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December 30, 2005

The Honorable John E. Baldacci
Governor, State of Maine
1 State House Station
Augusta, ME 04333-0001

Dear Governor Baldacci:

I enclose for your information this office's Report on Alleged Freedom of Access Act Violations by the Department of Environmental Protection in Connection With Negotiation of Agreements Relating to Gulf Island Pond. The report was prepared after interviews with a number of people both within and outside of the Department of Environmental Protection (hereafter "DEP"). As explained in the report, we have concluded the following:

1. By acceding to the request of Rumford Paper to refrain from retaining drafts of the so-called side agreement and their written notes on those drafts, the DEP staff attempted to put documents that had become public records beyond the reach of a request for those records pursuant to the Freedom of Access Act ("FOAA") and consequently violated the requirements of the FOAA;

2. While the staff did not fully understand their obligations under the FOAA and acted in the belief that they were in compliance, they should have exercised greater care to determine the true extent of their responsibilities under FOAA before acceding to Rumford's request;

3. Because the records still in existence have been retrieved from Rumford Paper, and because the actions of the DEP staff do not support a conclusion that the violations that occurred were willful, no formal enforcement action is required; and

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4. The lack of a clear and consistent understanding of the requirements of the FOAA on the part of the DEP staff demonstrates a need for training and the establishment of a clear departmental record retention policy.

While our report focuses on certain actions of the DEP, our experience in working with state agencies suggests that in light of the proliferation of electronic recordkeeping media, as well as the increased number and complexity of FOAA requests, state government in general would be well advised to give attention to the adequacy of record retention policies and training in the requirements of the FOAA. I offer the resources of my Office to assist in this important effort.

Sincerely,

G. Steven Rowe
Attorney General

OFFICE OF THE ATTORNEY GENERAL

Memorandum

To: G. Steven Rowe, Attorney General

From: Linda M. Pistner, Chief Deputy Attorney General

Phyllis Gardiner, Assistant Attorney General

Date: December 30, 2005

Re: Report On Alleged Freedom of Access Act Violations by the Department of Environmental Protection in Connection with Negotiation of Agreements Relating to Gulf Island Pond

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Question presented

The question you have asked us to investigate, in response to a number of complaints filed with our office, is whether the Department of Environmental Protection ("DEP") staff violated the Freedom of Access Act ("FOAA") by the manner in which they negotiated so-called side agreements with Rumford Paper Company ("Rumford") and/or International Paper Company ("IP") in the summer of 2005, relating to water quality in Gulf Island Pond.[1]

A variety of groups have alleged that by allowing Rumford Paper Company to generate all the drafts of Rumford's side agreement on company computers and by agreeing not to retain any documents relating to the agreement, the DEP staff attempted to "evade any public scrutiny,"[2] "deliberately undermined" or "subverted" the public's right to know,[3] and put documents "beyond the reach of the public records law."[4]

Although these FOAA complaints focus primarily on the Rumford agreement, because the public controversy that has arisen concerns both "side agreements," we have addressed the IP agreement here as well.

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[1] Gulf Island Pond is an impoundment in the Androscoggin River, created by a dam that is used to generate hydroelectric energy.

[2] Letter of November 4, 2005, from John H. Montgomery, Esq., attorney for FPL Energy Maine Hydro LLC ("FPL Energy").

[3] Letter dated November 8, 2005, from representatives of several environmental groups and the Maine Freedom of Information Coalition.

[4] Letter of November 8, 2005, from Mal Leary, President of Maine Freedom of Information Coalition.

Scope of inquiry

In the course of this inquiry, we interviewed all the staff members at DEP who were identified as having participated in any meetings or discussions concerning the development of one or both of these side agreements. These include: Andrew Fisk, Director of the Bureau of Land and Water Quality; James Dusch, Director of Procedures and Enforcement; Brian Kavanah, Director of the Division of Water Resource Regulation; and Dennis Merrill, James Crowley and Gregg Wood, all of whom are Environmental Specialists in the Bureau of Land and Water Quality. We also interviewed Dawn Gallagher, Commissioner of DEP during the relevant time period, and Assistant Attorney General Jerry Reid. For specific questions regarding the Board of Environmental Protection ("BEP") meeting of June 16, 2005, we interviewed Cynthia Bertocci, Executive Analyst for the BEP, along with Assistant Attorney General Peggy Bensinger, who was present at the meeting as the BEP's attorney.

In addition, we interviewed the following staff and representatives of Rumford Paper Company, who were involved in drafting and negotiating of the agreement: Scott Reed, Environmental Manager at the Rumford mill, and Steven Hudson, a former mill employee and now governmental relations consultant for Rumford.

We asked each individual we interviewed to produce any documents, including meeting or calendar notes, pertaining to the development of the agreements with both IP and Rumford. We also reviewed the legislative committee file on L.D. 1450, "An Act to Amend Water Quality Standards" (122nd Legis. 2005), and related bills. A list of the documents that we received from DEP and reviewed is attached.

Context/background

The development of these side agreements with IP and Rumford occurred in the context of multiple processes relating to water quality in Gulf Island Pond that were occurring simultaneously in the spring and summer of 2005. The Legislature was actively considering bills regarding water quality standards for the Androscoggin River; DEP was processing applications for Maine Pollutant Discharge Elimination System ("MPDES") permits for both IP and Rumford, as well as for water quality certification for FPL Energy; and there were active discussions regarding a consent agreement with IP to be executed in conjunction with its MPDES permit. A wide variety of stakeholders were involved in all of the permitting and legislative proceedings, and litigation was anticipated.

