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GOVERNOR

DEPARTMENT OF CONSERVATION
MAINE LAND USE REGULATION COMMISSION
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PATRICK K. MCGOWAN
COMMISSIONER

LETTER OF WARNING

Juliet T. Browne
Verrill Dana, LLP
One Portland Square
Portland, Maine 04112-0586

November 19, 2008

Subject: Kibby Wind Power Project; TransCanada Maine Wind Development, Inc. and Plum Creek Timberlands; Final Development Plan Permit DP 4794; Kibby Township, Franklin County

Dear Juliet;

- Introduction.* The following Letter of Warning (LOW) is in regard to an erosion event that occurred at the Kibby Wind Power Project (KWPP) at the Series B turbine string on Kibby Range in Kibby Township, Franklin County, Maine on October 27, 2008. The site is being developed by TransCanada Maine Wind Development, Inc. (hereinafter "TransCanada") in accordance with the conditions of Maine Land Use Regulation Commission (hereinafter "LURC") Final Development Plan Permit DP 4794 (hereinafter "DP 4794"), and the standards of the Commission's Land Use Districts and Standards, as applicable. The construction of the KWPP is being conducted by TransCanada under an Easement Agreement with landowner Plum Creek. The subject property is part of Lot #1.1 on Plan #1 of Map #FR013. Construction of the KWPP was started in early July, after the permit was approved by the Commission on July 9, 2008. In advance of the earthwork, areas to be developed are cleared by a forest operations contractor, in this case Theriault Tree Harvesting (TTH), who is a contractor for Plum Creek. All activities associated with the construction of the KWPP are subject to the conditions of DP 4794 and the erosion control standards of Sections 10.25,M and 10.27,E of the Commission's Land Use Districts and Standards.
- Third party erosion control inspection program.* Condition #10,B of DP 4794 required that TransCanada establish and carry out a third party erosion control inspection program during construction of the KWPP. In accordance with that condition, Stephen Roberge was hired by TransCanada and conducted the first weekly erosion control inspection on July 22, 2008.

CATHERINE M. CARROLL, DIRECTOR

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3. *Background and site description.* The following is based on a combination of the staff site inspection report, the third party inspection reports, and a summary of events provided by TransCanada.

A. *Background.* On or about October 21, 2008, TransCanada initiated skidding operations using the AR5 Mile 2.0 Wahl Rd. Skidder Access Trail (hereinafter "Skidder Trail") on Series B. During a site inspection on October 22nd, Mr. Roberge determined that erosion control measures were lacking at the Skidder Trail, strongly advising that the trail not be used until erosion control measures were in place, and also recommending the trail not be used until the ground is frozen. On October 23rd an erosion control crew was mobilized, and Plum Creek was notified by TransCanada via email and phone message to shut down skidding operations. LURC staff was also contacted. By the end of October 24th, 325 ft. of silt fencing, 12 water bars on the Skidder Trail, and 10 stone check dams next to the log yard at the base of the trail had been installed. Due to missing the cease work order issued by TransCanada on October 23rd, skidding was resumed by the forest operations contractor on October 27th during wet weather conditions without sufficient erosion control measures in place. Mr. Roberge did a site inspection on October 27th after the significant rain event of 1.5 inches on Saturday and Sunday, October 25-26th, which had also caused existing snow to melt. On October 27th all work using the Skidder Trail was ceased, and by the end of October 28th, 33 additional check dams and 13 additional water bars were installed, for a total of 43 check dams and 25 water bars installed. Mr. Roberge also did a site inspection on October 30th with LURC staff present. The findings and recommendations resulting from that inspection are documented in Section #4, below. Mr. Roberge conducted subsequent site inspections on November 5th and 11th to track the progress of the remedial work, and make additional recommendations as needed.

B. *Site description.*

- The Skidder Trail is approximately 3,000 ft. long in two sections, with the lower section on the steepest slope being approximately 1,500 ft. long with a slope of approximately 20%. The trail provides access to the vicinity of the B-17 turbine site.
- A log yard is located at the base of the Skidder Trail.
- The Skidder Trail and log yard were existing and had been used for forest operations prior to this development.
- The lower portion of the Skidder Trail where the erosion occurred is located between 2,100 ft. and 2,300 ft. in elevation, and is in an (M-GN) General Management Subdistrict.
- Kibby Stream is located approximately 3,000 ft. down-gradient from the Skidder Trail, and is oriented perpendicular to the trail.
- Existing skid roads connect the Skidder Trail to Wahl Rd., and border the log yard.
- Intermittent streams or drainage swales running roughly parallel to the Skidder Trail are separated from the trail by vegetated buffers that are several hundred feet wide. However, due to previously harvesting activities, the area adjacent to the trail (which has well-drained soil) is rutted.
- Wahl Rd. is located approximately 2,600 ft. down-gradient from the Skidder Trail, and is oriented perpendicular to the trail.

- A map of the site is attached to this letter.
4. *Staff site inspection and recommendations.* On October 30th LURC staff inspected TransCanada's Series B development site. The inspection was conducted in response to the October 27th third party inspection report and as part of the Commission's legal responsibilities for regulating land use activities in the unorganized areas of Maine. Also present at the site inspection were third party inspector Steve Roberge, Dana Valteau (TRC Environmental), Sylvain Rompre (Reed & Reed), Matt Nazarko (TransCanada), and Bob Page (Sargent).
- A. *Observations.*
- During the erosion event on October 27th, which was caused by high precipitation, snowmelt, and repeated use of the Skidder Trail under wet weather conditions, soil was eroded down-slope from the base of the trail a distance of approximately 900 feet to the area of an existing log yard. Eroded soil was in an area of upland forest that has been previously clear cut and along a ditch next to the skid road where a series of stone check dams had been installed to filter sediments.
 - While evidence was found of heavy sediments having left the log yard, no evidence was found of the sediments having reached a LURC defined stream channel or a wetland. LURC staff was unable to definitively determine if muddied water had reached any LURC defined stream channel at any time during this event.
 - A distance of approximately 2,000 feet of cut-over and regenerating forest exists between the down-slope extent of the erosion event and Kibby Stream.
 - At the time of the site inspection, no skidding activity was occurring. Water was entering the log yard at the base of the Skidder Trail, and then leaving the yard area via a small ditch along a skid road. Concentrated flow leaving the site was slightly muddied, but was being treated. Water leaving the site as sheet flow was being directed to vegetated buffers.
- B. *Staff and third party inspector recommendations.*
- It was recommended that an existing small culvert outside the log yard that was plugged with brush be repaired to help to divert water leaving the log yard.
 - It was recommended that the ditch along the skid road be permanently stabilized, for example using a stone lining.
 - It was recommended that for the water bars installed uphill from the log yard along the Skidder Trail and the main skid road, at a minimum LURC Timber Harvesting standards (reference Section 10.27,D,5,a of the Commission's Land Use Districts and Standards) be employed. Water bars should be spaced no more than 45 ft. to 60 ft. apart where a slope is 16% to 20%, and 40 ft. apart where a slope exceeds 20%. It was also recommended that water bar outlets be extended to prevent diverted water from re-entering the Skidder Trail.
 - It was recommended that the outlet ends of the existing water bars be extended. Water bars should be constructed at a 30% angle to a trail, and be large enough to not be breached by runoff.
 - It was recommended that any overwhelmed silt fences be repaired.

