BASIS STATEMENT

This rule is an amendment of Chapter 305 Permit by Rule Standards, which was originally approved by the Board in 1989, and Chapter 310 Wetlands Protection Rules, which was originally approved by the Board in 1990. These revisions were required pursuant to Legislative Resolve Chapter 116 (Public Laws of 1999, 2nd Regular Session of 119th Legislature) and deemed major substantive rules. The Resolve directed both the Departments of Conservation and Environmental Protection to provisionally adopt rules to regulate the cutting and removal of vegetation, other than timber harvesting activities, in areas adjacent to rivers, streams, brooks, ponds, wetlands and tidal waters. The Resolve directed the departments to adopt rules that retain consistencies and resolve inconsistencies, where appropriate.

The proposed revisions are based on conceptual, legislative amendments to the Natural Resources Protection Act (NRPA) that would give the Department authority over cutting and vegetation removal adjacent to natural resources. An exemption would be added to the NRPA that allows cutting adjacent to natural resources that mirrors the current Municipal Shoreland Zoning standards. This exemption is crafted such that adjacent cutting will continue to be regulated by towns in those areas where Shoreland Zoning is in effect. Cutting and removal of vegetation will be regulated by the Department in those areas not covered by Municipal Shoreland Zoning, which is alongside headwater streams upstream of the point where two perennial streams converge as depicted on a U.S.G.S. topographical map and certain types of freshwater wetlands where the Department currently has authority over adjacent activities.

The revisions to Chapter 305 occur primarily in Section 2 which regulated only those activities involving soil disturbance. This section was amended to require applicants to avoid and minimize any projects occurring adjacent to protected natural resources. The term “adjacent to” was amended to be the area within 75 feet of a protected natural resource, a reduction from 100 feet, and all regulated activities occurring within that setback, not just soil disturbance activities, will require permitting unless otherwise exempt.

The revisions to Chapter 310 involve adding “rivers, streams and brooks” as protected natural resources subject to the rule and adding “waterbodies” to the name of the chapter. Language in several sections was eliminated that would have allowed vegetation removal beyond that proposed to be allowed by exemption under the NRPA and precluded the Department from requiring an alternatives analysis for activities adjacent to protected natural resources. Additionally, an impact threshold was added for projects affecting rivers, streams and brooks such that no functional assessment or compensation will be required for smaller projects.

The Board of Environmental Protection received a number of comments on this rule during a public hearing held on October 18, 2001, in Augusta, Maine. Written comments were accepted into the record until 5:00 P.M. on November 2, 2001.

LIST OF COMMENTERS

1.	Nick Bennett	Natural Resources Council of Maine
2.	Bart Hague	landowner
3.	Abby Holman	Maine Forest Products Council
4.	Arthur McDermott	landowner
5.	Charles Woodman	landowner
6.	Gerry Mirabile	Central Maine Power Company

7.	Doug Denico	Plum Creek Timber Company
8.	Morton Moesswilde	Maine Forest Service
9.	Dan Hudnut	Wagner Forest Management
10.	Jennifer Burns	Maine Audubon Society
11.	Virginia E. Davis	Maine Real Estate & Development Association

RESPONSE TO COMMENTS

The following paragraphs contain summaries of comments in the record along with responses from the Department of Environmental Protection (Department).

1. **Comment:** The proposed amendments were strongly supported, noting the value of small streams for fisheries, food contribution to downstream waters, and for water quality improvement. Citing two studies, concerns were expressed that the 75 foot setback proposed may not be sufficient to provide pollutant filtration and protect aquatic insect communities. However, it was noted that the 75 foot proposal is consistent with municipal shoreland zoning. Further, it was stated that the new authority to regulate cutting and vegetation removal adjacent to protected natural resources will succeed only if the Department makes a concerted effort to educate the public. (1)

Response: The Department is aware from its review of scientific studies that various buffer or setback widths are deemed effective by the authors depending on soil, slopes, vegetative cover and the particular function or value of the stream trying to be protected. However, site-specific setback determinations are confusing and inefficient in a regulatory program, both for the public and the regulatory agency. The Department determined that a 75 foot vegetated setback is the minimum necessary to protect streams against certain types of impacts (e.g. polluted runoff) but is more than adequate to provide other benefits (e.g. shading). Further, the 75 feet setback proposed is consistent with Municipal Shoreland Zoning (SLZ) and the Land Use Regulatory Commission (LURC) standards. No change was made.