1) *Legislative process*

By the spring of 2005, MPDES permit applications for both the IP and Rumford mills and a water quality certification application for FPL Energy's hydro project had been pending for some time. DEP had also been working for months to finalize the Total

Maximum Daily Load ("TMDL") analysis for the Androscoggin River, which would form the basis for license limits and water quality compliance issues.

Legislation enacted in 2004 established a dissolved oxygen standard for the Androscoggin and St. Croix Rivers at 22 degrees centigrade, following a fairly vigorous public debate over what standard was necessary to support indigenous fish. P.L. 2003, c. 664, §1. There was a widespread belief that technical changes had to be made to that legislation, however, and several other bills were under consideration in 2005 to further amend the water quality classification statute in ways that renewed debate over the appropriate standards for dissolved oxygen necessary to support growth of indigenous fish. The mills argued for retaining the standard at 22 degrees, but environmental groups argued strenuously that it should be set at 24 degrees.

At a meeting with all the mills, DEP, and interested environmental groups in mid-April, 2005, the Governor challenged the mills to find a way to achieve the 24 degree standard even though it was not required by statute. Both IP and Rumford agreed to achieve that standard, voluntarily, over a 10-year period. DEP subsequently convened at least two meetings with all of the interested parties (one on April 25 and one on May 3) to discuss how best to accomplish this goal. On May 4, at a public hearing before the Legislature's Joint Standing Committee on Natural Resources ("Natural Resources Committee"), DEP laid out a proposed "framework" that included numbers and a time frame for moving to the 24 degree dissolved oxygen standard, with the understanding that permit limits would be based on the 22 degree standard then in state law.

The Natural Resources Committee Chairs asked the mills to put in writing their voluntary commitments to achieve the 24 degree standard, and both IP and New Page (Rumford's parent company) wrote such letters on May 18 and 19, respectively. These same letters were read into legislative record by Senator Scott Cowger, Senate Chair of the Natural Resources Committee. Legis. Rec. S-1182 (1st Spec. Sess. 2005). The IP letter was quite specific, and listed dissolved oxygen levels that the company agreed to achieve by year 1, year 5 and year 10. The Rumford letter for the most part did not refer to specific limits, but rather laid out in general, narrative form the commitments the company was willing to make and the type of regulatory certainty that they wanted to achieve as part of an "integrated plan."

Concerns were raised about whether DEP had adequate authority under existing statutes to enter into voluntary agreements with the mills for this purpose. To resolve those concerns, an amendment to L.D. 1450 was crafted by legislative staff with input from DEP and various stakeholders, and was adopted by the Natural Resources Committee on May 25. It specifically authorized DEP to "negotiate and enter into agreements with licensees and water quality certificate holders in order to provide further protection for the growth of indigenous fish." As a technical matter, this last phrase meant achieving a dissolved oxygen standard at 24 degrees. There apparently was no discussion at the Committee level concerning what the process would be for developing such agreements, or whether there would be any opportunity for public input. Although the same bill included language providing for public review and comment on revised

modeling for Gulf Island Pond, the section regarding the side agreements contained no such provision. *See* L.D. 1450, §5, ¶4.

The House and Senate voted to enact L.D. 1450, as amended by Committee Amendment "A" (S-291) as amended by Senate Amendment "A" (S-315), on June 7 and 8, 2005, respectively; and Governor Baldacci signed the bill into law, as an emergency measure, on June 20, 2005. It became Chapter 409 of the Public Laws of 2005.

2) Licensing proceedings

Approximately one week after the May 4 public hearing on L.D. 1450 and related bills, DEP issued draft MPDES permits for Rumford and IP, for a 30-day public comment period. Both permits set dissolved oxygen limits based on 22 degrees, and included limits for total suspended solids ("TSS") and phosphorus that matched the "framework" laid out by DEP at the May 4 public hearing. On May 13, DEP also submitted to the United States Environmental Protection Agency for approval the TMDL report, which provided the scientific basis for the limits in the draft licenses.

The draft license for Rumford called for achieving TMDL allocations for TSS and Phosphorus within 5 years. The draft license for IP was written with TMDL allocations for TSS and phosphorus within 5 years, but DEP's "framework" and public statements made by IP had made clear that the mill would not achieve those limits for 10 years. For that reason, DEP was anticipating that they would draft a consent agreement with a schedule of compliance, in conjunction with issuance of a final license for IP.

A newspaper ad taken out by IP's Androscoggin Mill in early June, indicating that IP had reached "a firm agreement" on water quality standards with DEP and the Legislature, prompted the Natural Resources Council of Maine ("NRCM") and Maine Rivers to request that BEP take jurisdiction of the pending MPDES permits and water quality certification. In their submissions to the BEP, which included the letters sent by New Page and IP to the Natural Resources Committee Chairs, attorneys for these organizations objected to the alleged "agreements," and expressed concerns that they had no knowledge of what DEP was negotiating and no opportunity to comment. Most of the discussion at the BEP meeting concerned IP's situation and the possibility that DEP would allow that mill 10 years in which to comply with license limits. Rumford's situation, however, was also discussed.

BEP declined, on June 16, to take jurisdiction of these permit applications, but only after Commissioner Gallagher indicated that DEP was ready to issue licenses within 2 weeks and could not wait for the Board to consider the matter further. The Commissioner also made representations, according to some witnesses, that there would be a transparent, public process for any agreements to be issued in parallel with the MPDES permits. Whether she was referring only to the IP consent agreement, or to any agreements on this topic, was not made clear in her comments.