- It was recommended that the Skidder Trail be put to bed and not used again until the ground is frozen.
 - The chart in TransCanada's Erosion/Sedimentation Control Plan should be updated to reflect the most current standards.
5. *Violations.* The activity involving the Skidder Trail did not comply with Conditions #3,C; #10,B; and #10,C of DP 4794; Sections 10.25,M,1,c and 2,b; and Section 10.27,E,10 of the Commission's Land Use Districts and Standards. Specifically:
- A. Condition #3,C states: "Unless otherwise granted permit approval, all approved activities and uses proposed in this Final Development Plan permit must meet the standards of Sections 10.25 to 10.27 of the Commission's Land Use Districts and Standards (as may be amended from time to time)."
 - B. Condition #10,B states: "Third party on-site inspections of erosion and storm water control measures during construction must, at a minimum, be implemented when the ground is frozen, saturated, or the area disturbed by the project would be one acre or more. The name of the individual or firm selected by the permittee for third-party inspection must be submitted to the Commission for review and approval. If inspections reveal that such measures are not functioning properly, remedial measures must be taken immediately. Inspections of erosion and storm water control measures must also be conducted by the permittee's on-site staff and its primary contractor's personnel."
 - C. Condition #10,C states: "The rock sandwich road design recommended by the State Soil Scientist, or other measures described in the "toolbox" of erosion/sedimentation and storm water control measures for this project, must be employed as proposed to maintain subsurface and surface hydrology where seepages and wetlands occur and to control runoff from all project areas. Existing stream crossings and drainage swales employing culverts may continue to be culverted."
 - D. Section 10.25,M,1,c states: "Soil disturbance shall be avoided or minimized when the ground is frozen or saturated. If soil disturbance during such times is unavoidable, additional measures shall be implemented to effectively stabilize disturbed areas, in accordance with an approved erosion and sedimentation control plan."
 - E. Section 10.25,M,2,b states: "Clearing and construction activities, except those necessary to establish sedimentation control devices, shall not begin until all sedimentation control devices have been installed and stabilized."
 - F. Section 10.25,M,3,b states: "A Commission approved erosion and sedimentation control plan in conformance with these standards shall be implemented throughout the course of the project, including site preparation, construction, cleanup, and final site stabilization."
 - G. Section 10.27,E,10 states: "In addition to the foregoing minimum requirements, except as provided for in Section 10.27,E,7, provision shall otherwise be made in conducting

timber harvesting operations in order to reasonably avoid sedimentation of surface waters.”

6. *Responsible party.* As the permit holder and developer of the project where the activity occurred, TransCanada is responsible for adhering to and/or taking appropriate corrective measures to assure that their site is in compliance with the Conditions of DP 4794 and the Commission's standards. Also recognized herein is the involvement in this matter of the forest operations contractor that conducted the work in the area where the activities occurred, TTH who works for landowner Plum Creek.
7. *Corrective measures.* Corrective measures were recommended by LURC staff during the October 30th site visit, and by the third party inspector during his October 22nd, 27th, and 30th site visits. The third party inspector provided additional oversight during his November 5th and 11th site visits. As of the November 11th site visit, the third party inspector reported that the necessary remedial measures had been put in place (see Section #4,B, above).
8. *Conclusion.* At this time, LURC staff have determined that the appropriate corrective measures have been taken to bring the site into compliance with the conditions of DP 4794 and the standards of Section 10.25,M. As such, the appropriate response at this time is a Letter of Warning. However, if the situation occurs again at any location throughout the development area, including the Series A and Series B turbine strings, as well as any of the other areas associated with this development, a Notice of Violation may be issued. In that event, discussions to resolve the violation(s) by means of an administrative settlement agreement resolution may be entered into. Alternatively, if an agreement cannot be reached, the Commission may pursue judicial enforcement to resolve any violations through legal action by the Maine Attorney General's Office.

LURC staff is authorized to resolve violations such as those described above in Sections #4 and #5, above, without seeking a monetary penalty or pursuing other enforcement action, provided the discrepancies are promptly and properly corrected. Based on our understanding of the activity, the circumstances involved, your cooperation in completing the remedial work, and anticipated continuing application of the needed protective measures, it appears that this matter can be resolved by this LOW and the on-site resolution that has been completed rather than through the more rigorous enforcement remedies available to the Commission.

Therefore, because you have properly completed the corrective measures indicated above in Section #4,B, and provided you continue to administer the measures required by the Erosion and Sedimentation Control Plan approved for the construction of this project, as well as those recommended by the third party inspector during his weekly inspections, LURC staff is inclined to resolve this matter without further action beyond issuance of this LOW. This action by staff does not exempt you from enforcement action in the future should you have subsequent violations, and you have an on-going obligation to maintain your property in compliance with the Commission's requirements.

If you have any questions regarding this LOW, or if you have additional information that may be useful in our consideration of this matter, please contact me at 207-287-4930. Again, we ask that you continue to implement in a timely manner any necessary erosion control measures. We appreciate your effort and cooperation in having expeditiously resolved this matter.

Sincerely,


Catherine M. Carroll, Director
Maine Land Use Regulation Commission

Enc: Site map

cc: Frank Cuff, Plum Creek
Dana Valleau, TRC Environmental
Steve Roberge, P.E., S.J.R. Engineering, Inc.
Bob Weingarten, Friends of the Boundary Mountains
Cathy Johnson, Natural Resources Council of Maine

xc: DP 4794 File
ZP 709 File

Leisa Dennett

From: Spencer-Famous, Marcia [Marcia.Spencer-Famous@maine.gov]
Sent: Monday, November 10, 2008 8:52 AM
To: Higgins, Darian; Hubbard, Ian
Cc: Rollins, Scott; McKee, Robert
Subject: FW: Kibby Inspection Report

Dana verified that Plum Creek's contractor was the one who did the activity, not Plum Creek per se. Nevertheless, Plum Creek is responsible for their contractors, just like TC has the overarching responsibility for all the contractors working on the development.

-----Original Message-----

From: Valteau, Dana (Augusta,ME-US) [mailto:dvalteau@trcsolutions.com]
Sent: Monday, November 10, 2008 8:36 AM
To: Spencer-Famous, Marcia
Subject: RE: Kibby Inspection Report

Darian is right, Plum Creek has contractors do their work. Their contractor for this area is TTH (Therault Tree Harvesting).

-----Original Message-----

From: Spencer-Famous, Marcia [mailto:Marcia.Spencer-Famous@maine.gov]
Sent: Mon 11/10/2008 8:14 AM
To: Valteau, Dana (Augusta,ME-US)
Cc:
Subject: FW: Kibby Inspection Report

Can you help clarify this? I am planning to draft something today and would like to make the correct statement.

From: Higgins, Darian
Sent: Monday, November 10, 2008 8:08 AM
To: Spencer-Famous, Marcia; McKee, Robert; Rollins, Scott
Cc: Hubbard, Ian
Subject: RE: Kibby Inspection Report

I can confirm that there was no one from PC present at the site inspection or at the post inspection meeting. For the sake of clarity, PC is not actually doing the skidding. They have contracted out to TTH Inc. and possibly others. I'm not even sure if PC owns a skidder. Is there any reason we can't name PC and TC as violators?

Nick Bennett

From: Stephen Roberge [sjroberge@roadrunner.com]
Sent: Thursday, October 23, 2008 4:52 PM
To: Spencer-Famous; Marcia; Chris Cinnamon-Langille; Dana Valteau; darienzo@adelphia.net; Jack Distranski; Matthew Nazarko; Rocque, David
Subject: Kibby Observations 102208
Attachments: 102208.doc; Invitation to view Steve's Picasa Web Album - Kibby 102208.htm

Skidder road to "B" series towers is becoming a mess and should be shut down until erosion controls are installed. I recommend the road not be used until freeze in, as there is no rush for this activity to be performed at this time. Freeze in should occur within the next few weeks as there is snow on the mountain now.

Be kinder than necessary, for everyone you meet is fighting some kind of battle.

