Maine Forest Service Interpretations of the Maine Forest Practices Act Statute and Rules
(12 MRSA §8867-A to §8888 & MFS Rules Chapter 20)

These interpretations take into account the full context, meaning, and intent of the Forest Practices Act, the associated Maine Forest Service (MFS) Rules, and the interpretations themselves, and must be used within that context.

Chapter 20, Section 2, Definitions

1. How are stump sprouts to be counted?

   Answer: Each stem in a sprout clump will be counted as an individual tree, provided it is "acceptable growing stock" as defined in the rule.

2. Are Alder and Chokecherry acceptable growing stock?

   Answer: No, Alder and Chokecherry are not considered to be trees that are generally capable of developing into merchantable products.

3. Where there is a designated agent and the rules call for landowner responsibility, who is ultimately responsible, landowner, designated agent, or both?

   Answer: The landowner will always be held ultimately responsible.

4. If a public road separates a parcel, can a landowner create a 40 acre clearcut on one side of Route 27 and have a 40 acre separation zone on the other side of the road?

   Answer: No. According to Chapter 20, section 2.A.35 (definition of a parcel), "…..Contiguous tracts completely separated by a public road or roadway are considered to be separate parcels under these rules." It is the intention of the law and the rules that the clearcut and the separation zone must be on the same parcel.

5. Is a utility line a change of use?

   Answer: Yes, and the Forest Operations Notification should show it as such.

6. If a landowner has a utility right-of-way through his or her property and wishes to create a clearcut, how will the right-of-way be treated with respect to the Forest Practices Act?

   Answer: The right-of-way will be treated as if it does not exist, just as a land management road is treated. It is neither a clearcut nor a separation zone.

7. What is the minimum distance that is required between openings less than 5 acres?

   Answer: An opening that is less than 5 acres is not a clear cut, and is not subject to the Forest Practices Act rules.

8. How large must an island of non-clearcut that falls within a clearcut be before it is counted as a separate area and not counted as part of the clearcut?

   Answer: The Forest Practices Act states that a clearcut must exceed 5 acres in size to be defined as a clearcut. Therefore when we conduct a cruise to determine whether an area is a violation of the Forest Practices Act, we consider any non-clearcut area surrounded by clearcut harvest area that is not 5 acres in size to be a part of the clearcut. Conversely, we remove from the clearcut acres any such area that is greater than 5 acres in size.

Chapter 20, Section 3, Notification

9. With regard to the landowner signature requirement on the Forest Operations Notification, is there a conflict between MFS Rules Chapter 20, section 3.A.1 (exception) and 12 MRSA §8883, sub-§1, paragraph H-1? If there is a conflict, which takes precedence, the rule or the law?

   Answer: The Rule says: "Exception: A landowner with a licensed professional forester in his employ is exempt from the requirement for landowner signature, provided the landowner maintains with the Bureau a list of licensed professional foresters authorized to sign for the landowner."

   The law says: "H-1. The signature of the landowner and the designated agent when a designated agent is listed in accordance with paragraph A. If the designated agent is a licensed professional forester who has a fiduciary responsibility to the landowner, the signature of the landowner is not required;"

   While we do not see that there is a clear conflict in this case, whenever there is a conflict between a rule and a law, the law shall take precedence.

   The exception in the rule applies in the case of a landowner (usually large) who "employs" a Licensed Forester, in other words, would the Internal Revenue Service consider the Licensed Forester an employee? If this is the case, the Licensed Forester can sign as the landowner (as long as the Licensed Forester is on the list maintained by the landowner with the MFS), there need not be a Designated Agent named, and the landowner need not sign the notification.

   The language in the statute applies when the landowner's designated agent is a Licensed Forester who has a fiduciary responsibility to the landowner. This allows the Licensed Forester (for example a consultant) to sign as the designated agent without the landowner's signature. If that is the case, the landowner does not have to sign the notification.

10. Given the answer to (9), what is the meaning of the phrase "a licensed professional forester who has a fiduciary responsibility to the landowner?"