FOAA requests were filed with the DEP in early June by NRCM, Maine Rivers, and FPL Energy, seeking a variety of documents relating to the MPDES permitting process, including "all documents, including all drafts, letters, memoranda, emails, and attachments, discussing, analyzing, or applying the 22 [degree] or 24 [degree] standards for the Androscoggin River Total Maximum Daily Load." FPL Energy also sent a "litigation hold" letter to Commissioner Gallagher, on May 31, 2005, requesting that all documents pertaining to these licensing proceedings be retained, in anticipation of a legal challenge to the licenses or water quality certification.

DEP's intention, based at least in part on discussions with the stakeholders in the early spring, and with the Natural Resources Committee, was to enter into agreements with the mills and to issue final MPDES permits at the same time. The licensing process was extended when the decision was made in late June to put IP's schedule of compliance into its MPDES permit, rather than in a consent agreement. This decision prompted issuance of a revised IP permit, on July 25, for a new 30-day comment period.

The DEP issued final MPDES permits for both mills, and a water quality certification for FPL Energy, on September 21, 2005. Separate agreements between DEP and IP, and between DEP and Rumford, were executed the following day and presented at a work session of the Legislature's Natural Resources Committee.

Findings of Fact relating to the IP agreement

The side agreement developed with IP was a one-page document that was drafted by DEP staff (primarily Dennis Merrill), using DEP computers. It circulated in house for comment in mid-July and was provided to IP sometime in August. IP personnel (Tom Saviello) suggested one minor change, which DEP agreed to just before finalizing the text. All known drafts of the agreement that circulated in house at DEP and back and forth with IP, are still available and have been produced by DEP in response to various parties' FOAA requests.

No meetings were held between DEP and IP to discuss the text of the agreement. Its content relates solely to the time frame and dissolved oxygen levels necessary to achieve a standard at 24 degrees by the year 2010. The substance of IP's agreement matches the letter provided by IP to the Natural Resources Committee Chairs in May, and read on the floor of the Senate before the Legislature voted to amend the statute on water quality classification.

The agreement was signed by Commissioner Gallagher and IP's mill manager without prior public review because it was neither a consent agreement nor a permit, and because the legislation authorizing such agreements did not provide for any public review process. It was signed without prior review by attorneys in this office as well.[5]

[5] Dennis Merrill did forward via email a copy of the draft agreement to Assistant Attorney General Jerry Reid on Monday, July 18, 2005, but Reid was away on vacation at the time and did not discover that he had received the draft until much later – after the controversy surrounding these side agreements emerged in the

Findings of Fact relating to the Rumford agreement

At the initial meeting with the DEP staff on May 10, 2005, Rumford representatives made clear that in exchange for voluntarily agreeing to go to a higher dissolved oxygen standard, they wanted certainty with respect to future permitting decisions and they wanted the ability to be relieved of responsibility for a second oxygenation unit for Gulf Island Pond once they had achieved the 24 degree standard. Several possible forms of agreement to achieve these goals were discussed on May 10, including an administrative consent agreement or a side letter. Both those options were rejected in favor of preparing a formal agreement that would *not* be a consent agreement.[6] At the conclusion of the May 10 meeting, Rumford's attorney offered to write the first draft of the agreement, and DEP staff agreed. Brian Kavanah, who was the most senior DEP staff person at that meeting, explained to us that he agreed to this approach because a) his staff were extremely busy trying to finalize the TMDL, the MPDES permits, and the water quality certification, and this seemed a practical way to avoid further overload, and b) since this was to be a voluntary agreement by the company to go beyond compliance, and not a regulatory action by DEP, it did not seem inappropriate to let the company draft it.

It is unclear exactly when Rumford representatives first met with DEP staff to review a draft of the agreement. No one we interviewed was able to recall the date, or to reconstruct it from calendar notes or documents. Rumford representatives Scott Reed and Steve Hudson thought it might have been in late May or early June; DEP staff member Andrew Fisk thought it occurred in late June. When presented with the copies of the dated drafts produced by Rumford, both Fisk and Kavanah recalled having seen a version similar to the one dated May 13, but neither thought they had seen an initial draft at that early date.

At the first meeting to discuss a draft, Rumford's representatives made clear to DEP that they wanted to prepare all the drafts of the agreement, and to keep all the notes and documents throughout the negotiation process. The company viewed this as a voluntary agreement, going beyond compliance, and, therefore, felt that they should not have to negotiate with, or receive any comments from, other parties who were involved in the licensing process. DEP staff member Andy Fisk agreed to their request, and according to all persons present (Fisk, Kavanah, Reed and Hudson), there was no significant discussion of the matter. Jim Dusch recalled being told by Andy Fisk later in the process just prior to the August 5 meeting that the only way Rumford would agree to go through this process was if they were able to keep control of all the documents.

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press this fall. Dennis Merrill did not see the agreement again after he forwarded it to Jerry Reid, and no one else at DEP made any attempt to follow up to receive input from our office on this agreement.

[6] It was not until two weeks later that the Natural Resources Committee adopted the amendment to L.D. 1450 authorizing the DEP to enter into enforceable agreements other than consent agreements, for this purpose.

