

Basis Statement

Chapter 25 Rule

Standards for Placing Wood into Stream Channels to Enhance Cold Water Fisheries Habitat

Routine Technical Rule

07 December 2012



**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-C, as enacted by the 125th Maine Legislature by Public Law 2011, chapter 599. The law requires the Commissioner of Conservation, through the Maine Forest Service (MFS), to “adopt rules to allow activities that enhance cold water fisheries habitat without a permit or fee. The legislation directed that:

- A. The rules must establish standards for the placement of wood in stream channels and specify that only licensed forester trained by the bureau in cooperation with the Department of Inland Fisheries and Wildlife in techniques to enhance fisheries habitat may implement these techniques.
- B. In developing standards to enhance brook trout habitat and the training required to implement habitat enhancement, the Commissioner of Conservation shall consult with the Department of Inland Fisheries and Wildlife, the Department of Marine Resources and the Department of Environmental Protection. The bureau shall notify the departments of habitat enhancement activities conducted under this section.
- C. A permit is not required for activities conducted in accordance with the rules adopted under this section in stream segments that have been identified by the Department of Inland Fisheries and Wildlife as lacking desired habitat features. The Department of Marine Resources must be consulted and approve of any habitat enhancement under this section on a stream that is identified as Atlantic salmon habitat.
- D. The initial rules adopted under this section are routine technical rules as defined in Title 5, chapter 375, subchapter 2-A. Subsequent amendments to those rules are major substantive rules as defined in Title 5, chapter 375, subchapter 2-A. This section does not relieve a person from meeting the requirements of section 8867-B or Title 38, chapter 3, subchapter 1, article 2-B. 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 assigned a Maine Forest Service specialist staff person to draft the rule. Drafting of the rule was accomplished in cooperation with staff from the Department of inland Fisheries and Wildlife, Department of Marine Resources and Department of Environmental Protection as directed by the legislature.

MFS released the draft rule for public comment in October 2012. A public hearing was held in Bangor on November 15, 2012. Two outside persons attended this hearing and spoke neither for nor against the rule, asking clarifying questions. MFS also received two sets of written comments on this proposal, these suggested minor changes and modifications to the rule. The modifications made in response to the comments did not substantially change the rule so no second comment period or hearing was held.

Economic impact of the rule

Various sections of the law governing state rulemaking (5 M.R.S Chapter 375, subchapter 2) require agencies to conduct various 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.

MFS has determined that the operation of this rule will not have a fiscal impact on the state treasury, municipalities, or counties.

Further, MFS has determined that this rule will have no discernible impact on small businesses or the regulated community.

Statements of fiscal impact

State government: MFS will implement this 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.

Information relied upon to develop the rule

Two primary documents were relied upon to develop standards for the rule:

Oregon Department of Forestry. 2010. Guide to Placement of Wood, Boulders and Gravel for Habitat Restoration. 33pp.

Naumann, Ben,. 2011. A Supplemental Guide for Large Wood Additions to Streams to Enhance Stream Function and Fish Habitat with Particular Focus in Downeast Maine. 17pp.

Comments about the rule

Introduction

As required by 5 MRSA § 8052, sub-§ 5, MFS has developed this written statement explaining the factual and policy basis for the rule. MFS addresses the specific comments and concerns expressed the proposed rule. 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.

MFS received two sets of written comments during the public comment period from the following parties: Huber Resources Corporation and the 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 comment

Generally we find the rules, clear concise, and east to follow. (1)

SECTION 3. DEFINITIONS

Comment: Stream channel definition – The stream channel definition is significantly different from the definition used by DEP in 38 MRSA §480-B. We believe that two different definitions create confusion. Unless there is a substantive reason for a different definition, we suggest using the DEP definition:

9. River, stream or brook. "River, stream or brook" means a channel between defined banks. A channel is created by the action of surface water and has 2 or more of the following characteristics.

A. It is depicted as a solid or broken blue line on the most recent edition of the U.S. Geological Survey 7.5-minute series topographic map or, if that is not available, a 15-minute series topographic map. [1995, c. 92, §2 (NEW).]

B. It contains or is known to contain flowing water continuously for a period of at least 6 months of the year in most years. [2001, c. 618, §1 (AMD).]

C. The channel bed is primarily composed of mineral material such as sand and gravel, parent material or bedrock that has been deposited or scoured by water. [1995, c. 92, §2 (NEW).]

D. The channel contains aquatic animals such as fish, aquatic insects or mollusks in the water or, if no surface water is present, within the stream bed. [1995, c. 92, §2 (NEW).]

