

Proposed Offset Easement Provisions: Concerns/Recommendations of Natural Resources Council of Maine and Maine Audubon

In Re: Amended Petition for Rezoning and Revised Concept Plan for Plum Creek's Lands in the Moosehead Lake Region (ZP 707)

INTRODUCTION

This document sets forth issues of concern identified to date in the terms and provisions of the offset easement (the "Easement") on lands proposed by Plum Creek (the "Protected Property") in relation to its Amended Petition for Rezoning (ZP 707).

This document does not address issues relating to either the size or the location of the Easement as currently proposed. On the issues of size and location, Natural Resources Council of Maine and Maine Audubon do have existing concerns in relation to Plum Creek's current proposal. We plan to raise those concerns at the appropriate time in the proceedings pending before LURC. This document should not be interpreted to suggest that if each recommendation herein were incorporated into the proposed easement terms, that will necessarily resolve or even address remaining concerns about the specific size or locations of the easement land.

In addition, as an overarching concern, the Easement allows substantially more land use development and substantially less land use protection than it should. It varies in significant ways from the LURC model easement, without clear articulation of the rationale why it is necessary to allow for less land use protection and more development than the LURC model easement permits. In essence, the Easement lacks several fundamental conservation and land use protection provisions, or it contains alternate terms that could be construed to avoid standard land use protection or conservation values.

GRANTEE/HOLDER

Issue: At the outset, we note an overall concern related to whether it is proper that the Holder (Grantee) of the Easement be a private non-profit entity when the Easement is proposed in the context of a State administrative proceeding and regulatory undertaking as part of the required statutory balance between new proposed land use development and conservation values. Throughout the Easement on several critical terms, the Holder is provided significant rights of approval, and assumes the right and responsibility for monitoring compliance with Easement terms and pursuing enforcement for any breach. The regulatory power and authority of the State is thereby divested or functionally preempted by the discretion or decisionmaking authority of a private entity.

Recommendation: A department or agency of State government should be the Holder and Grantee of the Easement. The State may decide to contract with a private entity for the monitoring of performance or compliance obligations, but the State must retain ultimate control of the rights of the Holder.

PURPOSE

Conservation Values

Issue: Three of the "Whereas" clauses refer specifically to commercial forest management. The LURC model easement notes that "sustainable forestry may be acceptable ...but should not be the primary purpose of the easement." Thus, in direct reversal to the LURC model easement, here the protection of conservation values of the Protected Property is secondary to a stated primary purpose of maintaining the forest as a commercial working forest. Beyond involving the basic Purpose of the Easement, which is proposed as a conservation "offset" in a regulatory setting, the issue is also significant in relation to any potential enforcement matters where interpretation of a term or provision may be in issue.

Recommendation: The easement should explicitly identify protection of the conservation values of the Protected Property as its primary purpose.

SECTION 1: GENERAL LAND USES

The LURC model easement prohibits or limits several land use development activities, which this Easement allows:

Alternative Energy Generation Activities

Issue: The LURC model easement does not permit energy generation activities. Plum Creek has added the right to develop Alternative Energy Generation Activities on the property. This is broadly defined as "all activities related to the generation of electricity from wind power". Such development is subject only to Holder review and reasonable approval regardless of any potential conflict with the conservation purposes of the easement. While such a provision may be appropriate in the paid for conservation framework easement, wind power development is still a form of development and given the proposed location of the offset easement and the conservation purpose of the offset easement it should not be permitted in this easement.

Recommendation: Alternative Energy Generation Activities should not be permitted in the offset conservation easement.

Septic Field Activities

Issue: Plum Creek has added and defined the right to conduct "Septic Field Activities" permitted under Chapter 10 of the Commission's Rules and Standards. This would permit up to 200 acres of septic waste spreading.

Recommendation: Septic Field Activities should not be permitted on the Protected Property.

Docks and Piers

Issue: The LURC model easement prohibits docks and piers from being developed on the property. Plum Creek has removed this provision from the Easement and has explicitly retained this right in Section 3.

Recommendation: The LURC model easement prohibition should be retained.

Antennae/Telecommunications et al. apprati

Issue: The LURC model easement does not permit the development and use of antennae and other apparatus for telecommunication and/or radio use but this right is retained in the Plum Creek Easement.

Recommendation: The LURC model easement prohibition should be retained.

Aircraft

Issue: The Commission's model easement prohibits the use of aircraft on the property but this right has been maintained in the Plum Creek's proposed easement.