    Answer: The term fiduciary is a legal term which has several separate but related meanings depending on the way it is used. We have compiled several definitions from Black's Law Dictionary, to develop an interpretation for use in the Forest Practices Act rules:

    - "Fiduciary. A person having a duty, created by his undertaking [contract or agreement], to act primarily for another's benefit in matters connected with such undertaking...[and] having duties involving good faith, trust, special confidence, and candor towards another."
    - "Fiduciary duty. A duty to act for someone else's benefit, while subordinating one's personal interests to that of the other person. It is the highest standard of duty implied by law (e.g., trustee, guardian)."
    - "Agency. Agency is the fiduciary relation which results ... between two persons, by agreement or otherwise, where one (the agent) may act on behalf of the other (the principal) and bind the principal by words and actions."

    When a fiduciary relationship exists, the agent is governed by legal principles, including "full disclosure." Black's defines full disclosure as a "[t]erm used in variety of legal contexts, e.g. a fiduciary who participates in a transaction for his own benefit is required

to fully reveal the details of such ..." The full disclosure principle also generally applies when a "conflict of interest" situation arises because a person with a fiduciary responsibility has a "private interest in, [or stands to] gain from," a fiduciary transaction or relationship.

Based on these legal definitions, we interpret the term "fiduciary" as used in the Forest Practices Act statute to apply to Licensed Foresters as follows: A Licensed Forester represents the landowner and the landowner's interests. The Licensed Forester owes a duty of trust and full disclosure to the landowner with regard to the harvesting operation. The same Licensed Forester may also represent the harvester or other purchaser of the timber; provided the Licensed Forester has fully disclosed all relationships to all parties he has a fiduciary responsibility to, and does not use any relationship to benefit himself at the detriment of any of the parties.

In addition to the fiduciary language in the Forest Practices Act statutes, Licensed Foresters are also governed by licensing board requirements, including the board's code of ethics for Licensed Forester (02, Department of Professional and Financial Regulation; 333, Maine State Board of Licensure For Professional Foresters, Chapter 100, Code of Ethics), which requires Licensed Foresters to avoid conflicts of interest, or even the appearance of them, and if one is discovered, to promptly and fully disclose it to the employer, and take action immediately to resolve it.

11. If I am harvesting wood on my own land, do I need to file a Forest Operations Notification?

Answer: Yes, unless you are specifically exempted under the so-called "small woodlot owner exemption." This applies only to owners of small woodlots who personally harvest small amounts of wood (2 acres of clearcut or 5 acres of partial cut) from their woodlots on an annual basis. MFS interprets this section to apply only to harvesting on woodlots, not areas used or planned for conversion to residential areas or other development.

Justification: 12 MRSA §8883-B, sub-§6 states in part:

"**5. Notification exemption.** The following activities are exempt from the notification requirement under this section:

"...C. Harvesting performed by the landowner[1] within a 12-month period when the total area harvested on land owned by that landowner does not exceed:

(1) Two acres if the residual basal area of acceptable growing stock over 4 1/2 inches in diameter measured at 4 1/2 feet above the ground is less than 30 square feet basal area per acre; or

(2) Five acres if the residual basal area of acceptable growing stock over 4 1/2 inches in diameter measured at 4 1/2 feet above the ground is more than 30 square feet basal area per acre."

12. If I am a logger clearing house lots or road rights-of-way in an approved development, do I or the landowner(s) need to file a Forest Operations Notification?

Answer: Yes, unless you are specifically exempted by the so-called "houselot exemption." When the landowner resides on the lot and plans to clear a small amount of additional area, or cut a few trees related to the use of the land as a houselot, or in situations where there is no house but where the landowner possesses a building permit and plans to clear the lot for houselot purposes, a Forest Operations Notification is not required.

[1] Underlined language is amendment approved by the 121st Legislature.

A logger clearing lots that the logger owns for the purpose of resale for development must file a Forest Operations Notification. A landowner conducting any harvesting prior to the sale of lots to other parties must file a Forest Operations Notification.

