

Forestry

Memorandum of Understanding

The Commonwealth of Massachusetts
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Memorandum of Understanding between the
Department of Environmental Protection
and the
Department of Conservation and Recreation
regarding the Wetlands Protection Act, and
the Forest Cutting Practices Act

This Memorandum of Understanding (MOU) supersedes that MOU entered into by the Department of Environmental Management (DEM), predecessor agency to the Department of Conservation and Recreation (DCR), and the Department of Environmental Protection (DEP) in September 1995.

I. Parties and Statement of Agreement

This Memorandum of Understanding (MOU) is entered into this 6th day of June, 2018 by and between the Department of Environmental Protection (DEP) and the Department of Conservation and Recreation (DCR). The MOU addresses procedures and responsibilities for each agency regarding forestry activities under the Wetlands Protection Act, M.G.L. c. 131, §40 (WPA); implementing regulations at 310 CMR 10.00; the Forest Cutting Practices Act, M.G.L. c. 132, §§40-46 (FCPA), and implementing regulations at 302 CMR 16.00, as may be amended from time to time.

The following procedures and responsibilities are supported by both DCR and DEP based on the understanding that it is mutually advantageous to cooperate in the undertaking described in this agreement.

II. Purpose

The purpose of this MOU is to reaffirm cooperative efforts between DEP and DCR by revising and updating the provisions of an existing MOU originally dated September 1995. This updated MOU identifies the roles that each agency will play to ensure that forestry practices are conducted in a manner consistent with the WPA, FCPA, and the regulations at 310 CMR 10.00 and 302 CMR 16.00. This MOU will serve to advise municipal conservation commissions, landowners, and other persons involved in forestry activities of the respective roles and responsibilities of all involved.

III. Procedures and Responsibilities

Under the WPA regulations, forest cutting practices are typically considered agricultural activities. Forestry activity is deemed work on Land in Agricultural Use when the land is presently and primarily used in producing forest products such as, but not limited to, biomass, sawlogs, and cordwood. (*see* 310 CMR 10.04 Agriculture (a)). Forestry activities subject to the FCPA that occur in Resource Areas and Buffer Zones¹ are **exempt** from the general performance standards of the WPA regulations if conducted in accordance with an approved forest cutting plan (FCP) and the requirements of 310 CMR 10.04 Agriculture (b)14. through 16.². An affirmatively approved FCP is one that has been reviewed and approved by a DCR Service Forester. A FCP that is granted approval solely due to a lapsed review period

¹ For the purposes of 302 CMR 16.00, the definition of "Wetland Resource Areas" shall be those subject to protection under M.G.L. c.131, § 40 and 310 CMR 10.00. A "Buffer Zone" as defined at 310 CMR 10.02(2)(b) is an area of land extending 100 feet outward from the boundary of any area specified in 310 CMR 10.02(1)(a). For the purposes of timber harvesting activity, the Filter Strip is an area of land adjoining the bank of a water body, where the cutting of trees and the disturbance of the ground are restricted in order to maintain conditions that shall help to infiltrate overland flow from precipitation into the ground and trap any sediments before they enter the water body. More information on the applications of Filter Strips may be found in 302 CMR 16.05(1)(d).

² Certain other forest cutting practices are not subject to the FCPA, do not require a FCP, and may be **exempt** from the WPA regulations, provided certain conditions are met. Such exemptions are limited to work on land **presently and primarily** in agricultural use and involving forest cutting as part of **normal maintenance and normal improvement** activities (310 CMR 10.04 Agriculture (b) and (c)), including activities such as harvesting saw wood and cordwood for personal use (i.e. cutting no more than 5,000 board feet or 10 cords per year). However, cutting *for personal use* greater than 5,000 board feet or ten cord but less than 10,000 board feet or 20 cords during any 12 month period requires an approved FCP. 310 CMR 10.04 Agriculture (b)15.

In the event that the general performance standards cannot be met, certain other tree-cutting activities may be permitted as "limited projects" depending on the magnitude of the alteration, availability of reasonable alternatives, and the extent to which adverse impacts are minimized and mitigation is provided. These activities include: work on land to be used primarily and directly in the raising of forest products per 310 CMR 10.53(3)(c); construction of new access for forestry per 310 CMR 10.53(3)(r); and the cutting of trees in excess of 10,000 board feet or 20 cords but less than 25,000 board feet or 50 cords within any 12 month period by owners for their own use per 310 CMR 10.53(3)(s).

is not an affirmatively approved forest cutting plan for purposes of this MOU and does not trigger the WPA regulatory exemption. (310 CMR 10.04 Agriculture (b)14.f.)