Recommendation: The basis for deviation from the LURC model easement prohibition is unclear; the deviation needs to be justified, consistent with the conservation purpose of the Easement.

Forest Management Activities

Issue: Permitted forest management activities are broadly defined and include "any other activity Grantor deems useful or expedient in connection with [forest management activities]".

Recommendation: Remove this phrase from the definition of Forest Management Activities.

Construction Material Removal Activities

Issue: Plum Creek retains the right to use the land for permitted "Construction Material Removal Activities" which is defined more broadly than in other working forest easements. (See also the discussion, below, under "Surface Alterations" in Section 4).

Recommendation: Construction Material Removal Activities should be defined to permit only limited rock, gravel, or sand extraction activities associated with forest management activities on the Protected Property.

Other Easements

Issue: Plum Creek has retained the right to grant permanent or temporary easements for ingress, egress and utilities for all lawful purposes regardless of the impact on the conservation values of the property.

Recommendation: The Holder should have approval rights over additional easements granted to Third Parties or to affiliates of the Grantor.

SECTION 2: SUBDIVISION

Sale of Lots and Termination of the Easement

Issue: Plum Creek has added a provision that allows the sale or gift of 50 acres of the property "from time to time" free of the restrictions of the easement provided the sale/gift is to a public or semi-public entity.

Recommendation: This provision should be removed from the easement terms.

Kingdom Lots

Issue: The terms of the easement permit the Grantor (Plum Creek) to break up the Balance parcel into 5 parcels (and the Moosehead Legacy parcel into 20 separate parcels). In addition, subdivision of 5,000-acre parcels is permitted, including Protected Property that is adjacent to property owned by Plum Creek (or a potential affiliate) not within the ZP 707 plan area. Such divisions could result in portions of the protected property being used for exclusive purposes such as an ATV park or private hunting reserve (even though pedestrian access is guaranteed) associated with facilities located on adjacent property; such divisions also make it more likely that multiple cell towers, permanent sawmills and other structures permitted under the easement will occur.

Recommendation: Division of the property should not be permitted.

SECTION 3: STRUCTURES AND IMPROVEMENTS

Structural development for non-forestry activities and utilities

Issue: Plum Creek has retained the right to develop structures and improvements anywhere on the Protected Property for Alternative Energy Generation Activities, Septic Field Activities, Permitted Construction Material Removal Activities, structures for nature observation, trails, tents, recreational vehicles, roads, utilities and up to six (6) telecommunications facilities. In addition, the siting of such structures and improvements is in the sole discretion of the Grantor (Plum Creek).

Recommendation: Structures and improvements should be limited to primitive trail use by the public and other permitted uses of the property subject to the revisions recommended above. Please note that the definitions for the following activities would need to be revised as recommended in Section 1 above in order to adequately protect the conservation values of the Protected Property and balance the development proposed in the Concept Plan: Alternative Generation Activities; Septic Field Activities; and Permitted Construction Material Removal Activities. If these definitions are revised as recommended above, some limited structural development associated with these activities would be permitted on the Protected Property.

Issue: Plum Creek has retained the right to develop (without the permission of the Holder) up to five (5) backcountry huts, bridges, benches, tables, public boat launches, erosion control systems, wells and springs. Huts are defined as “commercial lodging facilities used by persons in pursuit of primitive recreation”.

Recommendation: The Holder should have approval rights over the development and siting of Backcountry Huts and such facilities should be for public, not commercial use. The definition of hut needs to be refined to include limitations on size and to make it complementary with other related LURC definitions (remote camp, remote rental cabin, commercial sporting camp, etc).

Roads, utilities, telecommunication and safety buildings

Issue: The Grantor (Plum Creek) has the right to develop (or grant to others the right) new roads, utilities and telecommunication facilities, and public fire and safety buildings without the consent of the Holder.

Recommendation: Except in connection with Forest Management Activities, these structures should not be developed. Any public utilities use or other essential public use of the land in these terms which may arise in the future are subject to the State powers of eminent domain in any event, and thus need not be addressed in the Easement.

Public boat launches

Issue: New public boat launches that accommodate trailered boats may be developed, maintained and replaced with the consent of the Holder. Once installed and constructed, however, they can be “maintained, repaired, and replaced” without consent of the Holder.

Recommendation: The Development of new public boat launches and .replacement of any boat launches should be subject to Holder approval.