Nick Bennett

From: Valleau, Dana (Augusta,ME-US) [dvalleau@trcsolutions.com]
Sent: Monday, November 10, 2008 12:15 PM
To: Spencer-Famous, Marcia
Subject: RE: Kibby Inspection Report

The TTH crew had mostly moved to another job (not a TransCanada site) and the only operators left were a chainsaw/cable skidder crew that was working on the ridge top where there were no issues, cutting and decking trees. That crew was later shut down as well just because they could not be efficient with the skidding to the landings being shut down. TTH being a contractor, needs the revenue from wood moving off site to a mill or boiler, and Plum Creek also needs to keep the wood flowing to satisfy volume contracts they have in place with the consumers.

Dana Valleau
TRC
249 Western Avenue
Augusta, ME 04330

office: (207) 621-7093
fax: (207) 621-7001
cell: (207) 215-4582

-----Original Message-----

From: Spencer-Famous, Marcia [mailto:Marcia.Spencer-Famous@maine.gov]
Sent: Monday, November 10, 2008 10:46 AM
To: Valleau, Dana (Augusta,ME-US)
Subject: RE: Kibby Inspection Report

Why?

-----Original Message-----

From: Valleau, Dana (Augusta,ME-US) [mailto:dvalleau@trcsolutions.com]
Sent: Monday, November 10, 2008 8:57 AM
To: Spencer-Famous, Marcia
Subject: RE: Kibby Inspection Report

Nope.

-----Original Message-----

From: Spencer-Famous, Marcia
[mailto:Marcia.Spencer-Famous@maine.gov]
Sent: Mon 11/10/2008 8:52 AM
To: Valleau, Dana (Augusta,ME-US)
Cc:
Subject: RE: Kibby Inspection Report

2/11/2009

So was someone from TTH along on the site visit?

-----Original Message-----

From: Valleau, Dana (Augusta,ME-US)

[mailto:dvalleau@trcsolutions.com]

Sent: Monday, November 10, 2008 8:36 AM

To: Spencer-Famous, Marcia

Subject: RE: Kibby Inspection Report

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Subject: FW: Kibby Inspection Report

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there any reason we can't name PC and TC as violators?

Kibby Wind Power Project

TransCanada Maine Wind Development Inc.

3PI Report/Observations

LURC Project #: DP 4794

DEP Project #: L-23811-24-A-N, L23811-TH-B-N

Date: Monday, 10-27-08

Time: 8:00 AM

Report: 18

Observed by: Steve Roberge, PE

Company/Agency: SJR Engineering Inc.

Weather Conditions: 50s, Sun

Clearing Contractor: Plum Creek

General Contractor: Reed & Reed Construction

Contacts onsite: Mike (TRC), Sylvain (Reed+Reed), Jack (TransCanada)

Date of Last Inspection: 10-22-08

Estimated # of days since last rainfall over $\frac{1}{2}$ " : 1.5" rain Saturday night

Photographs taken: 32

Attachments: current conditions

The purpose of the unannounced site visit was to determine and document the effectiveness of the erosion control program being implemented at the project site. This weekend, a significant 1.5" rain event occurred at the site. Our site walk consisted of observing the skidder access path from AR-5 Mile 2.0 Wahl Road landing area to the top of mountain near B17 tower location. We walked the beginning of the restored $\frac{1}{2}$ mile Spencer Bale skidder access road. We also walked the crane access road from A19 to A18.

The crane access road (and tower sites) from A18 to A20 remain covered with slightly less mud than last report. However, no significant erosion control problem areas are occurring at this location.

The skidder access at 1/2 mile Spencer Bale Road has not been restored to date. It was reported the erosion control crew has not visited this site. Runoff water coming from the areas of the skidder trails leading to A10 area was clean.....no skidders have been using the trails. It was explained that this area would be the next to be restored after the cleanup to the "B" series AR5 skidder road.

"B" Series - The skidder access road from AR-5 Mile 2.0 Wahl Road landing area up to B17 tower area was issued a voluntarily stop work order (during the site visit) by Jack/Mike, as it was obvious the environmental controls were inadequate. The report from last Wednesday's site visit strongly recommended the skidder access road be discontinued until all erosion controls are installed and sediment removed. It was also my recommendation that the skidder road not be used until freezing in occurs (which may be just a few days from now weather dependant). This advice was not acted upon

by the logging operations and serious violations in the LURC permit have now occurred. The skidder road has significant wheel rutting and is allowing significant heavy mud/water flows down the ruts for significant distances. The wheel rutting is so severe that a skidder with chains on four tires got stuck along the skidder path. Erosion/sedimentation is occurring throughout the length of the skidder road. The skidder road is in a condition that is in violation of the LURC permit as inadequate erosion control techniques are being made. Several locations of silt fence have been overrun with silt/mud allowing this sediment to travel 100's, perhaps a 1000', beyond the skidder access trail. It is expected the contractor will cleanup this sediment (both onsite and off site) as best as possible, which includes hand labor and 5 gallon buckets, as necessary. It is unfortunate that this item, which had been identified when it was a small problem (last report), has now become a significant problem...a stop work item today. I'm at loss to understand the thinking/implementation process here. Erosion control devices/items are essential components when working along the steep mountain areas. About 6"-8" of snow melt and a heavy 1.5" rain over the weekend overburdened the scant erosion control that had been installed. I again strongly recommend this access road not be used until all sedimentation has been cleaned up, adequate significant erosion control devices are installed, wheel ruts removed, and the skidder road allowed to freeze in. Cutting can continue along the top of the mountain, skidding can continue along the top of the mountain with the cut trees being decked at the top of the skidder road until the skidder access road becomes frozen. Again, I do not understand the apparent rush to skid these cut trees down the skidder road immediately. Frozen conditions will occur very soon in this area.

Blasting/drilling operations continue in the area of A17-A18, and A14-A6 crane access roads. There are 3 drilling rigs onsite. The crushing operation was not in operation during site visit (A19 tower area).

Grubbing activities have not been performed in the "B" series or any new activity in the "A" series. Contractor (Sargent) continues site grading activities along A6 through A20 towers including crane access road.

The storage yard has been partially grubbed along $\frac{1}{2}$ mile Spencer Bale Road. Erosion control crews have installed silt fence along downslope boundaries. No mulch cover material has been placed on this surface to date.

The Goldbrook Road widening continues with significant drainage improvements (culverts, riprap, drainage ditches) being installed up to approximately the 2.5 mile marker.

No significant erosion control devices are needed or need maintenance within the construction zone pertaining to the towers or crane road. The tracked mud along the

riprap surface should be scraped off and kept as "clean" as possible to allow rainwater to infiltrate into the road bed rather than runoff. Future road/tower area construction should be constructed as "clean" as possible to allow water infiltration into the road surface to occur. The transition zone between the numerous cuts and fills along the crane access road is pumping water up to the surface of the road. The water rides this surface until it hits the rock fill section and infiltrates into the ground. It was noted by Sylvain these areas will need to be dug out and clean rock installed to prevent the pumping action along the road.

Dust control along Goldbrook Road was not necessary due to the wet conditions.

The following items were inspected:

1. **Silt Fencing:** Silt fencing has been correctly installed in many locations and is current with grubbing activities in the construction zone. An erosion control crew needs to repair the skidder road to B17 tower and install all necessary erosion controls for continued use of this road. Also the $\frac{1}{2}$ mile Spencer Bale Road needs to have final erosion control grading and maintenance activities prior to a snow event.
2. **Stabilized Entrance:** May be needed during construction of the crane access road if conditions warrant its use. Mud along the travel surface of the crane access road will prevent infiltration into the road base.
3. **Stockpile Area:** Disposal area has been sited and erosion control devices installed in preparation for fill materials being generated from Goldbrook Road widening. The $\frac{1}{2}$ mile Spencer Bale Road storage and disposal area needs a mulch cover over the grubbed areas prior to a snow event.
4. **Mulching:** The 3.5 mile Spencer Bale Road skidding area and landing yard has been hydro-mulched. All disturbed areas, other than the constructed crane access road and rocked tower areas, will need to have erosion control cover after November 1 prior to a snow event.
5. **Erosion Control Mix:** Erosion control mix has been made and is stockpiled for use. The mulch grinder is not ongoing this week as additional grubbing activities have not begun operations.
6. **Dust Control:** No problems with dust during site visit along the project construction site or any of the access roads due to the weekend rains.
7. **Hay Bales:** Not being used at this time.