DCR and DEP agree that:

1. It is DCR's responsibility to enforce the rules and regulations regarding FCPs and to ensure that the requirements for a forest cutting plan have been fulfilled by the applicant. Plan fulfillment includes completion of the Best Management Practices section of the forest cutting plan in accordance with the *Massachusetts Forestry Best Management Practices (BMP) Manual* (2013), <https://www.mass.gov/media/1113281/download>, as may be amended from time to time. The BMP section shall describe Resource Area impacts and shall include a scaled map correctly identifying all Resource Areas based on the current Massachusetts Geographic Information wetlands datalayer (<http://maps.massgis.state.ma.us/images/dep/omv/wetviewer.htm>). The Applicant shall send any proposed forest cutting plans to the DCR and the conservation commission of the city or town in which the cutting is proposed at least 10 business days prior to the start of work. Failure to do so may delay approval or may be cause for DCR denial of the forest cutting plan.
2. All decisions relative to the approval or disapproval of the submitted FCP will be made by the DCR Service Foresters, who are agents of the DCR.
3. All FCPs will be checked by DCR against the current edition of the *Massachusetts Natural Heritage Atlas*. Forest cutting plans falling within estimated and priority habitat areas will be immediately forwarded to the Natural Heritage and Endangered Species Program (NHESP) of the Division of Fisheries and Wildlife (DFW), a Division of the Department of Fish and Game, for review and comment as required by 302 CMR 16.00.
4. DCR will contact each conservation commission by letter on an annual basis. The letter will identify the forest cutting plan requirements, the ability of the conservation commission to comment on forest cutting plans, and the DCR offices that can be contacted in the event of questions.
5. DCR will make a site inspection prior to taking action on forest cutting plans involving work in Resource Areas, certified vernal pools³, and endangered species habitat. If requested by the conservation commission, the DCR will meet with the conservation commission to review the Resource Area boundaries and cutting plan activities.
6. If DCR has taken no action to approve or disapprove the forest cutting plan within ten (10) business days after submission of the forest cutting plan, harvesting can begin only in non-jurisdictional upland areas. Work in Resource Areas cannot occur until a forest cutting plan has been affirmatively approved and the Certificate has been issued by DCR.
7. DCR will simultaneously send copies of forest cutting plan approvals, disapprovals, extensions, and amendments to the applicant, appropriate conservation commission, the designated Wetlands Program contact at the appropriate DEP Regional Office, and the NHESP of DFW when applicable. Such copies may be sent electronically. Such notice of the *Final Report* referenced in paragraph 9 below will also be provided by DCR to all parties.
8. An activity occurring within or causing alteration of a Resource Area that does not comply with an approved forest cutting plan also constitutes a failure to comply with the FCPA. Such activity, as

³ Under 314 CMR 9.00, a vernal pool is defined as a waterbody that has been certified by the Massachusetts Division of Fisheries and Wildlife as a vernal pool. Any discharge of dredged or fill material to a certified vernal pool is neither exempt from the wetlands protection regulations nor subject to the provisions of this MOU. Discharges of dredged or fill material to certified vernal pools require a variance pursuant to 314 CMR 9.08.

determined by DCR, invalidates application of the WPA regulatory exemption and will be addressed through a DCR Stop Order or other affirmative, written confirmation of a violation of the FCPA. DCR agrees to coordinate with the conservation commission and DEP to bring the activity into compliance.

9. DCR agrees to conduct a final inspection upon completion of the work authorized in the FCP and issue a final report and Service Forester certification in accordance with the approved FCP.

10. Forest cutting plans will provide, and Service Foresters will require within one year of completion of work: the substantial restoration of site conditions in disturbed Resource Areas and streams to allow for the reestablishment of pre-existing vegetation; the removal of material, such as filter fabric and corduroy; and the removal of temporary access across and through Resource Areas, unless approved as a limited project under 310 CMR 10.53(3)(r). Temporary structures and material (including bridges, culverts, and corduroy poles) shall be removed so that fords and other stream crossings are left in a stable, unobstructed, and free-flowing condition.⁴ Completion of the operation constitutes the later of: 1) the expiration date of the FCP; or 2) the date the FCP is certified by the Service Forester; or 3) the expiration date of the extended FCP.

11. DEP has the authority to ensure compliance with these conditions. In cases when a final FCP certification has not been issued due to non-compliance with the provisions of 302 CMR 16.00, DCR agrees to coordinate with DEP to ensure compliance.

12. DCR Service Foresters will attend Resource Area delineation workshops sponsored by DEP at least once every five years.