Forest Improvements

Issue: Plum Creek has defined “Forest Improvements” to mean “any and all structures, improvements and utilities that are related to Forest Management Activities.” There should be no development of permanent

mills or other permanent industrial structures or development (including utilities, transmission lines, etc.) if the Easement is truly intended to be a conservation easement proposed as a balance to development. Recommendation: The definitions of Forest Improvements should be limited to “structures, improvements and utilities used solely in connection with and/or for the purpose of accomplishing Forest Management Activities.”

Existing Structures

Issue: Plum Creek has provided that expansion of existing structures that are not associated with Forest Management Activities can take place with the consent of the Holder, and that such structures can be “repaired and replaced” without the consent of the Holder. Maintaining LURC review of these structures simply continues the status quo so that, on this point, no conservation benefit is being provided by the easement.

Recommendation: Without a list of such existing structures on the Protected Property, it is impossible to assess the propriety of this provision or whether it will undermine the conservation values of the Easement.

SECTION 4: SURFACE ALTERATIONS

Alternative Energy Generation and Septic Field Activities

Issue: Permitted surface alterations include alterations associated with Alternative Energy Generation Activities and Septic Field Activities.

Recommendation: Surface alteration should be permitted only in association with Forest Management Activities on the Protected Property. See the recommendations in Section 1 for the definition of Forest Management Activities, Alternative Generation Activities and Septic Field Activities.

Construction Materials Removal Activities

Issue: Plum Creek has retained the right to remove rock, gravel, sand and other similar construction material (broadly defined as “Construction Materials”) for a wide range of purposes including Forest Management Activities on adjacent lands owned by the Holder; construction and maintenance of roads in the vicinity of the Property; construction and maintenance of roads used by the Holder; and the development of areas zoned by LURC for development. In addition, Plum Creek retains the right to sell, barter and exchange construction materials

Recommendation: Construction Material Removal Activities should be defined to permit only limited rock, gravel and sand extraction activities associated with forest management activities on the Protected Property. This would not permit the sale, barter or exchange of such material. See Recommendation in Section 1.

Area of surface alteration

Issue: The maximum size of a disturbed area related to sand, gravel and other extraction is 15 acres and no more than 400 acres may be active at any time. This makes viable the concern that numerous, successive areas of “400 acres” could be left inactive on the land to the severe detriment of conservation values.

Recommendation: The maximum size of the disturbed area should be reduced to 10 acres and no more than 125 acres should be active at any one time on the “offset” protected property. Provisions should be added to require re-vegetation and stabilization of the 125 actively disturbed areas.

Water extraction

Issue: Plum Creek retains the right to engage in surface and subsurface water extraction activities for forestry and residential purposes, and to build and maintain structures necessary for such activities.

Recommendation: The provision should prohibit water extraction operations for commercial consumer retail or the “bottled water industry” purposes.

SECTION 5: FOREST MANAGEMENT

The forest management provisions in the Easement provide substantially less protection for the Protected Property than the measures incorporated in the LURC model easement. The variance from the LURC model easement, and other working forest easements that incorporate meaningful forest management standards, is of great concern. The Easement lacks detailed, meaningful and enforceable forest management plan standards.

Requirements of the Forest Management Plan

Issue: The requirements of the forest management plan – or what is described in the Easement as the “Multi-Resource Management Plan” (hereafter “Management Plan”) – have not been identified in any detail in the easement.

Recommendation: The requirements for the forest management plan must be explicitly described in the terms of the easement.

Note: The management plan itself raises a number of issues, including issues relating to protection of habitat and biodiversity. These issues will become more or less relevant once it is clear what provisions are in the easement and the relationship among the easement, management plan and certification. In this summary, we have not addressed the issues regarding the management plan.

Management Plan and Easement Compliance

Issue: The Easement declares that Plum Creek’s current management plan is in compliance with the terms of the Easement.

Recommendation: Remove this language.

Approval Rights

Issue: Plum Creek has not granted explicit Management Plan approval rights to the Holder.

Recommendation: The terms of the Easement must state that written approval by the Holder is a requirement prior to implementation of the forest management plan.

Forestry Principles

Issue: Protection is limited to areas identified in the Baseline Documentation. However, the Baseline data collection process may overlook smaller rare natural communities or other unique natural areas in the initial screening period.

Recommendation: Language should be inserted in this section specifying that protection should be extended to any areas that are identified in the future.

Issue: The Forestry Principles focus on identified wildlife habitat and unique natural areas but do not address biodiversity more broadly. This could result in disregard of species and habitats of conservation concern (e.g. habitat for Canada Lynx, marten, declining neotropical migrants, etc...) that have not been identified in the Baseline Data.