At least three meetings took place throughout the summer between various DEP staff members and Rumford representatives to discuss the wording of the agreement.[7] Steve Hudson recalled that about half the meetings were held at DEP offices, and half at Rumford's Augusta office, which the company shared with Hudson's consulting business. Andy Fisk recalled two meetings at Hudson's office and one at DEP. Brian Kavanah remembered attending only one meeting, which took place at Rumford's Augusta office. Jim Dusch attended only one meeting, on August 5, in Fisk's DEP office. Gregg Wood, Jim Crowley and Dennis Merrill do not recall attending any meetings regarding the Rumford agreement, other than the initial discussions that took place at DEP on May 10. Andy Fisk was present at all the meetings except on May 10, according to all accounts.

Scott Reed of Rumford drafted the agreement, with input from Rumford's consultant, Steve Hudson, and counsel for the company. On each occasion when they met, drafts were shown to DEP staff for review and discussion, and were then returned to Scott Reed, who would go back to his office and generate a new draft. One version of the agreement, produced by Rumford, shows handwritten comments, which Jim Dusch confirmed that he made on August 5. He recalls that Steve Hudson and Scott Reed came to Andy Fisk's office at DEP to show them the draft, whereupon Jim retired to his office to review it, and write comments on it. He reviewed those comments with Andy Fisk (crossing some out as a result of their discussions), and then discussed each one with Hudson and Reed in Fisk's office that same day. Steve Hudson confirmed that the annotations in blue ink on the same document reflect comments he made in response to their discussions. Jim understood his role to be to review the document as to form and legality, and he relied on Andy Fisk to review it for content, in terms of water quality issues.[8] The August 5 draft was the only one the Jim Dusch reviewed. Brian Kavanah also remembered seeing only one draft, presented at the meeting he attended in Hudson's office, and he did not recall making any annotations on it. Andy Fisk remembered primarily making oral comments on the drafts during meetings with Rumford, but also recalled that he and Jim Dusch had faxed some alternative language for paragraph 16 to Rumford after the meeting on August 5.[9] No other staff members we interviewed saw any drafts of the Rumford agreement.

The series of drafts produced by Rumford reveal a number of revisions that were made over the course of the summer, but the basic framework of the agreement remained the same throughout the process and consistent with the discussions at the May 10 meeting. Although the text of the agreement incorporates all the elements outlined by

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[7] Andy Fisk was quite clear that no more than three meetings were held. Scott Reed and Steve Hudson thought that perhaps as many as six or seven were held, based largely on the number of drafts they recovered on Hudson's computer.

[8] Fisk, in turn, had involved Brian Kavanah (and he recalled, Gregg Wood) earlier on in the process in order to get the benefit of their expertise on some of the substantive water quality issues.

[9] When we showed him the document produced by Rumford and attached hereto as RPC-9, he was able to identify it as this same fax.

New Page in the May 19 letter to the Natural Resources Committee Chairs, it includes some provisions that were not described in that letter. In particular, paragraph 5 relating to Rumford's desire to be relieved of responsibility to contribute to the cost of the second oxygenation unit once the mill had achieved stricter discharge limits was not referenced either explicitly or implicitly in the letter. This aspect is clearly referenced, however, in the DEP staff notes of the May 10 meeting, which were retained and produced by DEP in response to FOAA requests. Paragraph 4 addresses how Rumford will achieve the 24 degree dissolved oxygen level, and thus most closely parallels the IP agreement. Other paragraphs address the parameters for future permitting decisions and seek to achieve the degree of certainty that Rumford had indicated (both during its initial discussions with DEP on May 10, and in its May 19 letter to the Natural Resources Committee Chairs) was important to the company.

The agreement did more than simply specify what Rumford was willing to do over time to achieve the 24 degree standard. In this respect, it went considerably beyond what was in the IP agreement. Rumford's agreement also purported to commit DEP to certain positions with regard to future permitting actions, even though both parties apparently understood that changes in circumstances (including any changes in legal standards) would void those commitments.

No versions of the Rumford agreement were ever sent to this office for review or comment, and DEP staff did not consult with their attorneys in this office during the drafting process. Because this was not a consent agreement, DEP did not bring it to the BEP for approval. As noted above, because there was no prescribed process for public review and comment on the agreement, it was not made public until both parties had signed and executed it on September 22, 2005.

Analysis and Conclusions

Our analysis of the facts as outlined above is divided into three parts, addressing the following questions: 1) whether a violation of FOAA occurred, 2) whether a violation, if it occurred, was willful, and 3) what remedial or enforcement action is appropriate under the circumstances presented.

I. Did the DEP's conduct in negotiating these side agreements violate the FOAA?

We should note at the outset that the key issue raised by this factual situation concerns the public records portion of the Freedom of Access Act (FOAA), not the sections relating to public meetings or public proceedings. Allegations have been raised that "secret meetings" were held between DEP staff and representatives of Rumford and IP. Neither the FOAA nor any provision in the statutes administered by DEP, however, required negotiation of these agreements to be conducted in public meetings.

The so-called side agreements with IP and Rumford, while important legally enforceable documents, were not administrative consent agreements or civil enforcement actions and thus did not trigger the requirement for public notice and public comment

pursuant to 38 M.R.S.A. §347-A(6). The amendment to Title 38 M.R.S.A. §465(4)(B) enacted in June, 2005, authorizing DEP to enter into these agreements also did not provide any process for public review and comment. Thus, neither the public nor any of the parties to the MPDES and water quality certification proceedings relating to Gulf Island Pond had a legal right to participate in the negotiation or the drafting of the IP or Rumford agreements, and the law provided no process for public review and comment on the final version of these agreements. The public's only opportunity to view the process was to see the documents that were created during the negotiating process.

