



Regulatory Bulletin

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MFPC sends out this periodic Regulatory Bulletin to keep members informed of the latest changes in federal and state regulations. The information is provided courtesy of the law offices of Pierce Atwood.

State Rulemaking Proceedings

DEP Construction General Permit

On March 10, 2003, the DEP issued its long-awaited Construction General Permit (CGP) for storm water discharges from construction activities of one acre or more, implementing both Phase I and Phase II of the Clean Water Act storm water program. The permit requires submission of a Notice of Intent form and compliance with specified performance standards for construction projects in all organized and unorganized portions of the State for which the DEP has delegated authority to administer the Act's NPDES program and which meet the size thresholds.

The requirement to comply with the permit is in addition to other federal and State requirements that may apply to construction activities. The CGP includes transition provisions for construction projects that were ongoing as of March 10th. With regard to silvicultural activities, the permit maintains the current regulatory exemption for non-point source silvicultural activities.

Under the regulation (DEP Ch. 521(10)), certain activities (including discrete conveyances related to rock crushing, gravel washing, log sorting, or log storage facilities) are defined as silvicultural point sources and these would require coverage under the permit if the other criteria are met.

Other activities, including "nursery operations, site preparation, reforestation and subsequent cultural treatment, thinning, prescribed burning, pest and fire control, harvesting operations, surface drainage, or road construction and maintenance from which there is natural runoff" are defined as non-point source activities and do not require coverage under the permit.

The permit became effective on March 10, 2003.

For more information, go to <http://www.state.me.us/dep/blwq/docstand/stormwater/construction.htm>

NRPA Scenic and Aesthetic Uses DEP Chapter 315

The DEP has proposed a new rule governing standards for meeting the Natural Resources Protection Act scenic and aesthetic uses criterion in individual NRPA permitting proceedings. In organized areas of the State, the rule would identify scenic resources to be protected, define when a professional visual assessment is required, and provide standards for mitigating or off-setting adverse visual impacts for permitted projects. Although many forestry activities are exempt from NRPA permitting, some are not, including harvesting activities in fragile mountain areas above 2,700 feet elevation.

A public hearing will be held April 3, 2003 and the deadline for comments is April 14, 2003. The proposed rule can be viewed at: <http://www.state.me.us/dep/blwq/315draft.pdf>

**MFS Ch. 22: Certified Resource Manager
Grant Program**

MFS has adopted rules establishing standards for administration of and eligibility for a grant program to encourage Maine foresters to obtain initial, independent 3rd party certification as an exemplary forest resource manager.

The new rule became effective March 1, 2003.

**Subdivision and Development Standards
LURC Chapter 10**

LURC has been working on a major rule revision that would affect subdivision and development projects in the unorganized areas. The stated purpose is to address ways to improve LURC's subdivision and rezoning review procedures by simplifying the review process for small-scale subdivisions and providing development standards for larger subdivisions. This issue came about after MFPC testified about the need to revise the subdivision process.

The revisions are expected to create new definitions for major and minor development based on gross floor area or impervious area, and for level 1 and level 2 subdivisions based on number of lots, acreage, proximity to and extent of road development and other compatible development, and location primarily within the M-GN subdistrict in certain identified townships that LURC has identified as most suitable for development.

Level 2 subdivisions would become an allowed use in the M-GN subdistricts of the specified townships without rezoning. The revisions would adopt comprehensive development standards for major subdivisions not qualifying as level 2. The standards would include significant new provisions governing parking and vehicular traffic, noise and lighting limits, erosion and sedimentation control, subdivision layout and design standards, and open space requirements.

LURC expects to host public informational meetings during April. The revisions are expected to be posted to rulemaking in May.

**DIFW Ch. 8, Bald Eagle
Essential Habitat Revisions**

The Department of Inland Fisheries and Wildlife proposed 45 additional designations of Essential Habitat for bald eagle nest sites, 16 deletions of previously designated Essential Habitats, 1 relocation of a previously designated Essential Habitat, and the repeal and replacement of Essential Habitat maps with effective dates prior to May 31, 2002. Consultation with DIFW is required prior to any state or municipal action (including permitting) for projects within Essential Habitat areas.

Advisory Council action approving the proposed rule is expected on March 20th, and the rule is expected to become effective on or about March 31, 2003.

DEP Ch. 2, Processing of Applications

The DEP has revised its Chapter 2 rules governing the processing of applications, appeals, and other administrative activities. The revisions make numerous minor and major changes to the rule, including adding provisions to incorporate alternative dispute resolution provisions into the appeals process.

The rule will become effective April 1, 2003.

DEP Water Withdrawal Reporting Program

As previously reported, those entities withdrawing water above threshold volumes that are not otherwise exempt under the DEP's water withdrawal reporting program were required to file an annual water withdrawal report with DEP by December 1, 2003. The DEP continues to answer questions about the scope of this new program, and expects to begin rulemaking on water use standards later this year. Information about the water withdrawal program and upcoming events and rulemaking proceedings can be found at: <http://www.state.me.us/dep/blwq/docmonitoring/>

Federal Rulemaking Proceedings

Reclassification of Gray Wolf - 50 C.F.R. Part 17

The U.S. Fish and Wildlife Service has announced a final rule reclassifying gray wolf populations in the lower 48 states from endangered to threatened under the Endangered Species Act, and establishing three Distinct Population Segments (DPS) for the species. The changes reflect the increase in wolf numbers and range in the lower 48 states. The reclassification made wolf populations in the Northeast (including Maine, New Hampshire, and Vermont) part of the "Eastern DPS" which encompasses states across the Midwest as far as the Dakotas.