Justification: (MFS Rules Chapter 20, section 3) states in part:

"EXEMPTION FROM NOTIFICATION REQUIREMENT: The following types of timber harvests are exempt from the notification requirements of this section, even if the forest products harvested are sold commercially:

1) Removal of single trees or small groups of trees from residential yards, roadsides, and similar urban or suburban settings where the tree removal occurs on an area two acres in size or less, and is conducted for the purposes of hazard tree removal, right of way and driveway clearance, and lot clearance for the construction of residential dwelling units. This exemption applies only to land on which a person resides, or for lot clearing operations for a landowner who possesses a building permit, or where such lot clearance does not exceed the necessary construction footprint."

13. When a utility line is to be cut through a property, who is responsible for filing the Forest Operations Notification?

    Answer: This question has two answers depending on the circumstances:

    1 - In the case of a single crossing of a single landowner, whoever owns the land is responsible for filing the Forest Operations Notification.

    2 - In the case of a utility line crossing multiple landowners we will accept a Forest Operations Notification from the utility company and they can list themselves as the landowner.

    In either case it will be necessary to file a separate Forest Operations Notification for each town involved, and the map must show the corridor.

14. What procedure should a landowner follow if during the 2-year life of a notification which notifies for a partial cut, the landowner decides to create a category 3 clearcut?

    Answer: The landowner should amend the notification by sending MFS a letter which references the existing notification number, and which is accompanied by a harvest plan required of such a clearcut. Once the amendment and the plan is received and date stamped by the MFS, the clock will start on the 60 day waiting period. During the waiting period, the landowner may continue with the partial cut, but may not create the category 3 clearcut.

Chapter 20, Section 4, Regeneration Standards

15. Regarding certification of Regeneration for Category 2 and Category 3 clearcuts, when does the 5-year clock start?

    Answer: The 5-year clock starts at the completion of the harvest. See section 4B of the rules.

Chapter 20, Section 5, Clearcut Standards

16. If I only have one clearcut on a piece of property, do I need to have a separation zone?

    Answer: Yes, if your total statewide ownership is greater than 100 acres.

17. If the separation zone fails between two clearcuts of any category, do they combine (grow) and become a larger clearcut and a possible larger violation, or are they to be treated as two separate violations?

    Answer: The two clearcuts will be treated separately. The existing situation will be analyzed by enforcement staff to ascertain what specific violations have occurred, including consideration of any other environmental laws and rules involving such issues as riparian buffers, water quality, set-back etc.

18. When can a clearcut created under the old rules be used for separation zone for a new clearcut?

    Answer: This answer has 2 parts, depending on the category of the clearcut. The old clearcut can be used for separation zone for a Category 1 clearcut once it is stocked with at least 450 trees per acre (with no holes greater than 5 acres). The old clearcut can be used for separation zone for a Category 2 or Category 3 clearcut once it is stocked with at least 300 trees per acre (with no holes greater than 5 acres) that are 10 feet tall for softwood, and 20 feet tall for hardwood, or when the said harvest area is stocked with at least 450 trees per acre (with no holes greater than 5 acres), and 10 years have elapsed since the clearcut was created.

19. Is the edge of the separation zone the average drip line?

    Answer: Yes.

20. What is a Certified Wildlife Professional, and who are they?

    Answer: The program for certification of wildlife biologists is a service provided by the Wildlife Society (a national society) for its members as well as nonmembers and the public, who may desire a peer review evaluation statement. Certification constitutes recognition by the Wildlife Society that, to the best of its knowledge, an applicant meets the minimum educational, experience, and ethical standards adopted by the Society for professional wildlife biologists. Certification does not constitute a guarantee that the applicant meets a certain standard of competence or possesses certain knowledge. A list of Certified Wildlife Professionals is available from the Wildlife Society. We will also accept certifications from Department of Inland Fisheries and Wildlife Regional Biologists as well, as long as such certifications are prepared on state time.

21. With regard to the Category 3 clearcut review and approval process, does the clock start when MFS receives and date stamps the notification and plan?

    Answer: Yes.

22. With regard to the 100 acre exemption, does the 100 acres include all land or just forest land?

    Answer: All land.

23. If a landowner, during the 2-year life of a notification, decides to connect two notified category 2 clearcuts and make one category 3, does the landowner have to stop and start the category 3 process? Should the vehicle be a new notification or an amendment?

    Answer: Yes. The vehicle should be an amendment to the existing notification.