The Department agrees that a strong educational effort will be necessary to effectively implement this new authority. The development of an educational program is a directive included in Legislative Resolve Chapter 116 and it will be developed upon provisional adoption of the rule amendments.

2. **Comment:** Another commenter strongly supported the amendments, a strong educational effort by the Department, and suggested that a 100 foot buffer would be better than 75 feet. A New Hampshire guidebook for municipalities was cited in which a 100 foot buffer was recommended. (2)

Response: The Department reviewed the guidelines cited by the commenter as part of its study of stream buffers. The Department finds that the recommendation of a 100 foot buffer in those guidelines is partly based on the studies the report writers referenced (50% of the studies recommended buffers of more than 100 feet, 50% recommended less) and partly on the fact that no standard buffer or setback is in effect in all the municipalities of New Hampshire except on large water bodies. Legislative Resolve Chapter 116 directed both the Department and the LURC to develop consistent rules, where appropriate, regulating cutting and vegetation removal. A seventy five foot setback is consistent with SLZ and LURC regulation on smaller streams, the type of natural resource most directly affected by the proposed amendments. No change was made.

3. **Comment:** A number of comments were made regarding the point rating system referred to in the clearing standards proposed as an amendment to the Natural Resources Protection Act (NRPA). The point rating system is used to measure a minimum, residual stand of trees required to be left within the 75 foot setback (used to define the term "well distributed stand of trees and other natural vegetation"). Commenters realized that the point system is in effect under SLZ but one felt that there is no basis for using an 8 and 12 point minimum nor a basis for assigning points given certain tree diameter ranges. Commenters also stated the system should give more credit (i.e. points) for larger trees but instead it favors smaller diameter trees in order to meet the requisite number of points required in the setback. Further, data on Maine's forest resources suggests that normal forests don't support enough trees naturally to rate 12 points under the point rating. It was suggested that rather than have all agencies adopt the point system, LURC standards should be adopted statewide and SLZ guidelines and municipal ordinances amended instead. (3, 7, 9).

Response: The point rating system used currently in the clearing standards under SLZ has been in effect since the early 1990s. It was developed in response to excessive clearing along the shoreline resulting from development and the need to have a measurable, repeatable, and enforceable standard. The Department's experience with the point rating system is that municipal Codes Enforcement Officers, department staff, forest rangers and the general public, with some training, can effectively use it to maintain a minimum amount of wooded buffer along the shoreline. The point rating system was originally developed to address a subjective standard of "well distributed stand of trees" and is not based on forestry data or principles. Rather, it is an attempt to provide some screening of development as well as allow views to the resource. It was developed through field trials, has been field tested routinely both during training and in the course of administering SLZ Ordinances, and was adopted by rule in March 1990.

Information submitted that suggests the forests of Maine do not naturally support enough trees to meet the point rating system is based on inventories of larger and/or commercial trees. The commenters themselves recognize that this data relating to the stocking of forests discounts small trees and in some cases non-commercial trees, all of which count toward points if greater than 2 inches diameter breast height (dbh). All of the concerns expressed related to meeting 12 points when in fact only 8 points will be required in the areas the Department will regulate should the Legislature adopt the proposed amendments to NRPA and these rules. Information submitted as part of the comments indicates the majority of areas naturally support at least this much growth.