8. Stone Check Dam: "B" Series landing yards need stone check dams along the ditches and water bar outlets.
9. Culverts/Riprap: Additional culverts have been installed along Goldbrook Road. Check dams and riprap inlet/outlets have been installed to capture any sediment coming from the upslope areas. Any sediment captured is being removed making the culvert ready for the next storm event.
10. Level Spreader: Not being used at this time.
11. Water Bars: Numerous water bars along the top, middle, and bottom of severely sloped disturbed areas (generally skidder trails) have been constructed in limited areas. Some water bar outlets have silt fence protection as a temporary protection feature, but will be upgraded to plunge pools with a ring of erosion control mix or stone check dams to capture any sediment that does flow along the bars once access and materials can be brought to the area. "B" Series skidder road needs numerous water bars with stabilized outlet construction.
12. Catch Basins/Stormdrain system: Not being used at this time.
13. Ditches/Swales: See water bars above.
14. Groundwater seeps/Hidden Channels: No new seeps/channels identified today. Photos of typical seep soil/rock profiles taken at A18 for Dave Rocque.
15. Cut/Fill Slope Protection: Sargent Construction crews are currently performing earthmoving activities on the A4 thru A22 access road and associated tower sites. Silt fence and erosion control mix have been installed along the downslope sides of disturbed ground.
16. Vegetative Cover: No new cover has been installed since last report.
17. Stream/Wetland Crossings: Severe sedimentation has occurred along the skidder access road leading up to B17 tower area. This sedimentation has found its way into streams and drainage channels that are downslope of the skidder road.
18. Spill Prevention: No spills noted.
19. Winter Construction: Not applicable at this time....begins November 1, 2008.
20. General nature of project: Project continues in clearing/skidding operations mode. The clearing and skidding operations have started/stopped in the B series

towers. Skidding activities are being accessed from 2.0 mile Wahl Road AR5 Road to Tower B17. This road needs to be repaired and erosion controls installed. The skidder road at 1/2 mile Spencer Bale Road has not been permanently restored other than erosion controls installed by the skidder crew. The skidder road needs to be permanently restored ASAP. Construction zone erosion controls are appropriate for the construction of the tower and crane roads. Heavy mud surface remains along crane access road.

21. Areas currently under construction/disturbance: "A" - series tower clearing/skidding has been completed except along the A11, A12, and A13 tower and crane road sites. "B" Series tower and crane access has been stopped as of 10:30 AM today.

22. Estimate total area under construction/disturbance: Entire "A" Tower series of ROW, (excepting A11-A13 towers and road) with several landing yard areas for the skidder operations are under construction. Concrete leveling pads have been placed for Towers A22, A21, A20, A15, and A14. Mile 1.0 Spencer Bale Road continues being slowly filled to reach crane road grade. Goldbrook road widening continues.

23. Comments: There are no significant problem areas noted in the construction zone (other than tracked mud on crane road surface). The contractor is keeping erosion control activities current with grubbing/disturbed soil activities. The Contractor is noting weather patterns and is proactively updating and maintaining installed erosion control devices and techniques. Skidder access road 4.5 mile Spencer Bale Road is no longer being used and has been permanently restored. Goldbrook Road widening earth movement activity continues.

The construction site did not experience significant erosion or sedimentation since the last visit. In the construction zone, the erosion control efforts were adequate to control erosion within the site limits of construction. I recommend the skidder road to B17 should be shut down until adequate erosion controls are installed and frozen ground conditions exist along the skidder trail. More erosion and sedimentation has occurred on just this skidder road than what I would expect from the entire construction zone site. I would recommend an additional erosion control crew to stay with the skidding operations. The skidder access roads need to be restored and allowed to freeze in prior to reuse.

Copy: Matthew Nazarko Marcia Spencer-Famous David Rocque
 Dana Valleau Chris Cinnamon-Langille Mike Darienzo
 File Jack Distranski

I've reviewed this with Scott Rollins regarding how LURC needs to proceed, which will largely depend on the results of the site visit. Factors we will consider include, but are not limited to, if the violation was a repeat performance, if streams were impacted, and has the problem been corrected. Once the site visit has been done and site conditions assessed, then LURC will decide if we need to open an enforcement case or if a warning is warranted. We have procedures that need to be followed in these cases.

As I understand it, the problem has been with the forest operations contractor. As you know, they are accustomed to adhering to very different and much looser set of standards than a contractor doing development. Apparently Dana has been on the forest operations contractor's case about skid trails and how to do them and stabilize them to meet the permit conditions, but the forester apparently doesn't try very hard to adhere to them. No matter what, the bottom line in this case is the permit conditions and LURC's E/S standards, not the typical forest operations standards. As you know, the forest operations contractor is Plum Creek, who is also the underlying landowner.

At this point, they have shut down all clearing operations until freeze up, which is what they should have done. Dana believes they were trying to get more wood out.

From: Rocque, David
Sent: Wednesday, October 29, 2008 9:11 AM
To: Spencer-Famous, Marcia; 'Stephen Roberge'
Subject: RE: B-series video of skidder access road mud flows

Steve/Marsha:

This was one of my biggest fears when reviewing windpower projects for the real mountains (not ridges such as Stetson or Bridgewater or Mars Hill). The hydrology issues are very unique and present a very real problem for construction activities. That is why I pressed the applicant so hard as to what they would do to handle the groundwater. One of their primary mechanisms was to have been groundwater diversions (ditches upslope of the construction activities). The other was to avoid working when groundwater tables are high (which is most of the time). I agree with Steve in that the applicant must be held accountable for the lack of using appropriate erosion control measures and made to use them in the future. Perhaps a meeting would be in order between LURC, the contractor, Steve and myself to discuss the problem and determine how to proceed from here, before any new ground can be exposed.

From: Spencer-Famous, Marcia
Sent: Tuesday, October 28, 2008 8:22 AM
To: Stephen Roberge; Rocque, David
Subject: RE: B-series video of skidder access road mud flows

Steve – Could you compile a list of all erosion control non-compliance events you have noted? Include location, date, and a short description of each. Thanks. I forwarded your email with the video link to Dana to open up a discussion about this.

From: Stephen Roberge [mailto:sjroberge@roadrunner.com]
Sent: Monday, October 27, 2008 10:55 PM
To: Spencer-Famous, Marcia; Rocque, David
Subject: B-series video of skidder access road mud flows

Hi Marcia and Dave,
 Copy and paste the link below to see a video of just one of many of the mud flows coming from the skidder access road leading to B17 tower. This issue was pointed out in the last report and not acted upon. I believe this violation deserves some sort of fine/penalty.....If this doesn't qualify, I'm not sure what would. This is the worst non-compliance for erosion control to date on this project. All eyes will be looking towards the LURC response to this issue. Please call me (242-6248) if you want additional information. Also many photos attached with the normal site visit report.