The side agreement with IP was prepared by DEP staff. The various drafts and comments on those drafts made by DEP staff, as well as by IP officials, have been preserved and produced in response to FOAA requests. Accordingly, there are no FOAA issues with regard to the IP agreement and no FOAA violations.

In contrast, the Rumford agreement that was drafted by Rumford officials, and copies of all the drafts of the agreement as well as annotations by DEP staff on those drafts, were retained by Rumford officials.[10] The focus of our analysis is whether DEP's failure to retain and produce these documents violated the FOAA.

The definition of "public records" under the FOAA includes "any written … matter …that is in the possession or custody of an agency or public official of this State … and has been received or prepared for use in connection with the transaction of public or governmental business or contains information relating to the transaction of public or governmental business." 1 M.R.S.A. §402(3).[11]

In negotiating this agreement, there is no question that DEP officials were transacting governmental business. Although not a permit or a consent agreement, this was, nonetheless, a formal legal agreement in which Rumford made commitments to achieve certain benchmarks in terms of water quality, and DEP also committed to certain actions in response. The legislation authorizing these agreements[12] specified that they would be "enforceable as department orders according to the provisions of sections 347-A to 349." This meant that DEP and the Attorney General's Office would be able to bring an action for penalties or injunctive relief to enforce the terms of the Rumford agreement. It was clearly an important public document.

The FOAA does not provide any exception that excludes drafts of an agreement from the definition of public record. If a document was "*received* or *prepared for use in*

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[10] The only documents retained by DEP relating to this agreement are notes of a meeting held on May 10, 2005 between DEP and Rumford staff, at which time the idea of creating such an agreement was discussed. The notes reference the issues that were ultimately addressed in the agreement, but the meeting pre-dated legislative action authorizing DEP to negotiate agreements with the mills for this purpose.

[11] This section of the statute goes on to list a number of exceptions, none of which is relevant to the factual situation presented.

[12] P.L. 2005, c. 409, §1, amending 38 M.R.S.A. §465(4)(B) (eff. June 20, 2005).

connection with the transaction of public or governmental business, or *contains information relating to* the transaction of governmental business," it is, by law, a public record. 1 M.R.S.A. §402(3) (emphasis added). Drafts prepared by Rumford officials were presented to, and "received" by, DEP staff and thus met this aspect of the public records definition.[13] Handwritten annotations on some of the drafts were also "prepared" by DEP staff for use in connection with these negotiations.

Drafts shown to, and/or annotated by, DEP staff were in the possession or custody of those DEP officials for a period of time. Documents that clearly would be considered public records if they were still in the DEP's possession or custody did not cease to be public records solely by virtue of being returned to the custody of Rumford, as a private party. Indeed, if Rumford had not specifically requested that the DEP staff not retain their notes or copies of any drafts, it is likely that DEP staff would have retained them in the normal course of business as a governmental agency, just as they retained copies of internal drafts and review comments on the IP agreement.[14]

The FOAA does not expressly impose an obligation on agencies to *create* public records, or to create a paper trail for every decision the agency makes. Thus, if meetings are held and staff people do not take notes, no public records will exist, and that by itself is not a violation of the FOAA. In this instance, however, DEP officials made a decision not to retain documents that did exist, were received or annotated by them, and were temporarily in their possession. Moreover, these documents related to a formal agreement negotiated by DEP in the exercise of specific statutory authority that was enacted after extensive discussions with legislators and stakeholders and expressly provided that the agreement would be enforceable as an order of the DEP.

The intent of the FOAA is clear: the public has a right to know the business that state agencies and public officials are transacting on the public's behalf, and that means having the ability to inspect documents that constitute public records, such as drafts of a binding agreement between an agency and a private, regulated entity. By not keeping those documents, DEP staff attempted to avoid the creation of a public record that would be open to public inspection. However, they did not manage to avoid creating a public record; instead, they failed to retain documents that had already become public records and thereby precluded the opportunity for public inspection of those records. That action, in our view, was in violation of the FOAA.

II. Were the violations willful?

Under the FOAA, a state agency whose officer or employee committed a "willful violation" of the statute "shall be liable for a civil violation for which a forfeiture of not

[13] The fact that DEP agreed to let Rumford prepare the drafts of the agreement does not constitute a violation of the FOAA.

[14] Interviews with DEP staff suggest that individual practices varied with respect to retention of draft documents; nonetheless, drafts of the IP agreement, together with staff comments on those drafts, were retained and produced by DEP.

more than $500 may be adjudged." 1 M.R.S.A. §410.[15] The statute does not define what constitutes a "willful" violation in this context, however, and, to date, neither has the Maine Law Court.

When the FOAA was originally enacted, section 410 provided that a "willful violation" constituted a class E crime. Under the Maine Criminal Code, where "willful" is the state of mind required for a crime, the individual must have acted "intentionally or knowingly" as those terms are defined in the code. *See* 17-A M.R.S.A. §34(1).[16] Even though section 410 as amended defines this as a civil violation, a court might still rely on the Criminal Code definitions of "intentionally" or "knowingly" for guidance.[17] A court might also look to how the term "willful violation" has been defined in other civil contexts.