The Department's experience with the point system has been that some clearing can be allowed while leaving enough trees to meet the required number of points. Information submitted suggests that the point system is biased toward smaller trees and the Department concurs. A major purpose of the vegetated buffer is for screening purposes and that is better accomplished with a mix of various age trees. It is less desirable to have only a few large trees providing screening and buffering functions on the natural resource. Additionally, if a site only contains a few large tress such that the requisite number of points does not exist, this does not constitute a violation. It only means no cutting can be allowed in that situation.

In the course of developing consistent regulations pertaining to cutting and vegetation removal, LURC staff also expressed a need for a clear standard given increased development pressure in the unorganized townships. This is why both departments felt it appropriate to adopt the clearing standards found in SLZ for LURC and NRPA jurisdictions.

Lastly, the point rating system is not actually part of the rule amendments being proposed. The point rating system is contained in a new exemption being proposed for the NRPA and it is not

part of the amendments proposed in either Chapter 305 or Chapter 310. Also, the department's proposal to amend NRPA would have no requirement to meet 12 points in the setback. Rather, the law's new jurisdiction and clearing standard would be applied along smaller streams and certain freshwater wetlands where only 8 points would be required. No change was made.

4. **Comment:** Concerns were expressed that the measurement technique for determining if the appropriate amount of trees is left within the 75 setback is too subjective. There is no precise methodology for setting out the 25 foot by 25 foot square plots to determine compliance. Information was submitted that by moving the plot just 5 feet one way or another can lead to significant point score variation. Further, it appears that if the applicable point rating is not met within ***any*** plot, then the entire setback area would be deemed in violation of the clearing standards. (3, 7, 9)

Response: The Department agrees no set methodology exists for laying out the plots to determine compliance and that the failure to meet the required points within any plot constitutes non-compliance with the standard. To the Department's knowledge, no enforcement action has been taken under SLZ where one 25 foot by 25 foot plot marginally fails to meet the required number of points after some cutting has occurred. However, if one plot is cleared totally, there is also a violation of the canopy standing and clearly the intent of leaving a "well distributed stand of vegetation" has been ignored.

These concerns, while valid, are related to proposed NRPA amendments and not the rule amendments. The Department is prepared to add additional language to the proposed NRPA amendments based on LURC's response to this same comment in its concurrent rule making effort.

5. **Comment:** The Maine Forest Service (MFS) commented that its field staff had limited sporadic experience with use of the point rating system although a few staff had extensive experience with it. MFS notes that the system, while it may have flaws, is workable and appropriate in smaller, well-defined areas, providing a methodical approach to assessing vegetation. MFS agrees that shifting plot layout can result in varying point ratings but that assessment of the area as a whole is more important that any point determination in just one plot. MFS also notes that data regarding the quantity of trees in the forest does not include smaller, and in some cases non-commercial, trees and does not reflect actual forest stands as they would relate to the point rating system. Although the rating system may favor smaller trees in the buffer, this appears to be desirable for screening and esthetic purposes as well as water quality purposes. (8)

Response: The Department concurs with these comments which is also reflected in responses to Comments # 3 and #4 above.

6. **Comment:** Larger canopy openings should be allowed (3,7,9) and a definition of "cleared opening" should be included. (9)

Response: The standard for canopy openings and the term "cleared opening" are part of the Department's proposed amendments to the NRPA and are not part of the rule amendments. However, both the standard and the term already exist in both SLZ and LURC rules.

7. **Comment:** The requirement to meet the applicable point rating under the clearing standards before any permit would be granted is off the mark. Few, if any, timber harvests, as currently allowed, would leave the required points within the setback. (9)

Response: The clearing standard is part of the Department's proposed amendments to the NRPA and are not part of the rule amendments. Further, the clearing standards do not apply to timber harvests. However, the Department is considering different language proposed for the NRPA based on LURC's response to this comment in its concurrent rule making effort.