Dave your photos of the soil/seep are attached in the normal report photos also. You can download them from the site and blow them up as appropriate.
 Steve

Maine Land Use Regulation
Commission

Compliance and Enforcement Response
Policy

March 1992

A LURC Guidance Document

Maine Land Use Regulation Commission
Compliance and Enforcement Response Policy
March 1992

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Maine Land Use Regulation Commission
Compliance and Enforcement Response Policy

I. Introduction and Purpose

The Maine Land Use Regulation Commission was established by the Legislature in 1971 to extend the principles of sound planning, zoning and subdivision control to the unorganized townships and plantations of the State of Maine. Those areas today encompass 10.5 million acres, nearly one half the geographic area of Maine. The Commission encourages well-planned and well-managed, multiple use of land and natural resources, and encourages the appropriate use of these lands by the residents of Maine and visitors.

A necessary component of an effective land use regulation program to meet the goals and principles of the Commission is the establishment of a comprehensive program which results in compliance with the Commission's laws, Standards and permits. This must provide for prompt, equitable and appropriate response to those who violate Commission laws, Standards, permits or other requirements. Evaluating projects and issuing permits are meaningful activities only if standards and permit conditions are to be enforced. Moreover, the program must provide adequate disincentives for undertaking regulated activities without first obtaining necessary permits, if such a program is to be effective. Providing education and training on land use standards and promoting full understanding of the value of proper land uses and resources are equally important to the success of the Commission's programs.

This Policy provides the framework for compliance and enforcement strategies. This document sets forth the Commission's policy for administering and developing administrative penalties under 12 M.R.S.A. §681 et seq., using a system for penalty development based upon the seriousness of violations. It assures penalties are assessed in a fair and consistent manner; that penalties are appropriate for the gravity of the violation committed; that economic incentives for noncompliance with the land use regulation laws are eliminated; that persons are deterred from committing land use regulation violations; and that compliance is achieved. Implementing this Policy in a consistent manner will over the long term result in high levels of compliance with Commission requirements by the regulated community and result in increased confidence by the public in the land use management and oversight program administered by the Commission.

In 1980, the Commission adopted its first major enforcement policies for strengthening its compliance program. These policies were refined in December 1986. Ten policy considerations provided guidance to the enforcement program, ranging from discussion of violation avoidance to executive sessions, to assessing monetary penalties for violations. Those enforcement policies, while superseded by this Policy, form the basic policy principles from which this Policy is developed.

II. Statutory Authority

A 12 M.R.S.A. §685-C

12 M.R.S.A. §685-C(8), among other things, provides that the Standards, rules, permits and orders issued by the Commission have the force and effect of law. For the purposes of inspection and to assure compliance with standards, rules, orders and permits issued or adopted by the Commission, Commission staff or authorized consultant personnel may conduct investigations, examinations, tests and site evaluations deemed necessary to verify information presented to it, and may obtain access to any lands and structures (within constitutional limits) regulated under 12 M.R.S.A. §681 et seq.

The law further provides that any person who violates any provisions of the land use regulation laws, or the terms of any conditions or standards, rules, permits or orders adopted or issued by the Commission is subject to a civil penalty payable to the State, of up to \$10,000 for each day of violation. A person who willfully or knowingly falsifies any statement contained in a permit application or other information required to be submitted to the Commission is in violation of the land use regulation laws and is subject to the penalties established by law.

III. Applicability and Scope

This Policy applies to administrative enforcement actions undertaken by the Commission for activities over which it has jurisdiction under 12 M.R.S.A. §681 et seq.

This Policy provides internal guidelines to aid the Commission's enforcement personnel in assessing appropriate penalties. It also provides a mechanism whereby enforcement personnel may, in connection with matters that will not require judicial action, within specified boundaries, negotiate administrative settlement agreements, and modify the proposed penalty when special circumstances warrant it.

The procedures set forth in this document are intended solely for the guidance of Commission personnel. They are not intended and may not be relied upon to create rights, substantive or procedural, enforceable by any party in litigation with the State of Maine. This is not a judicial civil penalty policy and as such may not be relied upon as such a policy. The Commission reserves the right to act at variance with this Policy and to change it at any time without public notice, as it deems appropriate to accomplish its legal mission.

IV. Relationship to Other Agency Policy & Guidance

This Policy is consistent with the established goals and policies of the Commission as set forth in the Commission's Comprehensive Land Use Plan, as amended in June 1990. These goals and policies, among others, consist of:

- A. Administering an effective enforcement and education program with respect to the laws, permits, regulations and standards of the Commission, in order to assure awareness and compliance by:

- 1 carrying out balanced but vigorous enforcement effort to identify, investigate and pursue significant violations of laws and rules administered by the Commission;

providing deterrence to acts of violation;

training and utilizing field staff of other willing State agencies to disseminate information to the public and report acts of noncompliance to the Commission;

holding land owners and land managers principally responsible for land use violations taking place on their lands; and

conducting educational programs for the regulated community and the general public concerning environmentally sound land use practices and other legal requirements administered by the Commission.

- B. Arriving at a just settlement of a violation, including the assessment of a monetary penalty, considering:

the potential or actual environmental damage resulting from the violation;

- (2) the extent and significance of the violation;

- 3 the environmental record of the person causing the violation, including any history of prior violations;

- (4) extent to which the person knew or should have known of the laws, standards or other requirements violated;

- (5) responsiveness of the person causing the violation to report and end the violation; and

- (6) remedial measures undertaken by or on behalf of the person committing the violation.

- C. Handling similar violations involving similar circumstances in a similar manner.

V. Definitions

The following terms have the following meanings unless the context indicates otherwise:

A. **Commission.** "Commission" means the Maine Land Use Regulation Commission. This term also includes the Commission's staff where a Commission action or responsibility has been delegated to staff.

B. **Contractor.** "Contractor" means contractors, operators or agents who are retained by or on behalf of a land owner to perform an activity.

C. **Director.** "Director" means the executive director of the Commission or the executive director's designee.

D. **Major.** When used in determining the potential for harm, "major" means actual and substantial, severe, or extensive damage to the environment or a community or harm to public health or safety, or the substantial likelihood that such damage or harm may occur as a result of a regulated activity. By way of example, this may include extensive siltation of a water body, significant loss of habitat, including, without limitation, extensive encroachment into fish and wildlife or wetlands protection subdistricts, endangerment to rare, threatened, or endangered species, degradation of surface or ground waters, or substantial adverse effects on a natural or human environment.

When used in determining the extent of deviation from standards, "major" means substantial or extensive deviation from Commission requirements. By way of example, this may include the failure to comply with a particular standard, performance of an activity well in excess of the limitation imposed by a standard, conducting a prohibited activity or failure to obtain necessary permits for a development or other regulated activity.

E. **Minor.** When used in determining the potential for harm, "minor" means damage to the environment or a community or harm to public health or safety that is inconsequential, de minimus, or slight and momentary in duration, or the relatively high likelihood that effects as a result of a regulated activity will cause slight or no damage to the environment or harm to public health or safety. Adverse effects are easily reversible.

When used in determining the extent of deviation from legal standards, "minor" means slight deviation, the effect of which is inconsequential, or a deviation somewhat from a particular standard but where nearly all applicable provisions of that standard are met. By way of example, this may include road construction that meets the technical requirements except the width of required buffer from a water body varies slightly from that required given the particular slope of land.

F. **Moderate.** When used in determining the potential for harm, "moderate" means actual damage or other adverse effects to the environment or a community or harm to public health or safety that is neither major nor minor, or the significant likelihood that such damage or harm may occur as a result of a regulated activity. The activity has or is likely to have effects of adverse consequence, though not severe.

When used in determining the extent of deviation from statutory or regulatory requirements, "moderate" means significant deviation from a particular standard or standards

but where some provisions of the standard or standards are implemented as required. Such deviation has an adverse regulatory effect when considered separately or associated with the cumulative effect of the activity if left uncorrected. By way of example, this may include some siltation of a water body but where such adverse effects can be remedied promptly.

