing a stream crossing structure (or removing one), what is considered an unreasonable discharge of sediment?

Answer: Discharges of sediment must be consistent with the Protection and Improvement of Waters Act and Erosion and Sediment Control Law. Discharges of sediment are generally considered unreasonable when commonly accepted Best Management Practices are not applied effectively.

28. Do you have to map both the temporary and permanent water crossings and submit that to the MFS?

Answer: Only permanent crossings must be mapped.

29. Temporary crossings vs. notification length. If a harvest lasts more than 2 years and a notification is extended, do the temporary crossings need to be removed?

Answer: A temporary crossing must be removed when the harvest is complete or the notification expires, whichever is earlier. Further, notifications may not be extended. Therefore, when a notification expires before the harvest is complete; a temporary crossing must either be removed or installed to meet the standards for a permanent crossing. In addition, any crossing that exists for more than 7 months is considered permanent and must meet the standards for permanent crossings.

30. Can a town that is under Statewide standards require a permit for a temporary crossing?

Answer: No. Provided the crossing is associated with a skid trail or haul road as defined by the statewide standards. Requiring a permit would be considered more restrictive than the statewide standards.

31. Does the 7-month time limit on a temporary crossing no longer apply?

Answer: See #29.