The only statutory definition of "willful violation" in the civil context in Maine appears in Title 26, section 1402, governing debarment from participation in state contracts for serious willful or serious repeated violations of the federal Occupational Safety and Health Act. It defines "willful violation" as "a violation committed intentionally or knowingly with an intentional disregard of, or plain indifference to, legal requirements under [Title 29, chapter 15 of the federal labor laws]." 26 M.R.S.A. §1402(1)(C). This language is largely drawn from federal caselaw. *See, e.g., Chao v. Occupational Safety and Health Review Comm'n*, 401 F.3d 355 (5th Cir. 2005); and *A.E. Staley Manufacturing Co., v. Secretary of Labor*, 295 F. 3d 1341 (D.C. Cir. 2002)(willful violation is an act done voluntarily with either an intentional disregard of, or plain indifference to, OSHA's requirements).

The federal courts have used similar language to define what constitutes a "willful violation" in a variety of other employment related statutes. In these contexts, the courts

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[15] The full text of 1 M.R.S.A. §410 is as follows:

> For every willful violation of this subchapter, the state government agency or local governmental entity whose officer or employee committed the violation shall be liable for a civil violation for which a forfeiture of not more than $500 may be adjudged.

[16] The definitions of these terms are set forth in 17-A M.R.S.A. §35, as follows:

> 1. "Intentionally."
>
> A. A person acts intentionally with respect to a result of his conduct when it is his conscious object to cause such a result.
>
> B. A person acts intentionally with respect to attendant circumstances when he is aware of the existence of such circumstances or believes that they exist.
>
> 2. "Knowingly."
>
> A. A person acts knowingly with respect to a result of his conduct when he is aware that it is practically certain that his conduct will cause such a result.
>
> B. A person acts knowingly with respect to attendant circumstances when he is aware that such circumstances exist.

[17] *See District Attorney for the Fifth Prosecutorial District of Maine v. City of Brewer*, 543 A.2d 837 (Me. 1988).

have held that to establish a willful violation requires a showing that the violator "either knew or showed reckless disregard for the matter of whether its conduct was prohibited by the statute."[18] Moreover, the U.S. Supreme Court has clarified that this is not a negligence standard. Thus, a violation is not willful even if the employer acted unreasonably in determining whether it was in compliance with the applicable statute. *Baystate*, 163 F.3d at 40, citing *McLaughlin*, 486 U.S. at 135, n.13.

This construction is consistent with the plain meaning of the word "willful." A standard dictionary definition of "willful" is "deliberate, voluntary or intentional." *Random House Unabridged Dictionary* (2nd ed. 1993). An act that is "willful" is "not accidental [but is] done deliberately or knowingly and often in conscious violation or disregard of the law, duty, or the rights of others." *Merriam-Webster's Dictionary of Law* (1996). "A willful act may be described as one done intentionally, knowingly, and purposely, without justifiable excuse, as distinguished from an act done carelessly, thoughtlessly, heedlessly, or inadvertently." *Black's Law Dictionary* (6th ed. 1990).

All of these definitions suggest that for a violation to be willful, the act constituting the violation must have been done a) voluntarily, and b) with either an awareness of the applicable legal requirements that are being violated, or an intentional or reckless disregard of those legal requirements.

In the instant case, it seems clear that while the staff involved in negotiating the Rumford agreement acted voluntarily in agreeing to comply with Rumford's request, they did not know that their conduct was in violation of the FOAA. This was largely because they did not fully comprehend the requirements of the FOAA. In particular, they did not appreciate that once drafts of the agreement were shown to them by Rumford officials for review and comment, they became public records. By returning the documents to Rumford officials at the conclusion of their meetings, the DEP staff intentionally placed the documents beyond public view; but because they did not appreciate that what they were handling was already a public record, it does not appear that they intentionally violated the FOAA.[19]

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[18] *See, e.g., Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111 (1985)(employer liable for liquidated damages under Age Discrimination in Employment Act, 29 U.S.C. §626(b), if it knew or showed reckless disregard for whether its conduct was prohibited by the Act); *McLaughlin v. Richland Shoe Co.*, 486 U.S. 128 (1988)(adopting same standard for statute of limitations under Fair Labor Standards Act, 29 U.S.C. § 201 et seq.); *Hazen Paper Co. v. Biggins*, 507 U.S. 604 (1993)(applying same standard to liquidated damages provision of Age Discrimination in Employment Act); *Hillstrom v. Best Western TLC Hotel*, 354 F.3d 27 (1st Cir. 2004)(applying *McLaughlin* standard to statute of limitations under Family and Medical Leave Act, 29 U.S.C. § 2617(c)); *Baystate Alternative Staffing, Inc. v. Herman*, 163 F.3d 668 (1st Cir. 1998)(applying *McLaughlin* standard to civil penalty standard of Fair Labor Standards Act).

[19] It appears to have been DEP staff's "conscious object" to avoid creation of a public record during the negotiation process (in response to Rumford's request), but it was not the staff's conscious object to take something that was already a public record and to place it outside of public view. Thus the violation was not done "intentionally" as that term is defined in Maine's Criminal Code. For similar reasons, we do not believe the DEP staff's conduct constitutes a violation of 1 M.R.S.A. §452. They did not intentionally remove or "secrete" any document that they believed belonged to the DEP or any other state agency.

The key DEP staff members we interviewed offered various explanations as to why they did not believe their actions were in violation of the FOAA. These included the belief or the fact that:

1) they did not have an obligation under FOAA to create a public record, but only to make available to the public the documents that were actually in the agency's files; accordingly, if they had nothing in their files, no public record would exist;

2) they did not have an obligation to keep copies of drafts of any documents, including but not limited to drafts of this agreement; thus, even if they had held onto notes or drafts, they could have discarded them later without violating the FOAA;

3) this was not a regulatory action by the DEP (i.e., it was not a permit, consent agreement or enforcement action), but rather a purely voluntary agreement by Rumford to go beyond compliance with the legal standards set forth in statute; and

4) development of the side agreement was essentially a ministerial act, since the contents of the agreement had already been outlined publicly in the letter from New Page to the Chairs of the Natural Resources Committee, which was widely distributed to interested parties and read into the legislative record.