This reclassification allowed the Service to list this DPS as threatened even though the existence and status of reproducing populations in the Northeast is still in question. Because populations in the western portion of this DPS have already exceeded recovery goals, this DPS may be delisted in the future. The final rule has not yet been published in the Federal Register. For more information, see:

<http://news.fws.gov/newsreleases/r2/7E125387-EC61-4A46-85B415926D56A03E.html>

Canada lynx listing - Reopening of Comment Period - 50 C.F.R. Part 17

In response to a recent decision by a federal district court, the U.S. Fish and Wildlife Service has reopened the comment period on its decision to list a Distinct Population Segment (DPS) of Canada lynx under the Endangered Species Act (ESA). Specifically, the Service is seeking additional information relevant to its reevaluation of whether lynx populations in the Northeast, Great Lakes, and Southern Rockies constitute a significant portion of the species' range and should be included in the listing.

The Service seeks information on lynx habitat quality and quantity, and is expected to consider

information from recent lynx studies in Maine.

The notice can be viewed at: <http://a257.g.akamaitech.net/7/257/2422/14mar20010800/edocket.access.gpo.gov/2003/pdf/03-6291.pdf>

If the Service determines that lynx populations in the Northeast should be listed either as a separate DPS or as part of another DPS, then activities in areas where lynx occur could be significantly impacted. In general, an ESA listing would mean that activities requiring any federal permit or authorization, or that involve federal action or funding, would first have to go through ESA consultation to determine potential impacts to lynx. Such consultation can result in permitting delays and/or additional permit conditions.

In addition, any activities that result in "take" of lynx (including anything that harms or harasses lynx and significant habitat modification that results in death or injury to lynx) would be prohibited and could result in substantial criminal or civil sanctions or citizen suits to enjoin such activities.

The deadline for comment is April 16, 2003.

FERC Hydropower Licensing 18 C.F.R. Parts 4, 5, 16 and 385

The Federal Energy Regulatory Commission has issued a notice of proposed rulemaking for a new licensing process for hydroelectric projects under the Federal Power Act. The new process would: (1) condense the existing (and lengthy) pre-filing consultation requirements with the Commission's scoping process under NEPA, (2) increase FERC staff's involvement in the development of licensing applications, (3) provide for increased coordination with resource agencies having mandatory conditioning authority, (4) provide for more public participation in pre-filing consultation, (5) establish schedules and deadlines for those participating in application development, and (6) require a Commission-approved study plan and a dispute resolution process for addressing disputes regarding study plans. Copies of the proposal can be viewed at: http://www.ferc.fed.us/hydro/docs/hydro_rule.htm.

FERC plans to hold several workshops on the proposal, including workshops on March 31 (tribal) and April 1 (public) in Manchester, NH. Written comments on the proposal must be submitted by April 21, 2003.

EPA and Corps Seek to Define “Waters of the United States” - 33 C.F.R. Part 328; 40 C.F.R. Parts 110, 112, 116, 117, 122, 230, 232, 300, 401

The Environmental Protection Agency and the Army Corps of Engineers have issued an advance notice of proposed rulemaking to obtain early comment on the scope of waters that are subject to Clean Water Act jurisdiction. The agencies are seeking to refine the definition of “waters of the United States” to clarify the scope of their jurisdiction after the Supreme Court held in *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers* that the presence of migratory birds alone does not make isolated waters jurisdictional. The agencies have outlined their position that, although the migratory bird rule can no longer be used to assert federal jurisdiction, other factors, such as whether the water is used for recreation, as habitat for shellfish, or for industrial purposes, can be used. At issue in this rulemaking will be how broadly the federal government can regulate the nation’s waters under all Clean Water Act programs. The proposal can be viewed at: <http://a257.g.akamaitech.net/7/257/2422/14mar20010800/edocket.access.gpo.gov/2003/pdf/03-960.pdf>

The deadline for comments on the proposal has been extended to April 16, 2003.

EPA Withdraws TMDL Rule Revisions - 40 C.F.R. Parts 9, 122, 123, 124, and 130

In a final action to become effective April 2, 2003, EPA has withdrawn revisions to its water quality planning and management regulations and related NPDES regulations dealing with Total

Maximum Daily Loads (TMDLs). The TMDL rule revisions, which never became effective, were promulgated in 2000 by the Clinton administration and would have revised the existing rules governing States’ obligations to identify waters not meeting water quality standards (impaired waters) and develop pollutant budgets (TMDLs) to restore water quality in those waters, including through NPDES permits. Nonpoint sources of pollution were included in the rule, which also included forestry activities. The withdrawal does not affect the existing TMDL rules last revised in 1992, and EPA intends to continue to work on regulatory and non-regulatory mechanisms to improve the TMDL program. The rule revision can be viewed at: <http://a257.g.akamaitech.net/7/257/2422/14mar20010800/edocket.access.gpo.gov/2003/pdf/03-6574.pdf>

Notice of Intent to Undertake Negotiated Rulemaking on “All Appropriate Inquiry” Standard 40 C.F.R. Ch. 1

EPA has published notice that it will establish a negotiated rulemaking committee to negotiate proposed federal standards for conducting all appropriate inquiry as required by the Small Business Liability Relief and Brownfields Revitalization Act. These standards, once adopted, would be used to determine who can take advantage of the innocent landowner defense and the Superfund liability limitations for bona fide prospective purchasers and contiguous property owners. The notice can be viewed at: <http://a257.g.akamaitech.net/7/257/2422/14mar20010800/edocket.access.gpo.gov/2003/pdf/03-5324.pdf>

The deadline for comment on the notice of intent to set up a negotiated rulemaking committee is April 7, 2003. EPA plans to hold a public meeting to discuss this process on April 15, 2003.

