

OFFICE OF POLICY AND LEGAL ANALYSIS

Date: March 22, 2013

To: Labor, Commerce, Research & Economic Development

From: Henry Fouts, Esq., Legislative Analyst

LD 491 An Act Regarding Timber Harvesting on Land Managed by the Division of Parks and Public Lands (Jackson)

SUMMARY

This bill prohibits the Department of Agriculture, Conservation and Forestry, Division of Parks and Public Lands from contracting for timber harvesting on land under its management if the contractor uses persons employed under the H2-A visa program for temporary foreign workers for that purpose.

TESTIMONY

<p>Proponents:</p> <ul style="list-style-type: none"> • Loggers are underemployed because of hiring of foreign workers, sometimes illegally. • States don't have to participate in the H2-A program – a state agency doesn't have to allow it. If this law was unconstitutional, the Director, whose policy is not to let foreign workers on state land, would be unconstitutional. Therefore, it must be unconstitutional. • Dept. of Conservation is going to new contracting method for timber – service contract. Would support an amendment to restrict large landowners and mills from bidding on service contracts on public lands (they subcontract out to Canadian companies). • There are abuses of the H2-A program in the Maine timber industry. For example, a Canadian starts a U.S. Company, claims there are no US workers available, then hires themselves as a temporary foreign worker. • A few years ago the Conservation Dept. caught a company that had brought Canadian workers to work on public land, and removed them. No other enforcement is currently possible. 	<p>Opponents:</p> <ul style="list-style-type: none"> • Share interest in having ME workers work on state land. Current Division of Parks and Lands policy achieves this – forbidding bonded foreign labor on state lands - without putting it in statute. • A letter from former AG Schneider regarding a similar bill in the 125th says it is unconstitutional to do this. • Have only found one occurrence of policy being violated, and it was quickly remedied.
<p>NFNA</p> <p>Supportive of legislation recently put in place (e.g. requiring equipment registration) as effective in addressing many of the problems of past abuse of the H2-</p>	

**DIVISION OF PARKS AND PUBLIC LANDS
TIMBER SALES POLICIES AND PROCEDURES**

I. POLICIES

A. BONDED LABOR It is Division Policy to favor the employment of U.S. citizens over non-immigrant temporary woodsmen (bonded labor, so-called) on harvesting operations carried out under stumpage permits issued by the Division of Parks and Public Lands. This policy may be waived by the Director for a specific permit and contract period upon certification by the Regional Manager that the permit holder has complied with the procedure specified by the Maine Bureau of Employment Security for employment of bonded labor.

B. EXPORT OF UNPROCESSED TIMBER It is the policy of the Division of Parks and Public Lands to support domestic markets whenever possible. Sales will be to the domestic market only, unless the Director determines that a combined domestic-export sale is warranted. Bidders supplying the domestic market will be allowed the opportunity to match a high bid involving export. (Proposed Wording: Bidders supplying the domestic market will be allowed to match the total high export within five working days of the bid opening and to match the terms and conditions of the timber sale.)

C. INSURANCE Permittees are required to maintain in full force and effect throughout the term of the permit (and extension), public liability insurance with a liability limit of not less than \$400,000 single limit coverage (was \$300,000); and workmen's compensation insurance, such policies of insurance to be issued by insurance companies qualified to do business in Maine, to name the State as an additional insured as its interests may appear and to provide for no cancellation thereof without notice to the State. Permittee shall deliver to the State promptly upon request, a certificate evidencing such insurance coverage. If a contractor is claiming an independent status, the independent contractor will not hire any employees to assist in the wood harvesting without first providing the required certificate of insurance or certificate of pre-determined of independent contractor status to the Division.

D. SUPERVISION A full-time woods foreman may be required if one or more mechanical harvesters are active on the job. The foreman must not be a harvesting crew member.

E. COMPETITIVE BIDDING Timber sales will be made under a permit awarded on the basis of competitive bidding together with an evaluation of a logging contractor's experience, reliability, reputation, financial responsibility and similar factors.

F. HIGHEST VALUE All severed timber shall be scaled and stumpage paid on the best product value.

G. COMPLIANCE WITH TITLE 12 CH. 220, Subsection 1848-2. Sale of National Resources from public reserved lands - Grant of Permits Persons engaged in timber harvesting on Public Reserved Lands must be compensated at rates not less than the most recently issued prevailing wage and piece rates and equipment allowances for the pulpwood and logging industry as determined by the Department of Labor, Bureau of Labor Standards. Pertinent information regarding wages, piece rate and equipment allowances shall be made available to the Bureau if requested.

H. SOIL DISTIBURANCE POLICY See attachment.

I. TRIP TICKET AND CHAIN OF CUSTODY POLICY See attachment.

J. SAFETY Permittee or sub-contractor is required to be CLP or Master Logger certified.

II. PROCEDURES

A. All bidden timber sales will be advertised in local, regional or statewide newspapers, as appropriate. Logging contractors on Division's mailing list will be contacted directly.

B. All timber sales will require the posting of performance and payment security by the contractor, up to the amount of 20 percent of the estimated total value of the stumpage.

C. All timber sales will use either "mill scale" or Division of Parks and Public Lands scale. There may be a fee charged for Division scaling.

D. Required road construction will have the location and design of all roads approved by the Permit Administrator in advance of construction.

April 15, 2011

Representative John Martin
2 State House Station
Augusta, ME 04333

Dear Representative Martin:

This letter is in response to your inquiry about my office's recent comments to the Joint Standing Committee on Labor, Commerce, Research and Economic Development about Senator Jackson's bill, LD 340, *An Act Regarding Timber Harvesting on State Land*.

At your request, our office re-reviewed the language of LD 340 and we continue to believe that it is unconstitutional as it presents preemption and equal protection issues under the United States Constitution. As previously conveyed to the committee:

LD 340 prohibits foreign workers who have been federally certified to work in the timber industry from working on Maine public lands. The federal program generally contemplates that foreign workers can only be certified if "(1) the employer has not offered foreign workers higher wages or better working conditions (or less restrictions) than that offered to U.S. workers, and (2) U.S. workers are not available for the employer's job opportunities." 20 CFR 655.200(b). There is a rather elaborate process for an employer to obtain this certification. The federal certification presents both a preemption and equal protection problems for this bill. While the courts have allowed states to ban aliens from certain occupations – such as police officers – there seems to be no basis upon which to ban federally certified workers, particularly where the certification is based upon the unavailability of U.S. workers.

Please let me know if you have any questions.

Sincerely,

William J. Schneider
Attorney General

cc: Senator Troy Jackson