For the reasons outlined above in part I of our analysis, these rationales are insufficient to support a conclusion that the DEP staff's conduct was consistent with the requirements of the FOAA. Nonetheless, the explanations do reflect that the DEP staff thought about the matter before reaching the conclusion that they could agree to Rumford's request without violating the FOAA. As noted in part I above, the staff believed that they could prevent the creation of public records simply by agreeing not to keep these documents in their custody or possession. Their belief was legally incorrect and, therefore, acting on it could be construed as unreasonable. That still would not make this a "willful violation," however, if a court were to apply the standard established by the U.S. Supreme Court in the cases discussed above.

Whether or not the DEP staff's beliefs concerning the public records provisions of the FOAA were objectively reasonable, they appear to have held those beliefs in good faith. And although Maine's Law Court has not addressed this issue, the Superior Court has suggested that while there is no good faith exception to the requirements of the FOAA, when governmental officials take action based on a good faith belief that they are in compliance with the FOAA, that good faith is relevant to whether a "willful violation" has occurred under 1 M.R.S.A. § 410. *Guy Gannett Publishing Company v. City of Portland*, 1992 Me. Super. LEXIS 220 (Me. Super. Ct., Cum. Cty., Sept. 24, 1992).

There are several reasons that the DEP staff should, at the very least, have been more attuned to the FOAA and exercised greater care to determine the extent of the

agency's FOAA obligations before acceding to Rumford's request that they not keep any drafts or notes of the negotiations. First, as noted above, the absence of any legal process for public notice and comment on these agreements meant that review of these documents would provide the public and interested parties with their only opportunity to see what the DEP was negotiating. Second, three FOAA requests (as well as FPL's litigation hold letter) were pending at the time these negotiations began, and some of them were arguably broad enough in scope to include documents generated in the process of negotiating the Rumford agreement. At the very least, those requests should have prompted a more careful review by DEP staff to determine whether any of them encompassed the Rumford documents. Finally, as noted in our factual findings, the intense public interest expressed at the Board meeting in mid-June regarding any agreements that DEP might be negotiating with the mills in parallel with the MPDES permits should have heightened the staff's sensitivity to compliance with the FOAA.

It appears to us, based on our interviews, that the DEP staff agreed to Rumford's request concerning documents because they were sympathetic to Rumford's desire to avoid having all the various interest groups and parties involved in the MPDES and water quality certification process able to comment on this agreement as it was being developed. Both DEP and Rumford viewed the document they were negotiating as a purely voluntary agreement by the company to go beyond compliance and, therefore, did not think it warranted the same level of public scrutiny -- particularly since the elements of the agreement had largely been revealed in the letter to the Chairs of the Natural Resources Committee that was widely available to the public and all interested parties.

Knowing that there was no legal requirement to involve other parties or the public in meetings to discuss the agreement with Rumford, the staff agreed to a procedure that went one step beyond and shielded the documents created in the process of negotiating the agreement from public view. In this respect, DEP's actions were taken without adequate consideration of and appreciation for the public's rights under the FOAA. Nonetheless, in our view the staff's conduct did not rise to the level of reckless or intentional disregard of the requirements of the Freedom of Access Act, nor does it show plain indifference to those legal requirements.[20]

For all of these reasons, we conclude that the FOAA violations that occurred here, although significant, were not willful, and we believe it likely that a court would come to this same conclusion.

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[20] We have referred throughout our analysis and conclusions to "DEP staff" rather than individual DEP employees. As noted in the Findings of Fact, a number of people were involved in the discussions leading up to the finalization of the side agreements. Since we have concluded that the actions of these individuals do not constitute willful violations of the FOAA for which civil penalties should be sought, we refer to them collectively.

III. What is the appropriate remedy for this FOAA violation?

Although the FOAA authorizes a civil penalty only for willful violations, this office, or any aggrieved person, may bring an action for injunctive relief to force disclosure of public records that have been wrongfully withheld, even if the violation is not willful. In this case, however, there is no need for such action because Rumford has cooperated voluntarily and, in response to our request, has produced (according to their representations) all the documents still in existence that they showed to, or received from, DEP relating to this agreement. Rumford officials searched computer files at the mill, and requested the company's consultant, Steve Hudson, to do the same. The mill's environmental manager, Scott Reed, who did most of the drafting, disposed of all the drafts in his possession immediately after the final agreement was signed in September 22, 2005, and, accordingly, was not able to recreate any public records when we made the request.[21] Steve Hudson, however, was able to recover a number of drafts showing edits made during the negotiation process in the summer of 2005, including one draft with handwritten annotations made by DEP staff during a meeting at DEP's offices on August 5, 2005. Indeed, Rumford's production may have been over-inclusive since the DEP staff, when questioned, could not verify that they had seen all of the drafts that Rumford produced for us.[22]

Since there is no way to re-create documents that have already been destroyed, there would be nothing to be gained by seeking a court order to compel production of public records in this case. By seeing the documents attached to this report, the public and any interested parties will have an opportunity to see what they could have and should have been able to see some months ago – i.e., the evolution of the Rumford agreement as it went through the negotiating process with DEP.