13. It is DEP's responsibility to enforce the WPA regulations and to determine if forest cutting activities are in compliance with the provisions of 310 CMR 10.04 Agriculture. DEP and DCR will seek to reach consensus on whether any violation constitutes a breach of the FCP, and coordinate to achieve compliance, prior to further enforcement action. An activity occurring within or causing alteration of a Resource Area that does not comply with a FCP and/or the FCPA, violates the requirements of 310 CMR 10.04 Agriculture (b)14. a. through f., or the relevant portion of 310 CMR 10.04 Agriculture (b)15., will not be exempt from complying with the WPA regulations. In such instances, the activities may be subject to enforcement actions by the DEP, DCR, NHESP and/or the local conservation commission. DEP and DCR agree to coordinate to bring the activity into compliance.

14. DEP agrees to assist in the delineation of Resource Area boundaries when requested by DCR. DCR also agrees to request assistance from municipal conservation commissions where such assistance may be helpful and the commission is amenable.

IV. Recommended Procedures for Conservation Commissions

DCR and DEP agree to recommend and support the adoption of the following procedures by conservation commissions:

1. The conservation commission will have the opportunity to comment on forest cutting plans submitted to DCR for approval, while they are still in the "application" phase, including the Best Management Practices Section and boundary delineation of Resource Areas. Comments should be submitted to the DCR Service Forester during the cutting plan notification 10 day comment period. However, comments regarding suspected non-compliance with an approved FCP may be submitted to DCR at any time if the commission has concerns about non-compliance.

⁴ Certain forestry practices may be exempt from federal Clean Water Act, Section 404 (33 U.S.C., §1344) requirements as noted in 33 CFR 323.4. If not exempt, the provisions of the Department of Army Corps of Engineers General Permits for the Commonwealth of Massachusetts (2018) should be consulted for federal permitting standards for wetland impacts associated with: temporary structure maintenance (GP 1); temporary construction, access, and dewatering activities (GP 14); and agricultural activities (GP 20),

2. It is suggested that at least one conservation commission member be designated the point of contact for review of submitted FCPs. The designated member(s) should be responsible for review of forest cutting plans, for contacting the DCR Service Forester with any comments, and for coordinating site inspections at the commission's discretion.
3. Upon review of the forest cutting plan, the conservation commission should contact the DCR Service Forester within the designated 10-day period if any of the following occurs:
 - a. The FCP appears incomplete, inaccurate, or is otherwise not fully understandable or readable, including but not limited to:
 - i. Resource Areas have been inaccurately identified;
 - ii. the limits of cutting are not clear;
 - iii. property boundaries are unclear;
 - iv. wetland and/or stream crossings are not depicted or appear inappropriately placed; or
 - v. the FCP appears to allow for or otherwise sanction an explicit or implicit change in land use from forest to some other land use.
 - b. the Best Management Practices Section of the forest cutting plan was not completed for those projects within Resource Areas, including Filter Strips adjacent to Resource Areas, or
 - c. the conservation commission has any questions regarding the forest cutting plan (e.g. distinctions between Buffer Zones and Filter Strips).
4. The conservation commission should coordinate with the appropriate DCR Service Forester to ensure compliance with the FCPA if:
 - a. work began in Resource Areas before an affirmatively approved forest cutting plan was issued; or
 - b. work is not in compliance with the approved forest cutting plan including working in Resource Areas that were not described as being part of the forest cutting plan.
5. If work is taking place in Resource Areas without an approved forest cutting plan, when such plan is required by the WPA regulatory exemption, the conservation commission may issue an enforcement order stopping work in Resource Areas.
6. If forestry activity subject to a FCP occurs in Resource Areas past the 10-day review period but the FCP has not been affirmatively approved, the conservation commission should notify the landowner and DCR that the activity may be in violation of the WPA and possibly the FCPA.

V. Outreach and Implementation


DCR and DEP will distribute this MOU on the interrelationship between the FCPA and WPA regulations. The agencies will conduct outreach to stakeholders regarding the pertinent regulations and requirements of this MOU, including the State Forestry Committee, DCR District Service Foresters, DEP Regional Wetland staff, conservation commissions, and persons involved in forestry activities (consulting foresters, loggers, natural resource managers, etc.). The agencies will ensure proper training of respective staff involved in oversight of forestry and wetlands protection laws and regulations.

Realizing that this MOU cannot cover all possible circumstances, and that compliance with wetlands and forest cutting laws and regulations is a common goal, the DCR and DEP will work together and cooperatively with local conservation commissions to resolve issues that may arise; and overall, to advance the common goal of natural resource protection.

VII. Duration


This MOU shall remain in effect until it is amended by the parties or, due to changes in the law or regulations or otherwise, the parties determine it is no longer advantageous or appropriate for the terms hereof to be followed.

Date Leo Roy, Commissioner
 Department of Conservation and Recreation



6/6/18

Date Martin Suuberg, Commissioner
 Department of Environmental Protection



6/6/18