G. Respondent. "Respondent" means the person committing or otherwise responsible for a violation of standards of the Commission.

H. Standards. "Standards" means the laws administered by the Commission and the rules, regulations, performance criteria, application and permit requirements (including permit terms and conditions), orders and other requirements of the Commission.

VI. Education

The Commission regards education of those who live, work, or have occasion to recreate in the Commission's jurisdiction, in matters relating to land use standards, as an important and integral component of an effective land use regulation program. It finds that having a public and regulated community which is knowledgeable of land use regulation laws and standards and sound land use practices further the goals and objectives of the Commission, and will result in high levels of voluntary compliance with those laws and standards. Toward that end, informational mailings, outreach seminars for the general public, and specialized training programs for the regulated community and other interested persons will be carried out by Commission staff periodically each year.

VII. Compliance and Inspections

A General

The Commission administers a program to assure compliance with the Commission requirements by the regulated community. This is done primarily by:

maintaining staff in regional offices throughout the jurisdiction, with offices in Ashland (part-time), Greenville, Old Town and Presque Isle, in addition to those in the central office located in Augusta;

- (2) performing periodic inspections of permitted or otherwise regulated activities, including sampling or testing as appropriate;

conducting compliance inspections at the request of a permittee for the purposes of issuing a certificate of compliance upon a demonstration that a site or activity is in compliance with land use requirements;

investigating complaints of alleged violations; and

conducting training and public outreach seminars to inform the regulated community and the general public of Commission requirements and sound land use practices.

B. Protocol

Reports of alleged violations will be documented in writing on forms approved by the Director. The Commission will respect the wishes of complainants who for various reasons may wish that their name not be disclosed in the ordinary course of an administrative enforcement proceeding.

Inspections and investigations will be carried out in accordance with procedures established by the Director. Results of inspections and investigations will be documented in writing on appropriate forms, in accordance with procedures established by the Director.

- (3) Inspections will be carried out by Commission staff or on behalf of the Commission staff by representatives authorized by the Director. Those inspections will be carried out in a professional manner, with the staff or authorized representatives identifying their affiliation to those present on a site and disclosing the reason for their appearance.

Written notice of apparent violations of Commission standards ordinarily will be provided to the respondent following investigation, in accordance with the provisions of this Policy and with procedures established by the Director.

VIII. Enforcement Response

A. Summary

In seeking to achieve a high level of compliance by the regulated community and prompt return to compliance for those activities which result in noncompliance with land use standards, the Commission will apply a range of enforcement responses. Appropriate responses must reflect circumstances related to particular cases, but generally will depend, among other things, upon the seriousness of the violation, effect of the violation on the environment, and the responsiveness and compliance history of the respondent. It is the policy of the Commission, whenever feasible, to bring noncomplying activities into full compliance with applicable Commission standards, and require appropriate remediation or restoration. It recognizes, however, that this goal is not always obtainable. In this regard, full conformance may not be required by the Commission where achieving it is likely to result in greater environmental damage. Moreover, full compliance may not be required in the discretion of the Director in exceptional cases where:

the violation does not appear to have been willfully or knowingly caused by the present owner of land;

the deviations from standards are minor;

there is no threat of continuing environmental damage or public health or safety threats;

the costs of requiring full compliance are clearly inappropriate in view of the environmental or other public gains to be realized;

the respondent has made sufficient efforts to end the violation and to comply with applicable requirements; and

such continued noncompliance will not adversely affect owners of adjacent lands or the public interest.

The monetary penalty should reflect any circumstance of continued noncompliance.

B. Types of Enforcement Response

The Commission utilizes a number of administrative enforcement mechanisms to respond to acts of noncompliance. These are summarized as follows:

- (1) Immediate On-site Resolution This is an informal approach used on a site when very minor infractions occur or may occur and where immediate direction to the respondent will prevent or immediately correct the deficiency.
- (2) Letter of Warning This is a written notice which identifies and explains the violation, and cites the standard violated, and states that if compliance is not achieved within a specified period, further enforcement action will be initiated. It is used for minor infractions where some response or minor corrective action by the respondent is required.

Notice of Violation This is a written notice which identifies and explains the violation, cites the appropriate provision violated, prescribes actions to be taken to bring about compliance, and either sets out a schedule for compliance, requires the respondent to submit a proposed schedule or requires certification of compliance. Depending upon the nature of the violation or the responsiveness of the respondent, a Notice may or may not be followed by further enforcement action. It is used for all moderate and major violations.

- 4) Administrative Order by Consent This is an administrative action by the Commission involving consent of the respondent that directs the respondent to return to compliance within a certain period by taking certain

prescribed actions. Prior to the issuance of a compliance order, the Commission may hold an enforcement hearing on the violation and provide prior written notice of that hearing to the respondent.

Enforcement Action This is a process preparatory to either a settlement action or referral to the Department of Attorney General. Violations which are severe, highly controversial or involve issues of precedence for the Commission will be presented to the Commission for its deliberation. Such exceptional violations may involve precedent-setting decisions including complex interpretations of law, large monetary penalties, unusual remedial or corrective measures, major damage or potential for major damage, or unusual circumstances regarding the cause of violation. Following presentation of the enforcement action by the staff and deliberation, the Commission will determine whether to authorize a settlement to be negotiated by the staff or to refer the matter to the Attorney General for further enforcement action. This proceeding is an informal one, and the respondent will be offered the opportunity to participate.

Administrative Settlement Agreement This is an administrative action whereby the Commission, through its staff, negotiates a settlement of the violation with the respondent. Participation by the respondent is on a voluntary basis. The settlement agreement is a three party agreement between the Commission, the respondent and the Department of Attorney General and is contractually binding on the parties. Such agreements must be ratified by the Commission at a scheduled Commission meeting. Principal elements of a settlement agreement ordinarily include the following:

- i. identification of the respondent and location of business;
- ii. agreement to the Commission's regulatory authority over the matter;
- iii. admission of responsibility for the violation;
- iv. description of the violation;
- v. corrective measures that must be taken by the respondent to bring about compliance and time schedule for implementation of those measures;
- vi. payment of a monetary penalty to the State
- vii. waiver of rights of appeal by the respondent; and
- viii. conditional release by the Attorney General and Commission for causes of action they may have against the respondent.

- 7 Referral to Department of Attorney General Following staff consultation with the Attorney General's Office and mutual determination of enforcement priorities and possible courses of action, the Commission may refer a violation to the Attorney General's Office for judicial prosecution. This referral may be undertaken in the first instance by the staff; or following unsuccessful settlement discussions by the staff; or following presentation of an enforcement action by the staff. Upon referral of the matter to the Attorney General's Office, the Commission staff will assist the Attorney General's Office in case preparation and prosecution, as requested by the Attorney General lawyer assigned to the case.

C. [Reserved]

D. Time Frames for Response

The Commission recognizes that timely investigation and enforcement of land use regulation violations are important for an effective compliance and enforcement program, and that those affected by a land use complaint are interested in a prompt determination of the enforcement status of that complaint whenever possible. However, the Commission also appreciates the limitations inherent in the enforcement mechanisms and staff resources available to the Commission to resolve violations. Therefore, in recognition of these factors, the Commission establishes the following as a general goal for taking timely and appropriate enforcement responses:

Initial response to complaint: 5 business days

Violation Determination 45 calendar days

Violation resolution or referral to the Attorney General: 180 calendar days

E. Calculation of Civil Penalty

(1) Summary

The system set forth herein is for guidance of the Commission staff in seeking voluntary settlement and compliance with a respondent in an enforcement matter. This system is not designed to determine penalties or other remedies in a matter that has been referred to the Attorney General for judicial enforcement. Such matters ordinarily require more substantial penalties, up to the legally authorized maximum of \$10,000 per day, together with all appropriate remedial measures.