Recommendation: A new principle should be added as follows: Maintain the native biodiversity of the forest, including healthy and well distributed populations of native flora and fauna and the ecosystems on which they depend.

Non-commercial Forestry Activities

Issue: Extensive non-commercial forest activities are not required to fall within the scope of the management plan. For example, removal of vegetation for scenic vistas, views from trails, public roadways, campsites, overlooks and other public vantage points do not require management plan compliance.

Recommendation: Non-commercial forestry activities must be covered within the scope of the management plan.

Certification and Easement Compliance

Issue: The terms of the Easement state that certification will be an indicator that the Holder is “in full compliance with said Forestry Principles and the Management Plan”.

Recommendation: Revise this language so that it is clear that certification indicates that the Protected Property is managed in a way that is consistent with the terms of the particular certification program, not that it is in compliance with the Forestry Principles of the Easement or other terms of the Easement. The holder should retain responsibility for determining whether the management plan is consistent with the terms of the easement.

SECTION 6: WASTE MANAGEMENT AND FOREST CHEMICALS

Best Management Practice Standards

Issue: The Plum Creek easement requires activities on the Protected Property to be conducted consistent with best management practice (BMP) compliance standards. In contrast, the LURC model easement requires activities to be consistent with the conservation purposes of the easement.

Recommendation: The purposes of the conservation easement should be revised to reflect protection of conservation values as a primary purpose of the easement (see recommendation in the Purpose section). In addition, the above provision should be revised to indicate that activities must be consistent with the conservation purposes of the easement or the BMP standards, whichever is the more stringent standard.

Waste Storage

Issue: The Easement permits storage of “waste generated by allowed uses” on the Protected Property, with no defined time period or restriction beyond “removal at reasonable intervals.” The concern is that a functionally permanent waste storage area or facility, transfer station, or other such use or operation could arise under this provision.

Recommendation: No long term “waste storage” – temporary or otherwise should be permitted on the property.

Insecticide, herbicide and fungicide use

Issue: The LURC model easement requires that any use of herbicides, insecticides, or fungicides must have no adverse effect on wetlands, flora, fauna or other inhabitants. Plum Creek omits this restriction.

Recommendation: The use of herbicides, insecticides and fungicides must have no adverse effect on wetlands, flora, fauna, or other inhabitants as required by the LURC model easement.

SECTION 7: PUBLIC ACCESS EASEMENT

Type of Public Use

Issue: The LURC model easement permits only non-commercial, non-motorized public access and use of the Protected Property for traditional low-intensity recreational uses. In contrast, Plum Creek retains the right and sole discretion to allow commercial use of the property for which fees may be levied.

Recommendation: Identified State agencies, not the Grantor, should determine which commercial users may use the Protected Property.

Public Access

Issue: The LURC model easement requires Holder-approval of any rules or regulations imposed on the public by the Grantor. In contrast, Plum Creek reserves the right to make rules and regulations independent of the Holder that will “control, limit or temporarily prohibit” public access under certain circumstances.

Recommendation: Holder approval in writing should be required for rules and regulations to which the public is subject.

Issue: Plum Creek has retained the right to prohibit use of the property, or open the property, to commercial guides and sporting camps and to levy charges for commercial users including guides, sporting camps, non-profit organizations, and educational and scientific institutions. In other words, for its own commercial benefit, Plum Creek retains the right to close the land to any non-fee paying users.

Recommendation: The Grantor (Plum Creek) should not have retained, exclusive commercial rights over the recreational use of the property. Further, as in the LURC model easement, Holder approval in writing should be required for any rules or regulations restricting or prohibiting public access for non-commercial, non-motorized traditional low-intensity recreational uses.

Motorized Vehicle Use

Issue: Plum Creek retains the sole discretion to allow motorized vehicle use on the Protected Property. The Holder has no rights in this regard.

Recommendation: The Holder should be given approval rights over motorized recreational use of the Protected Property.

Public Liability

Issue: The public bears the sole risk and liability for use of the property.

Recommendation: This provision should be stricken. The Grantor has adequate statutory protection from liability.

SECTION 8: BASELINE DOCUMENTATION

Baseline Conditions

Issue: The terms of the easement state that “the current conditions and forest practices on the Protected Property, as documented in the Baseline Documentation, are consistent with the terms, conditions, and Purposes of the Easement.”

Recommendations: This language should be stricken. Baseline Documentation is meant to be descriptive and to be used for monitoring purposes. It is not necessarily an indication of compliance with the terms of the easement.