8. **Comment:** One comment supported the proposed amendments and felt the 75 foot buffer on first order streams is a positive step forward. However, the rating score required in this buffer area should be 12 points, not 8 as proposed, to provide more vegetation and be consistent with LURC's proposed amendments. (10)

Response: The point rating system referred to is not a part of the rule amendments: it is part of a proposed exemption to the NRPA which will be taken before the Legislature in 2002. It is agreed that requiring 12 versus 8 points to remain in the buffer would result in a denser stand of trees, but it would not be consistent with either existing SLZ standards or LURC's proposed rules (LURC is proposing 8 points on small streams).

9. **Comment:** One commenter supported the reduction from 100 feet to 75 feet as the area to be defined as "adjacent to" but was against increased protection of areas adjacent to freshwater wetlands, further restricting the ability to utilize the wetlands, such as for purposes of sewage treatment. It was felt this could constitute a takings. (4)

Response: Only those freshwater wetlands where the Department currently has jurisdiction over adjacent activities will also be subject to the new cutting and vegetation removal standards proposed to be added to the NRPA. Activities adjacent to protected natural resources that exceed the clearing standard will require permitting. As proposed, a number of these activities may be eligible for the Permit by Rule process. Other activities will require full permit review. The need for a permit does not constitute a takings in and of itself. Any takings claim is both fact and site specific. Nothing in these rules prohibits outright the use of lands within 75 feet of streams or freshwater wetlands.

10. **Comment:** One commenter noted that with a new jurisdiction over cutting and vegetation removal adjacent to protected natural resources, it is unclear whether the clearing associated with the installation of overhead utility lines, and the maintenance of cleared areas, would be allowed as part of a crossing approved under Section 9 of Chapter 305 "Utility Crossings". Noting that undefined terms can lead to inconsistent interpretations among staff when determining the standards or applicability of PBR, it was suggested that definitions for "Installation" and "Maintenance" be added in Chapter 305 Section 9(D). (6)

Response: As written, nothing in the proposed NRPA, Chapter 305 or Chapter 310 amendments would prohibit, or require a permit for, maintenance of existing cleared areas. Currently, the clearing of trees associated with the installation of a new overhead utility line across a river, stream or brook is not regulated. The Department does intend to allow the necessary clearing for these utility crossings under the PBR process, as applicable, and agrees that some clear indication of this allowance is needed. Rather than develop 2 new definitions, the Department proposes to add language to the existing "Crossing" definition found in Chapter 305 Sections 9 (D)(1) and 10(D)(2) as follows:

> Crossing. Any activity extending from one side to the opposite side of a protected natural resource, or to an island or upland within a protected natural resource whether under, through or over that resource. Such activities include, but are not limited to, roads, fords, bridges,

culverts, utility lines, water lines, sewer lines and cables, and the clearing and removal of vegetation necessary to install and maintain ~~as well as maintenance work on~~ these crossings.

11. **Comment:** A comment was received opposing the proposed amendments to law and rule if the new authority over cutting and removal of vegetation adjacent to protected natural resources prohibits the continued, routine clearing of vegetation along a brook. (5)

Response: In language proposed in the clearing standards under NRPA, an exemption for the maintenance of cleared areas would be included which allows continued removal of vegetation in areas already cleared.

12. **Comment:** One commenter supported the objective of improving water quality and developing uniform, consistent regulation of vegetation removal across the state. Concerns were expressed that:

a. the new rules may promote sprawl by making it more difficult to construct in developed areas, thus promoting development on larger, more remote land;

b. the amendments proposed would reduce the effective use of Section 2 of PBR. The commenter recommended that Section 2 of PBR remain the same and stated that the waiver of the 14 day waiting period is an important provision which should not be eliminated;

c. a separate section should be created in Chapter 305 to address cutting and vegetation removal and clear standards developed so applicants can determine if they qualify for the PBR process;

d. the requirement that development within 25 feet of a protected resource receive a full permit may make development of this area infeasible;

e. regarding the showing of "no practicable alternative", the Department's review should be limited to that parcel of land and the project layout and design. Additionally, projects located in areas already developed should be facilitated and language was suggested for Section 2(C)(1) that 'projects located in an existing developed area and consistent with the pattern of development' are presumed to have no practicable alternative; and

f. the consequences for subdivisions created after September 1, 2002, are too severe. This language will pose significant limitations on subdivisions and may lead to larger lots being created. (11)