The penalty calculation system consists of (1) determining a base penalty for a particular violation based upon the seriousness of the violation; (2) considering economic benefit of noncompliance where appropriate; and (3) adjusting the penalty for special circumstances. Two factors are considered in determining the base penalty:

potential for harm to the environment or public health or safety; and

extent and number of deviation(s) from a statutory or regulatory requirement including, but not limited to, those contained in the Commission's Land Use Districts and Standards.

These two factors constitute the seriousness of violation under the land use regulation laws and standards, and have been incorporated into a matrix from which the base penalty will be chosen.

Where a company or person has derived significant savings by failure to comply with land use requirements, the amount of economic benefit from noncompliance gained by a respondent will be considered in determining the penalty over the base amount.

After determining the appropriate base penalty based upon its significance and, where appropriate, economic benefit the penalty may be adjusted upward or downward to reflect particular circumstances surrounding the violation. The factors that should be considered are:

- (a) good faith efforts;
- (b) degree of willfulness and/or negligence;
- (c) history of noncompliance;
- (d) inability to pay; and
- (e) other unique factors

The penalty calculation includes appropriate assessment of multiple and multi-day penalties.

(2) Calculation of Base Penalty

(a) Administrative Record

In order to support the penalty developed in a settlement agreement, the enforcement staff will ordinarily include in the case file an explanation as to how the proposed penalty amount was calculated. In ongoing enforcement cases, the assessment rationale is exempt from mandatory disclosure requirements of the Freedom of Access law, 1 M.R.S.A. 402(3).

Determination of the Base Penalty

Seriousness of a violation is based on two factors which are used to assess the appropriate base penalty:

- i. the potential for harm to the environment or public health or safety; and
- ii extent of deviation from a statutory or regulatory requirement.

Enforcement staff should evaluate whether the potential for harm and the extent of deviation from Commission requirements are major, moderate, or minor in a particular situation and establish a base penalty using the following matrix:

Penalty Matrix

Extent of Deviation from Statutory or Regulatory Requirements

		Major	Moderate	Minor
Potential for Harm	Major	\$ 10,000	\$ 9,000	\$ 6,000
		to	to	to
		\$ 7,000	\$ 4,500	\$ 3,000
	Moderate	\$ 4,200	\$ 3,200	\$ 2,000
		to	to	to
		\$ 2,100	\$ 1,600	\$ 1,000
	Minor	\$ 1,500	\$ 900	\$ 550
		to	to	to
		\$ 750	\$ 400	\$ 200

(3) Multiple and Multi-day Penalties

A separate penalty may be assessed for each violation that results from an independent act (or failure to act) by the respondent and is substantially distinguishable from any other violations. In general multiple penalties are not appropriate where the violations are not independent or significantly distinguishable. In those circumstances, the violations should be cited in a settlement agreement, but one penalty only should be assessed.

12 M.R.S.A. §685-C(8) provides the Commission with authority to seek penalties up to \$10,000 per violation per day, with each day that noncompliance continues to be assessed as a separate violation. Multi-day violations generally should be calculated in the case of continuing egregious violations. However, a per day assessment may be appropriate in other cases as well.

(4) Economic Benefit Derived from Noncompliance

This component includes consideration of the economic benefit of noncompliance to a respondent when penalties are assessed. An "economic benefit" component is calculated and added to the base penalty when a violation results in significant economic benefit to the respondent. Where it appears the economic benefit derived is de minimus, staff need not include an economic benefit assessment when arriving at a penalty amount. Economic benefit may be derived from either cost savings or direct economic gain.

Cost savings, hence an economic benefit, may be as a result of either delayed costs or avoided costs. Delayed costs are expenditures which have been deferred by a respondent's failure to comply with the requirements. The respondent eventually will have to spend money in order to achieve compliance. In general terms, delayed costs represent capital costs. For example, the failure to install a fish ladder at a dam site or a phosphorus control/retention pond, construct a road or to replace a substandard sewage disposal system represent delayed costs.

Avoided costs are expenditures which are nullified by a respondent's failure to comply. Avoided costs generally represent operating and maintenance costs. For example, failure to perform required groundwater monitoring and analysis or perform certain required operation or maintenance activities represent avoided costs

Alternatively, a respondent may realize an economic benefit, not by cost savings, but by deriving an economic gain by performing a revenue-producing activity that is otherwise prohibited or limited. For example, a respondent may realize economic benefit by harvesting marketable timber in excess of the standards in a Fish & Wildlife Protection subdistrict.

Use of this adjustment component is important to remove incentives for noncompliance and nullify any competitive business advantage gained by the respondent over another by the act of noncompliance.

(5 Penalty Adjustment Component

The seriousness of the violation determines the base penalty. The reasons the violation was committed, the intent of the person who committed the violation, and other factors related to the respondent are not considered in choosing the appropriate penalty from the matrix. However, any penalty system must be flexible enough to make adjustments to reflect legitimate differences between similar violations and still result in equitable treatment given the circumstances involved. The adjustment factors can increase, decrease or have no effect on the penalty amount paid by the respondent. This section sets out several adjustment factors that should be considered. These include:

- a) good faith efforts;
- (b) degree of willfulness and/or negligence;
history of noncompliance;
- (d) inability to pay;
penalty offset provision; and
other unique factors.

In general these adjustment factors will apply only to the base penalty and not to any economic benefit component, except that the inability to pay factor should be applied comprehensively.

(a) Good faith efforts

Good faith efforts to promptly implement corrective measures should be considered in assessing a penalty. Self-reporting of a violation and prompt correction of environmental problems can constitute "good faith efforts". Lack of such actions, conversely can result in increased penalty. No downward adjustment should be made if the actions taken primarily consist of coming into compliance.

(b) Degree of willfulness and/or negligence

In assessing the degree of willfulness or negligence, the following factors may be considered:

- i. how much control either directly or indirectly the respondent had over the events constituting the violation;
- ii. Whether the respondent knew or should have known of the risks associated with the activity or conduct;
- iii. whether the respondent took reasonable precautions against the events constituting the violation;
- iv. whether the respondent knew or should have known of the legal requirements which were violated; and
- v. how quickly the violation was remedied by the respondent.

Lack of knowledge of the legal requirement should not be used as a basis to reduce the penalty. To do so would encourage ignorance of the law. Rather, acts of noncompliance by a respondent having knowledge of the law should serve only to enhance the penalty.

(c) History of noncompliance (upward adjustment only)

Where a person has violated land use regulation requirements in the past, this may indicate that the person was not deterred by a previous enforcement response. Factors that should be considered with respect to prior violation history are:

- i. how similar the previous violation was;
- ii. how recent the previous violation was;
- iii. number of previous violations; and
- iv. respondent's response to the previous violation(s) with regard to correcting the problem.

(d) Inability to pay (downward adjustment only)

There is little to be gained from seeking penalties that are demonstrated beyond the means of the respondent. Therefore, the Commission should consider the ability of a respondent to pay a penalty. The burden of proof to demonstrate inability to pay rests with the respondent. When it is determined a respondent cannot afford to pay a portion of a penalty, the Commission may consider the following options:

- i. a delayed payment schedule;
- ii. installment payment plan, with or without interest; and
- iii. direct penalty reductions

Amount of any downward adjustment of a penalty is dependent upon the individual financial circumstances of the respondent.