E. The channel contains aquatic vegetation and is essentially devoid of upland vegetation. [1995, c. 92, §2 (NEW).]

"River, stream or brook" does not mean a ditch or other drainage way constructed, or constructed and maintained, solely for the purpose of draining storm water or a grassy swale. (1)

Response: The stream channel definition in the proposed rule is taken from MFS rule Chapter 21 Statewide Standards For Timber Harvesting and Related Activities in Shoreland Areas §3.BB. We believe it is in keeping with the spirit of the comment to use the definition from statewide standards. These standards are currently being phased in and will eventually be used statewide by foresters when conducting operations in shoreland areas.

SECTION 4. TRAINING REQUIRED

Comment: Why limit to licensed foresters, especially if fisheries biologists are involved and designating trees to be felled? Include Certified Logging Professionals and Master Loggers who will receive the same training as the foresters. (2)

Response: To clarify, the rule does not require that the biologist designate the trees to be felled: “The plan will include the beginning and ending coordinates of the treatment area, the number of pieces of wood to add and the average stream width. **The biologist may also mark trees to be felled, but this is not required.** [emphasis added]”

While the MFS recognizes that many trained loggers would be capable of executing these treatments without forester supervision, when the MFS proposed this legislation the legislative committee members had concerns about operating in such sensitive areas. The licensed forester requirement adds an extra level of accountability by ensuring that a licensed individual will oversee the operation. The same level of accountability does not exist for the other groups mentioned because they have no license to put at risk. Having forester involvement is also consistent with other rules involving operations near sensitive areas (marking prior to harvesting in resource protection districts for example).

Comment: Fisheries biologists should be required to be trained before creating plans. Most are probably not familiar with timber harvesting techniques or regulations. (2)

Response: The rule has been modified by adding a definition of biologist that includes a training requirement. **Biologist: A fisheries biologist employed by the Maine Department of Inland Fisheries and Wildlife or Maine Department of Marine Resources, or other qualified person identified by those departments, who has attended a training in wood addition techniques including an introduction to timber harvesting techniques and forestry regulation.**

SECTION 5. DESIGNATED STREAM REACHES

Comment: Section 5(B) and Section 7(C) – Section 7(C) suggests that the plan required by Section 5(B) need not be signed by DIFW or DMR, or the landowner or its agent unless the project is in an Atlantic Salmon Area. However, Section 5(B) requires

that the plan be “mutually agreed upon by the DIFW or DMR and the landowner or their agent.” Without the signature of the parties, it is unclear how the Maine Forest Service will determine that the plan has been mutually agreed upon. This could cause significant enforcement problems. We strongly suggest that Section 5(B) require the signature of the DIFW or DMR and the landowner or their agent and that section 7(C) be eliminated, as follows:

Section 5(B)

...The plan must be mutually agreed upon and signed by the DIFW or DMR and the landowner or their agent... (1)

Response: The rule has been modified as recommended.

SECTION 6. WOOD PLACEMENT STANDARDS

Comment: Species: Don't limit too much. Suggest language be changed: "...should be..." to "...are preferred..." (2)

Response: The rule has been modified as recommended.

Comment: E. Soil Disturbance

“Wood addition treatments must not cause soil to enter the stream, or damage stream banks and adjacent areas such that soil erosion into the stream could result.”

Comment: What are the consequences to forester, landowner, contractor if this happens? Probably impossible to avoid all soil entering stream if tipping over trees with root wad intact. Is it really that critical anyway? As written, this is so onerous as to kill the entire program.

Suggest: “Reasonable care should be taken to avoid sedimentation. Any situation which could result in continuing erosion to the water body should immediately be corrected with the use of riprap, hay bales, siltation fence, water bars or other appropriate measures.” (2)

Response: We acknowledge that as written this section is onerous, probably not practically attainable and would likely present a significant risk to a landowner who is voluntarily working to improve a public trust resource. However we are uncomfortable with the use of the word “should” in the recommended modification. We have modified the rule to clarify that reasonable measures must be taken to avoid sedimentation and if disturbance occurs that will lead to ongoing sedimentation steps must be taken to fix things.

“Reasonable measures must be taken to avoid the occurrence of sediment entering the stream channel and the disturbance of stream banks. If, despite such precautions, disturbance occurs which could result in continuing sedimentation,

these conditions must be immediately corrected with hay bales, siltation fence, water bars or other appropriate measures.”