Baseline Documentation Content

Issue: The minimum level of detail in the Baseline Documentation is not specified in the terms of the easement. This is of concern given that Forestry Principle (i) states that “protection of identified wildlife habitat and unique natural areas” are limited to areas identified in the Baseline Documentation.

Recommendation: A description of the information to be included in the Baseline Documentation should be included as part of the easement and should be subject to Holder approval.

Approval of Baseline Documentation

Issue: Baseline data does not explicitly require approval by the Holder (it says merely “acknowledge.”)

Recommendation: Holder should have approval rights over the Baseline data and should have the right to approve the natural resource professional responsible for compiling the Baseline data.

Timing of the Baseline Data Collection

Issue: The phrasing of this section suggests that Baseline Documentation may occur after the conveyance of the easement.

Recommendation: Data collection for the Baseline Documentation should be completed before the conveyance of the easement.

SECTION 9: PROTECTION OF CONSERVATION VALUES

Easement Boundary Changes

Issue: The boundaries of the Protected Property may be changed with Holder consent, provided that the total acreage does not change. This provision presents a serious concern in the context of the Easement as a proposed conservation balance within the current regulatory undertaking. It threatens to undermine that entire process by relegating to Plum Creek and a private “Holder” entity the power to alter or change, unilaterally, key factors in the administrative decisionmaking relating to size and locations of the land covered by the Easement.

Recommendation: As set forth above, the State should be the Holder of the easement and the ability to change the boundaries should be limited to the purpose of protecting important conservation values and/or natural features.

SECTION 12: HOLDER’S AFFIRMATIVE RIGHTS

Enforcement

Issue: The LURC model easement grants to the Holder the right to enforce the Easement for any activity or use of the Protected Property that is inconsistent with the purpose of the Conservation Easement. In contrast, the Plum Creek easement provides enforcement rights only where there is a violation of the easement.

Recommendation: The Holder should have the right to enforce for any action inconsistent with the purposes of the easement.

Issue: The Easement limits the Holder’s legal remedies by prohibiting monetary damages for violations of the easement.

Recommendation: The Holder should be entitled all “legal and equitable remedies” available in the event of violation of the Easement.

Conservation Values

Issue: The LURC model easement provides that the Holder may require the Grantor to exercise reserved rights in a manner “that avoids unnecessary harm to the conservation values” protected by the easement. Plum Creek has struck this language.

Recommendation: Insert the language from the LURC model easement. The change also relates to the concern raised, above, in the “Purposes” section.

Property Survey

Issue: The LURC model easement provides the Holder with the right to conduct a professional survey of the Protected Property at Grantor’s cost if it is required to determine if there has been a violation of the easement. Plum Creek has struck this provision from the easement.

Recommendation: Insert the language from the LURC model easement.

Recreational Management Rights

Issue: The Holder has the right to manage non-motorized recreation. However, without the right to manage motorized use, the value of the right to manage recreation is greatly diminished.

Recommendation: Holder should be granted the rights of approval for motorized recreation.

SECTION 13: THIRD PARTY RIGHTS AND ENFORCEMENT

Third Party Approval Rights

Issue: The LURC model easement provides the Third Party with the same approval rights as the Holder. Plum Creek has eliminated this right.

Recommendation: It is unclear why the omission was made from the LURC model easement. Subject to additional concerns, raised above in the “Grantee/Holder” section, this provision should be amended to conform to the LURC model easement.

Limitations on Remedies

Issue: Plum Creek has deemed that any penalty levied for violation of a LURC regulation will be deemed sufficient penalty.

Recommendation: The Holder should have the right to enforce against any action inconsistent with the purposes of the easement, and be entitled all “legal and equitable remedies” available in the event of violation of the Easement.

SECTION 14: ADDITIONAL REQUIREMENTS

Activities Affecting Conservation Purposes

Issue: The LURC model easement requires the Grantor to inform the Holder prior to undertaking any activity that may adversely affect the conservation purposes of the easement. Plum Creek has struck this language.

Recommendation: Insert the language from the LURC model easement.

Stewardship Fund

Issue: The Easement contains no provisions for stewardship funding in relation to monitoring for compliance with the management plan or with Easement provisions and purposes. Especially in light of Plum Creek’s having omitted any real monetary liability or exposure for an Easement violation in the present version, there are no provisions which assure that the Grantor is truly vested in maintaining the conservation values of the Easement (which is proposed as a balance to development).

Recommendation: The Easement should be accompanied by a legally enforceable obligation containing provisions for the Grantor’s funding on a sustainable basis a stewardship fund for the Protected Property.