Responses: The following responses correlate by letter to the comments listed above:

a. While the Department also opposes sprawl, it is inappropriate to sacrifice our natural resources to prevent it. The goals to reduce sprawl, improve water quality and protect natural resources are not mutually exclusive and can be accommodated by increasing development densities further away from protected natural resources.

b. and c. The department disagrees that a separate section regarding cutting and vegetation removal activities needs to be created under Chapter 305. The types of development activities referred to by the commenter are likely already subject to NRPA and Chapter 305 since earth moving and construction are involved, not merely the cutting of vegetation. The Department concludes that it is most efficient to deal with all the regulated aspects of a given development

under one set of standards. The elimination of the 14 day waiting period for projects performed by contractors certified in erosion control by the department is necessary in order to accommodate an anticipated increase in review times associated with the determination of "no practicable alternative". The department will explore other incentives for these certified contractors outside of this rule making and as part of the certification process. No change was made to the rule.

d. Under current rule, the Department has for many years required, and issued in appropriate circumstances, a full permit for activities within 25 feet of the protected resource with the exception of those few activities specifically listed in Section 2 of Chapter 305 as being allowed in this area.

e. Under the amendments, determining 'no practicable alternative" is limited to the parcel on which the activity is proposed. The department considers the project design, layout and utilization of existing cleared or developed areas as part of the determination that a project's impact has been minimized. The activities listed in Section 2(C)(1) which are presumed to have "no practicable alternative" clearly demonstrate a need to be located within the 75 foot setback. The "pattern of existing development" has no relevance to demonstrating a need to be within the setback, especially if it is meant to include consideration of development as it exists in the general area and off the subject parcel. As for current development layout on the parcel, the consideration of existing cleared or developed areas is already factored in under the minimization standard. No change was made to the rule.

f. Regarding the restriction on subdivisions created after September 1, 2002, the Department finds that newly created subdivisions should incorporate buffers on streams or use them as side lot lines instead of straddling the stream with the lot.

12. **Comment:** Regarding proposed amendments to Chapter 310 Wetland Protection rules, comments were received that the Applicability section should have language that clearly indicates the rule applies to cutting and vegetation removal within 75 feet of a river, stream or brook. The rule is not clear about what methodologies would be required for functional assessment, the requirements for compensation, and how much vegetation removal would be allowed beyond the standards contained in the clearing exemption proposed in NRPA. The rules are overly burdensome given the blanket exemption for forestry activities. The considerations required in an alternatives analysis should be limited to project design and layout and the rule should reflect the benefits of locating projects in areas already developed. (11)

Response: The rule does not now make any references to the types of activities subject to the rule. Rather, applicability of the rule is based on the natural resource being impacted and the level of permitting required. There are no specific functional assessment methodologies or compensation requirements currently in the rule. The rule does not now define any minimum amount of impact beyond which the Department cannot or will not issue a permit. Strict limits and rigid thresholds that effectively prohibit some activities from even being contemplated may deny the State and the public certain opportunities and effectively undermine the concept of compensation, which has proven a valuable and useful tool in mitigating impacts. Once a project reaches the level that requires a full permit and is subject to Chapter 310 standards, the Department position is that all of the current standards in the rule should apply to activities affecting rivers, streams and brooks just as they do for activities affecting other protected natural resources. A lesser avoidance standard would not be appropriate. No changes were made.