Although not required by the FOAA, any alleged harm to the public caused by the delayed disclosure of these documents has also been mitigated by the fact that DEP has now voided these agreements. Under the statute, actions taken by a public body in a non-public *meeting* in violation of FOAA may be declared null and void. 1 M.R.S.A. §409(2). The same remedy does not exist, however, where an agency or official fails to produce or to retain public *records*. Nevertheless, independent of this inquiry, the DEP opted to take this remedial action anyway, and served notice on all the parties to the MPDES and water quality licensing proceeding on November 29, 2005, that the agency was rescinding the agreements.

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[21] Rumford's attorney, Mark Haley, Esq., informed us that immediately after concerns were raised in the press regarding these side agreements last fall, he advised Rumford officials to retain all documents then in existence relating to the side agreement.

[22] Attached to this report as Attachments RPC-1 through RPC-10 are all of the documents produced by Rumford in response to our request. Several include cover notes on Preti Flaherty note paper indicating the approximate date on which the documents were generated. These dates were derived from email messages transmitting drafts that were circulated internally among Rumford Paper Company staff and company attorneys. RPC-8 is the version annotated by Jim Dusch and Steve Hudson on August 5, 2005, as described above.

In short, because the existing public records concerning the Rumford agreement have been recovered, and we conclude the FOAA violations here were not willful, we do not recommend taking any enforcement action.

We recommend instead that agency staff, both at DEP and throughout state government, receive comprehensive training in the Freedom of Access Act and, in particular, with regard to their obligations to maintain public records. It is clear from our inquiry into this matter and other inquiries we have received in recent months that state agency employees lack a uniform understanding of their obligations under the Freedom of Access Act, and that specific training is needed to assure consistent and improved compliance in the future. Agencies need to develop clear policies with regard to what documents constitute public records and how they must be maintained. Agencies also should improve their procedures for ensuring that those records (including those available only in electronic form) are retained and can be retrieved in response to any FOAA request. Staff in all state agencies need to be well informed about such policies and procedures and should receive regular training regarding their obligations under the FOAA.

Documents produced by DEP and reviewed during course of FOAA inquiry

- Dennis Merrill's handwritten notes of a phone call with Mike Sinclair of Rumford on April 25, 2005
- Brian Kavanah's handwritten notes of May 10 meeting with Rumford
- Dennis Merrill's handwritten notes of May 10 meeting with Rumford
- emails transmitting and/or commenting upon on drafts of IP draft side agreement, by Dennis Merrill, Brian Kavanah, and Jim Dusch
- handwritten notes by Deb Garrett of meeting on 5/11/05
- New Page letter to Chairs of Joint Standing Committee on Natural Resources, dated May 19, 2005
- IP letter to Chairs of Joint Standing Committee on Natural Resources, dated May 18, 2005
- Androscoggin River Water Quality Improvement Agreement between Rumford Paper Company and DEP, signed on September 21 and 22, 2005
- Agreement between DEP and IP, signed on September 22, 2005
- P.L. 2005, c. 409
- OPLA draft of Committee Amendment "A" dated May 23, 2005, w/handwritten title "L.D. 1450-Revised Amendment"
- email from Dawn Gallagher to Andy Fisk, Brian Kavanah and Dick Davies on May 13 w/suggested language for an amendment, discussed w/Steve Hinchman, Elaine Makos and Steve Clarkin
- email from Dawn Gallagher to OPLA staff, Natural Resources Committee chairs, Andy Fisk and Deb Garrett on May 16 re: need for language giving DEP clear authority to enter agreements
- talking points on L.D. 1450 prepared by DEP on 5/30/05 at Senator Cowger's request
- talking points on L.D. 1450 prepared by DEP on 6/3/05 at Senator Cowger's request
- email from Jeff Pidot to Dawn Gallagher on Nov. 10 re: discovery of email to Jerry Reid of July 18

- FOAA request from Naomi Schalit of Maine Rivers to DEP on June 1, 2005
- FOAA request from Peter Brann for NRCM and NRDC to DEP on June 3, 2005
- FOAA request from Clint Townsend for Maine Rivers on Oct. 22, 2005

- DEP framework memo of May 4 to Natural Resources Committee
- DEP's final administrative position given to Natural Resources Committee on May 11

- email exchange between Brian Kavanah and Tom Saviello re: IP side agreement on September 20, 2005
- email exchanges of Oct. 28, 31 and Nov. 4, between or among Andy Fisk, Jerry Reid, Pete Carney, Jim Dusch, Jeff Pidot, Naomi Shalit, Jack Montgomery and Jeff Thaler
- email to Peter Carney from Maine Rivers Board Secretary on Nov. 1 asking for updated response to FOAA request
- copies of drafts of the IP agreement w/Dennis Merrill's handwritten notes on them, discussing Jim Dusch's comments

- version of attachment to email from Jim Dusch to Dennis Merrill, dated July 15, showing text of Dusch's comments on draft of IP side agreement
- copy of Cindy Bertocci's notes of the BEP meeting on June 16, 2005
- copy of packet given to BEP for meeting on June 16, 2005
- notice of violation for Rumford Paper Company
- draft consent agreement with Rumford sent w/cover letter of Aug. 30, 2005
- handwritten notes by Brian Kavanah of meeting with representatives of IP, Rumford and Legislature on May 25, 2005

ATTACHMENTS*

Documents Produced by
Rumford Paper Company

December, 2005

* Available upon request, contact Chuck Dow at 626-8577