24. If a clearcut and its associated separation zone were created under the old rules, can any of that separation zone be used as shared separation zone for a new clearcut under the new rules?

Answer: Yes, as long as the old separation zone remains intact until the old clearcut is no longer a clearcut under the old rules, the separation zone distance, but not the area, can be shared by the new clearcut.

25. If you have two 70 acre clearcuts, separated by a separation zone 50 acres in size and each clearcut is surrounded by 250 feet of separation zone that makes the total separation 70 acres. Is that in conformity with the new rules which allow for sharing of a separation zone?

    Answer: No. It is the intention of the statute and the rules that separation zone distances can be shared, but acres cannot. According to the Forest Practices Act statute (12MRSA §8869 sub-§2-A), "A clear-cut must be separated from any other clear-cut by at least 250 feet except where a property line is closer than 250 feet from the edge of the clear-cut. Unless an exemption is provided in rules adopted pursuant to section 8867-A, a separation zone must be equal to or greater than the area clear-cut." When determining the area needed for separation zones, landowners must provide an area equal to the collective size of the clearcuts. In this case the separation zone would need to be 140 acres, with no less than 250 feet between them. The separation zone would of course need to meet the other separation zone standards as well.

26. Can trees less than 4.5" that are not acceptable growing stock be used towards the total of 60 sq. ft. required in separation zones between Category 2 or Category 3 clearcuts?

    Answer: Yes, as long as the trees are 1.0 " dbh or larger and as long as there are at least 40 square feet of basal area in acceptable growing stock and 40 square feet of basal area in trees 4.5 " dbh or larger.

27. If a landowner has a 300 acre parcel that borders on a public road, can the landowner clearcut 25 acres along the road?

    Answer: Yes, assuming the road is the landowner's boundary and the landowner has appropriate separation zone distance and acres on the other three sides, the landowner can create the 25 acre clearcut adjacent to the road.

28. If a Category 2 or Category 3 clear cut is surrounded by the required 250 foot separation zone width but the 1:1 separation zone area is a balloon that is connected to the 250 foot zone by a corridor of qualifying separation zone, how wide does this corridor need to be to meet the requirements in the rules? No other surrounding land will meet separation zone requirements.

    Answer: Since all separation zones must be at least 250 feet wide, the corridor described in the question must also be at least 250 feet wide. While implicit in this question, we also want to emphasize that unless the clearcut touches or approaches a boundary, the separation zone needs to be at least 250 feet wide all the way around each clearcut.

29. When creating a clearcut adjacent to a field, does the landowner need to leave a 250 foot separation zone along the edge of the field?

    Answer: Yes, assuming the landowner owns the field and the field is not adjacent to boundary in such a way that the boundary exception applies. The definition of a separation zone in the rules is: "...an area that immediately surrounds a clearcut and separates it from any other clearcut. A separation zone must consist of forest land, and must meet the standards and requirements of this rule. The separation zone may include forested wetlands, and skid roads or skid trails, provided these skid roads or skid trails are not immediately adjacent to a clearcut. A separation zone does not include other non-forest areas such as non-forested wetlands, public and private roads, land management roads, winter haul roads, driveways, utility lines, development sites, pipelines or railroad rights-of-

way." A field is not forest land and cannot serve as a separation zone. It is treated the same way that a land management road is treated.

30. How close to the edge of a clearcut must the separation zone be?

    Answer: The separation zone must be adjacent to and surround the clearcut. Except as otherwise exempted in the rules, if the forest growth immediately surrounding a planned clearcut does not meet separation zone standards for the category of clearcut being planned, the clearcut cannot be made legally.

31. Can an old clearcut that "grows up" to become separation zone quality during the life of an adjacent separation zone (it did not qualify at the time the separation zone was needed), be substituted for some of that separation zone at the time it does qualify?

    Answer: Yes, as long as the regenerated clearcut meets all of the requirements of a separation zone under the new rules.

32. Which of the four reasons for creating a clearcut should be used in the following cases: (1) site conversion, e.g. conversion from a natural hardwood or mixed wood stand to a softwood plantation? and, (2) the management objective of encouraging intolerant species that require full sunlight such as white birch?