(e) Penalty offset provision

The monetary penalty may be partially offset when the respondent proposes as part of a settlement agreement to undertake an activity that will provide environmental or land use benefits to the State beyond what is required to bring a site or activity into compliance. The monetary penalty actually paid and the amount allowed as an offset together must be greater than 125 percent of the penalty that would otherwise be assessed if an offset was not applied. The decision to allow an offset is wholly discretionary with the Commission and Attorney General when they determine there is a significant benefit to the public interest.

(f) Other unique factors

This policy allows for a limited adjustment for unanticipated and unusual factors which may arise on a case-by-case basis, at the discretion of the Commission.

F. Delegation

Where circumstances arise which may cause harm to the environment or pose a threat to public health or safety, the Commission delegates authority to the Director to take all actions necessary to prevent or reduce such harm or threat, including, but not limited to, seeking injunctive relief through the Attorney General. In addition, the Director may enter into agreements with other agencies from time to time as the Director deems advisable to further the effective enforcement of the Commission's programs.

Furthermore, the Commission delegates authority to the Director to resolve certain classes of violations, including:

- (1. violations involving activities conducted without necessary Commission permits except those of an exceptional nature; and

- (2) violations involving noncompliance with statutory provisions, permit terms or conditions, or Commission standards except those of an exceptional nature.

For these classes of violations, the Director is authorized to enter into settlement agreements or, alternatively if settlement is unlikely, directly refer the matters to the Department of Attorney General. Settlement agreements entered into by the Director will be presented to the Commission for ratification.

G. Executive Sessions

Commission discussion of pending enforcement matters, content of settlement agreements, penalties, and legal strategies for resolving violations will be held in executive sessions. Settlement agreements or other final actions by the Commission require Commission action at a scheduled public meeting.

IX. [Reserved]

X. Land Owner Responsibility

The Commission finds that owners of land on which regulated activities occur are responsible for those activities. As such, they will be held responsible for assuring that the actions undertaken on their lands including those by contractors are in compliance with all applicable Commission requirements. Furthermore, land owners and land managers have an obligation to assure that contractors undertaking activities on their lands are properly trained and are advised of Commission and other relevant land use and environmental requirements. The Commission recognizes, however, that in certain limited circumstances it may be appropriate to pursue enforcement against a contractor for a violation either jointly with the landowner or alone. In determining whether to pursue an action against a contractor, the Commission will consider the following:

- A nature of the activity which resulted in the violation;
- B. impact of the activity on the land owner
- C. land owner's involvement in planning, arranging for supervising, conducting, or allowing the activity;
- D. land owner's knowledge of the activity;
- E. competitive advantage or other benefit gained by a contractor by the act of noncompliance;
- F. deterrent effect to be realized by the Commission's enforcement response to the violation; and
- G such other factors as are relevant to a particular case.

Notwithstanding the above, nothing in this Policy shall be construed to prevent the Commission from settling with a land owner and/or contractor or, alternatively, referring the matter to the Department of Attorney General for prosecution against the land owner and/or the contractor or other party determined by the Attorney General to have legal responsibility.

XI. Settlement Agreements

A. Settlement Encouraged.

The settlement agreement is an important enforcement tool for the Commission in that it represents a practical mechanism to compel corrective action and fully resolve a violation without having to resort to a judicial remedy. The Commission encourages the Director, in cooperation with the Department of Attorney General, to enter into settlement discussions and settlement agreements with respondents so long as the settlement is consistent with the objectives of the land use regulation laws and standards and this Policy.

B. Protocol

Whenever the Director determines that a violation of law warrants civil enforcement with a monetary penalty, the Director will notify, in writing, the respondent and seek to negotiate a settlement to resolve the violation in accordance with this Policy. The notice will set forth in clear and concise language:

the law, standard, rule or permit violated;

- (2) a factual statement sufficient to inform the person with reasonable certainty, of the acts or measures which constitute the violation; and a time by which the person must respond to the notice; and

a general description of the procedures of this Policy, so a respondent can understand the process being used to respond to the violation and what recourse is available if the respondent disputes the agency's position.

C. Settlement Discussions.

Settlement discussions will be entered into by the Director in good faith as a means of settling a violation. These discussions are for settlement purposes only. As such, they may not bind the Commission, nor may any representations made by the staff be used or relied upon in any proceeding, except where a settlement agreement reflecting those discussions has been entered into by the Commission and Attorney General.

D. Commission Action

All settlement agreements arranged by the Director will be presented to the Commission for its ratification at a scheduled meeting. The Commission will ordinarily accept and enter into settlement agreements presented to it by the Director when the settlement agreements, including penalty amounts, have been developed in accordance with this Policy.

XII. [Reserved]

XIII. [Reserved]

XIV. Inter-agency Coordination

A. Attorney General

The Commission recognizes the independent authority of the Attorney General to act on the Attorney General's own initiative with respect to any violation of law.

Where deposition of any matter involves settlement of a legal violation or otherwise involves the waiver of the State's right to prosecute a violation, the Attorney General will be a necessary party to the Agreement.

It is understood that in cases where staff efforts to reach a settlement agreement have not been successful, the Department of Attorney General will generally seek to support and pursue a position no less rigorous than that taken by staff in applying the terms of this Policy.

B. Use of Law Enforcement Powers

The Commission has not been granted such law enforcement powers as power of arrest and prosecution or to unilaterally assess monetary penalties for a violation. Its staff are not law enforcement personnel and are not authorized to carry or use armed force.

Of note, 12 M.R.S.A. §8901(3) grants law enforcement powers to forest rangers and the state supervisor (within the Maine Forest Service), for the purposes of enforcing laws of the Commission. The powers granted are equivalent to those of a sheriff or sheriff's deputy, and include the right to arrest violators, prosecute them, serve criminal process against offenders, require aid in executing forest ranger duties and deputize temporary aides.

The Commission is the principal authority responsible for oversight of land use activities within its jurisdiction. As such, it is the policy of the Commission that law enforcement personnel consult with the Director and seek the Director's approval prior to use of such powers in enforcing Commission laws. Except, however, if a law enforcement officer determines that an emergency exists such that taking immediate action to enforce land use regulation laws is necessary to protect public health or safety, the environment or property, the Director should be notified within 24 hours of the law enforcement officer having taken such emergency actions.

C. Use of Court Rule 80K

The Commission currently does not have statutory authority to enforce its land use laws and rules in District Court under Maine Rules of Civil Procedure Rule 80K. However, some governmental entities, including the Department of Environmental Protection, have been granted that authority, pursuant to 30-A M.R.S.A. §4221(2).

Again, the Commission is the principal authority responsible for oversight of land use activities within its jurisdiction. As such, it is the policy of the Commission that no state executive agency initiate an enforcement action for the violation of its laws within the jurisdiction of the Commission, on behalf or in lieu of the Commission, without prior consultation and approval by the Director, in which case the Director shall be guided by this Policy.

D. Inter-agency Agreements

The Commission may enter into agreements with other governmental entities to further the goals and objectives of the Commission including, but not limited to, for the purposes of disseminating information to the regulated community and the general public, carrying out resource inventories, identifying violations and conducting inspections.

Of note, the Commission entered into an inter-agency agreement with the Maine Forest Service, Department of Conservation on March 12, 1990 to assist the Commission in conducting inspections and reporting acts of noncompliance. Similarly, the Commission regularly receives the cooperation of personnel of the Maine Department of Inland Fisheries and Wildlife with respect to investigation of enforcement matters.

XV. Effective Date

This Compliance and Enforcement Response Policy is applicable after adoption by the Maine Land Use Regulation Commission and should be used to calculate penalties for settlement of enforcement actions instituted after the effective date of the Policy, regardless of the date of violation.

ADOPTED BY THE MAINE LAND USE REGULATION COMMISSION
THIS 19TH DAY OF MARCH, 1992.

By: David E. Boulter
David E. Boulter, Director

Effective: March 19, 1992