Comment: Figure 4: The second paragraph states “for stability, 2 of the logs should be twice as long as the bankfull channel...” However, Section 6 (A)(3)(B) states “at least two key pieces must be used at each structure.” These two sections are inconsistent. In order to be consistent with Section 6(A)(3), we believe that the second paragraph of Figure 4 should state “for stability, 2 of the logs must be twice as long as the bankfull channel...” Without this change, there is confusion about whether the two key pieces are required or simply recommended. (1)

Response: Then intent of the key piece language is to be sure that trees placed are large enough to resist movement. Experience from Maine and other states has shown that unsecured wood needs to be of the size specified to have a good chance of staying put during high flows. It is possible to secure shorter trees by bracing them between or against standing trees or boulders, so clarifying language has been added to the rule to indicate that key pieces must be of the size indicated unless they can be stabilized by bracing between or against trees or other naturally occurring stable objects. **“Key pieces may be shorter if they can be effectively secured against movement by bracing against or between standing trees, boulders or other naturally occurring stable objects (See Figure 3).”**

SECTION 7. NOTIFICATION

Comment: I assume this refers to the current notification form. Clarify by rewording: “Prior to implementing a wood addition project a licensed forester, (or other person meeting training requirement?) must submit a Forest Operations Notification form to the Bureau of Forestry.” (2)

Response: The rule has been modified as recommended.

Comment: Remove part C. and incorporate those requirements into A. 3: “3. Include a copy of the treatment plan previously prepared *and signed by IFW, DMR or their designee*, for the designated stream reach.” (2)

Response: The rule has been modified as recommended, with the exception that the requirement for the landowner or agent’s signature has been added and a note that DMR signature is required if the reach is in an Atlantic salmon area as required in the original part C. 3. Section 7(A)(3). **“Include a copy of the treatment plan previously prepared and signed by IFW, DMR or their designee and the landowner or their agent, for the designated stream reach. DMR must sign the form if the reach is in an Atlantic salmon area.”**

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

1 – Cathy Johnson
Natural Resources Council of Maine
3 Wade St
Augusta ME 04330

2 – Barry Burgason
Certified Wildlife Biologist
Huber Resources Corporation
Old Town, ME 04468

Appendix 2. Notice of Agency Rule-making Proposal

AGENCY: Department of Agriculture, Conservation and Forestry – Division of Forestry

CHAPTER NUMBER AND TITLE: Chapter 25 Standards for Placing Wood Into Stream Channels to Enhance Cold Water Fisheries Habitat

PROPOSED RULE NUMBER (*leave blank; assigned by Secretary of State*):

CONTACT PERSON FOR THIS FILING: Keith Kanoti ph:207-287-1073 email: keith.kanoti@maine.gov
address: 22 SHS Augusta ME 04333

CONTACT PERSON FOR SMALL BUSINESS INFORMATION (if different):

PUBLIC HEARING (if any): Thursday November 15th at 2:00 PM at the Bangor Motor Inn,
701 Hogan Road Bangor, ME

COMMENT DEADLINE: 5:00 PM Monday November 26th Submit written comments to: Maine Forest Service
Attn: Rondi Doiron 22 SHS Augusta ME 04333

BRIEF *SUMMARY: This rule establishes standards for placing wood into stream channels under the supervision of a licensed forester for the purpose of enhancing cold water fisheries.

IMPACT ON MUNICIPALITIES OR COUNTIES (if any) None.

STATUTORY AUTHORITY FOR THIS RULE: 12 M.R.S., §8867-C; Public Law 2011, chapter 599

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

E-MAIL FOR OVERALL AGENCY RULE-MAKING LIAISON: keith.kanoti@maine.gov

DETAILED BASIS STATEMENT / SUMMARY:

The purpose of this rule is to streamline the permitting process for implementing cold water fisheries habitat enhancement projects that involve adding wood to stream channels. Projects implemented under the supervision of Maine licensed foresters, who have been trained by the Bureau of Forestry in cooperation with the Department of Inland Fisheries and Wildlife (DIFW) in these techniques, and take place in stream reaches designated by DIFW or Department of Marine Resources (DMR) biologists as needing treatment, do not require a state permit or fee if consistent with a treatment plan developed by a DIWF or DMR fisheries biologist or their designee. The intent of the plan is to provide additional guidance to the forester implementing the treatment; the plan must be mutually agreed upon by the DIFW or DMR and the landowner or their agent. The treatment detailed in the plan must be consistent with standards in this rule.

Copies of the rule may downloaded from the Maine Forest Service Website at:

<http://www.maine.gov/doc/mfs/fpm/water/index.html>

or be obtained by contacting Rondi Doiron by email rondi.doiron@maine.gov or phone 207-287-8421.