    Answer: The selection of the reason for creating a clearcut is up to the landowner and/or the landowner's Licensed Forester after careful consideration of all the available options that are consistent with the landowner's objectives. Each decision likely will be based on its own unique set of circumstances, and it is not up to the MFS to make that decision for the landowner. Unless totally unsupportable from the standpoint of acceptable forestry practices, the MFS will accept any of the four reasons that a Licensed Forester selects and is willing to support.

33. The rules state: "A certification, from the Licensed Forester or Certified Wildlife Professional preparing the plan, that the proposed harvest does not occur within significant or essential wildlife habitats, or if the harvest does occur within such areas, a certification that all appropriate approvals, permits, or variances have been obtained." What is the MFS expectation with regard to this requirement?

    Answer: For Significant Wildlife Habitat, this means that the Licensed Forester or Certified Wildlife Professional certifies, in writing, in the plan that the harvest does not occur within Significant Wildlife Habitat. It is the responsibility of the Licensed Forester or Certified Wildlife Professional to check the Department of Inland Fisheries and Wildlife maps. If MFS finds out later that the harvest did occur within a Significant Wildlife Habitat, it will be considered a violation. If the harvest is planned to occur within a Significant Wildlife Habitat, the Licensed Forester or Certified Wildlife Professional must submit either a copy of the approved Natural Resources Protection Act permit or the approved Permit by Rule with the plan. If the Regional Biologist is willing to send a letter concerning the issue, it would be prudent to include a copy in the plan.

    For Essential Wildlife Habitat, this means that the Licensed Forester or Certified Wildlife Professional certifies (in writing, in the plan) that the harvest does not occur within Essential Wildlife Habitat. It is the responsibility of the Licensed Forester or Certified Wildlife Professional to check the Department of Inland Fisheries and Wildlife maps. If MFS finds out later that the harvest did occur within an Essential Wildlife Habitat, it will be considered a violation. If the harvest is planned to occur within an Essential Wildlife Habitat, the Licensed Forester or Certified Wildlife Professional must submit a copy of the approved Department of Inland Fisheries and Wildlife variance.

34. We have purchased a large property on which the former owner created and reported many Category 2 clearcuts. All of these clearcuts have the required separation zones in place and harvest plans on file. The regeneration has been certified with MFS, but the young trees have not yet reached the required 10 foot height. for softwood, and 20 foot height. for hardwood, nor have 10 years passed since the clearcuts were created. It appears to us that these cuts are not clearcuts by definition, but were planned and reported as such in an abundance of caution by the previous owner. These clearcuts contain significant volumes of merchantable wood that we would like to capture. Can we re-enter these clearcuts? If we choose to do so, what do we need to do to make sure we don't violate the Forest Practices Act?

Answer: Since these clearcuts have been reported to the MFS as Category 2 clearcuts, they fall under Section 5.C.d of the rules. As such, they will remain clearcuts (and the separation zone must be maintained) until the regenerated clearcut contains a minimum of 300 trees per acre of acceptable growing stock well distributed over the harvested area, and the softwood trees are at least 10 feet tall and the hardwood trees are at least 20 feet tall, or 10 years have passed (if they are old rule clearcuts, they fall under the appropriate section of the old rules). While there is nothing in the Forest Practices Act that prohibits re-entry into a clearcut, you do so at considerable risk of damage to the regeneration and thus affecting the time that the harvest remains a clearcut and the separation zone must be maintained. The Forest Practices Act requires that landowners who wish to practice even-aged management utilizing Category 2 and Category 3 clearcuts, do so in a prescribed way that requires preplanning and assumes competent execution by a Licensed Forester. Taking into consideration the intent and the context of the Forest Practices Act, re-entry is allowed, but only if certain conditions are met by the landowner:

1) The landowner must file a new Forest Operations Notification, complete with a map and an attached letter, signed by the landowner or Designated Agent stating that this is a re-entry of a Category 2 clearcut originally notified and reported under a previous notification number and stating that number;

2) The landowner must amend the harvest plan for the original clearcut giving the reasoning for the re-entry, explaining what will be done, and documenting changes that will be applied on the ground. The amended plan must be signed by a Licensed Forester. The amended plan and the original plan must be kept on file and available for inspection by the MFS; and,

3) The landowner must file a new clearcut report under the new Forest Operations Notification number, referencing the original Forest Operations Notification number.

Further:

- The 10 year clock will start over;
- Regeneration must be recertified within 5 years as usual; and,
- The separation zone must be maintained to the standards required under the rules in effect at the time of the original clearcut.

35. Does the salvage of blowdown (an area where trees are blown over by a weather event) create a clearcut?

Answer: A salvage harvest does not create a clearcut, as long as ***only*** those trees damaged by the natural event are harvested. Trees that can be harvested are those that are blown down or damaged so that they are not considered to be acceptable growing

stock (Chapter 20 Rule: Sec. 2: A, 1, (B & C). You cannot opportunistically harvest any residual standing trees that were not affected by the blowdown. If the blowdown and salvage is done as outlined above and exceeds 5 acres in size, and site conditions are documented (photos, cruise, etc…), it will not create a clearcut.

36. Ten years have elapsed since a clearcut could be created under the "old rule" Forest Practices Act. The effective date of the FPA "new rule" was October 1, 1999, and any clearcut that was created prior to October 1, 1999 is subject to the "old rule" requirements for the life of a clearcut. Do the separation zones need to be maintained on these "old rule" clearcuts?

    Answer: Yes, separation zones on "old rule" clearcuts need to be maintained until ten years have elapsed since the clearcut was created and the clearcut has regenerated and meets one of the following criteria:

    1. The average residual basal are of acceptable growing stock (AGS) over 1 inch is 30 square feet of basal area per acre or higher and trees are well distributed over the harvest area.
       OR
    2. At least 60% of 1/500 acre plots or equivalent must have at least one tree of AGS that are five foot tall softwoods and/or 10 foot tall hardwoods and is equal to 300 trees per acre, well distributed. Plots will provide a fair representation of the entire harvest area.

    The Maine Forest Service suggests that if landowners are having problems in meeting these criteria on "old rule" clearcuts, to contact one of the Regional Enforcement Coordinators and discuss the situation.

37. Can a separation zone include a non-forested wetland?

    Answer: No. The definition of a separation zone from Chapter 20 rules states, "Separation Zone means an area that immediately surrounds a clearcut and separates it from any other clearcut. A separation zone must consist of forest land, and must meet the standards and requirements of this rule. The separation zone may include forested wetlands, and skid roads or skid trails, provided these skid roads or skid trails are not immediately adjacent to a clearcut. A separation zone does not include other non-forest areas such as non-forested wetlands, public and private roads, land management roads, winter haul roads, driveways, utility lines, development sites, pipelines or railroad rights-of-way." However, a separation zone can surround a non-forested wetland so long as the width of the non-forested wetland is not included in the required minimum 250 foot separation zone between clearcuts and the acres of the non-forested wetland are not counted towards the 1:1 separation zone area required for Category 2 and 3 clearcuts.

38. In Chapter 20 Rules, Section 5 (Clearcut Standards), C, 2c an exception exists on stocking requirements for Category 2 and 3 clearcuts that states, "Areas not capable of growing at least 60 square feet basal area per acre due to poor soils or other site conditions may be used as part or all of a separation zone, provided this condition is documented and mapped by a Licensed Professional Forester in a harvest plan available for inspection by agents of the Bureau". The question is does this included non-forested wetland areas?

Answer: No. Based on the definition of “separation zone” (see Interpretation 37 above), non-forested areas can not be used as separation zones for clearcuts; non-forested areas include non-forested wetlands. The exception applies only to **forested** areas that have unique site specific conditions which prevent them from having the required stocking to qualify for clearcut separation zones. The key is that these areas need to be forested to be considered for the exception under the rules.

Chapter 20, Section 8, Effective Date

39. After October 1, 1999, how will I know if a harvest is under the old rules or the new rules?

Answer: If a harvest operation is notified and started on October 1, 1999 or later, it will be subject to the new rules. Otherwise it is subject to the old rules. In an enforcement action, the MFS will use any evidence it can find to ascertain the actual start date.