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Memorandum

To: Commission Members

From: William J. Galbraith

Date: December 26, 2012

Re: LUPC Enforcement Program and Penalty Matrix

In recent months, Commission members have expressed concern over the adequacy of penalty assessments for violations warranting resolution through administrative settlement agreements, particularly as to whether the penalty amounts being assessed provide sufficient deterrence. Commission members have further expressed an interest in increasing the penalty amounts for significant violations above what would be assessed using the current matrix. In response, staff has been exploring the broader topic of the purpose of the enforcement program, and what role penalty assessments play in achieving the goals and objectives of the program.

The Commission's compliance program consists of four important components: education, public assistance, monitoring and enforcement. At the January meeting, staff will present a brief overview of the existing enforcement program, with a focus on the penalty matrix established in the Commission's 1992 Compliance and Enforcement Response Policy and the process by which penalties are currently assessed using the Policy's penalty matrix. Enclosed with this memo are copies of the Policy (which you also have in your binders) and a set of instructions currently used by staff in calculating a penalty, which includes a hypothetical example to aid discussion. In addition, at the January meeting staff would like to engage the Commission in a general discussion regarding the Compliance and Enforcement Program going forward. Staff also will be prepared to discuss alternatives for modifying the penalties assessed for violations and the pros and cons of the alternatives. These alternatives will include modification of the penalty matrix, as well as retention of the existing matrix but modification of the manner the base penalty is adjusted through revision of the Policy and accompanying instructions.

Some questions that would be helpful to consider prior to and during the presentation and discussion are:

- What is the overall purpose of the enforcement program?
- What role does penalty assessment serve in achieving that purpose?
- What is wrong with the current system of penalty assessment?
- How to best determine the appropriate penalty amount in each case to achieve the purpose(s) of assessing a penalty (e.g., is the current penalty matrix an appropriate method to achieve the goal)?
- How much should penalties be increased, if at all?
- Are there unintended consequences of increasing penalty amounts?
- Recognizing there is a spectrum of actions staff may take to prevent or deter people from committing violations – including education and outreach, onsite assistance, compliance monitoring, and enforcement investigation and response – how should we best use our resources?

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 other wise 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 the 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

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

Draft Sample
Instructions for Use of the Penalty Assessment Matrix
(2012)

Application of the Penalty Assessment Matrix involves 3 basic steps, and two additional factors that may be considered. A penalty range is established using the first 2 steps. A recommended penalty amount within the established penalty range is determined using the 3rd step. Additional penalty amount or a decrease in penalty can be determined by examining the applicability of the 4th step factors.

1. The activity or development taken as a whole is classified regarding its "Potential for Harm" by evaluating its characteristics in comparison to the descriptive criteria listed under the 3 categories of Major, Moderate and Minor. Judgment will have to be applied in fitting the unique characteristics of each activity into one of the 3 categories. However, by also keeping an SA reference file, we should be able to clarify the categories and ensure consistency within the categories over time.

2. Secondly, the activity/development is classified as to its "Extent of Deviation from the Statutory or Regulatory Requirements" by evaluating the deviation from any particular standard and/or the number of applicable standards violated.

These first two determinations will place the activity into one of the 9 cells of the penalty matrix, within which the range of suggested penalty amounts for that category of violation is defined.

3. To determine a recommended penalty amount, the "Considerations for Establishing Monetary Penalties" questionnaire is completed, which primarily evaluates the cause and circumstances of the violation, the corrective actions taken, the prior history of the violator, and his/her level of cooperation and responsiveness. Each question should be evaluated independently and supporting evidence described for each decision. Answers that indicate additional percentage points, should be summed, and multiplied by the minimum penalty indicated for the category of violation. That dollar amount is then added to the minimum penalty amount to indicate the suggested penalty.

4. Other categories of factors may be taken into account as explained in the Commission's *Compliance and Enforcement Policy*, including financial gain realized by the violator, or financial hardship of the violator. There is also a set penalty for violations involving after-the-fact permittable activities, where there is no evidence of prior knowledge of LURC, the development/activity is in substantial compliance with Commission requirements except for the permit, and the a-t-f permit is promptly applied for and obtained by the violator.

PENALTY MATRIX

EXTENT OF DEVIATION FROM STATUTORY
OR REGULATORY REQUIREMENTS

POTENTIAL FOR HARM	MAJOR (>50%)	MODERATE (25-50%)	MINOR (<25%)
MAJOR	$23,000 to $11,500	$14,800 to $7,400	$10,000 to $5,000
MODERATE	$ 6,800 to $ 3,400	$5,200 to $2,600	$3,200 to $1,600
MINOR	$ 2,400 to $ 1,200	$1,400 to $ 700	$ 600 to $ 300

POTENTIAL FOR HARM

MAJOR: Actual and significant environmental damage has occurred as a result of this activity;
or
the potential exists for extensive or severe environmental damage due to erosion, siltation, sedimentation, loss of habitat, threat to endangered or threatened species or communities, contamination or degradation of surface or ground water supplies, adverse effects on the natural or man-made character of the area, because of the nature of the activity, the sensitivity of the affected area to such activity, the size of the affected area, or the length of time the violation remains/ed unmitigated;
or
there are clear zoning, public safety or health issues, or threats to the regulatory program attributable to the activity which may constitute a major public impact. Remediation of the site will generally require considerable site modification, or rezoning, or consideration by the Commission of a Variance or Permit by Special Exception in order to bring the development or activity into compliance.

MODERATE: No significant environmental degradation associated with the specific activity. However, there are clear negative environmental or regulatory effect(s) associated with the cumulative impact of such activity if left uncorrected or unregulated. There may be minor siltation, erosion or other environmental damage associated with the activity, but such adverse effects can be and are promptly remedied by site stabilization and/or a moderate amount of site remediation;
or

the activity may have moderate public impact, due to zoning, public safety, or public health issues, with one or more neighboring properties being affected. If inappropriate zoning is a factor, the activity must successfully meet the criteria for rezoning in order for it to be considered as a moderate violation. There may also be potential public safety and/or health issues associated with the activity.

MINOR: Little or no actual environmental damage associated with the specific activity. Potential exists for environmental damage or threat to the regulatory program due to cumulative effect of similar activities if left uncorrected or unregulated. The matter requires little or no remediation to stabilize the site and bring it into compliance. No significant public safety or public health issues attributable to this activity, and little or no direct public impact.

DEVIATION FROM STANDARD

MAJOR(>50%): When the activity or development deviates from the Standard, as specified in Chapter 10 of the Commission's Land Use Districts and Standards, by more than 50% for any specified requirement, or the activity or development overall deviates from or exceeds more than 50% of the applicable standards.

MODERATE(25%-50%): When the activity or development deviates from the Standard as specified in Chapter 10 of the Commission's Land Use Districts and Standards by between 25% and 50% for any specified requirement, or the activity or development overall deviates from or exceeds 25% to 50% of the applicable standards.

MINOR(<25%): When the activity or development deviates from the applicable Standard, as specified in Chapter 10 of the Commission's Land Use Districts and Standards, by less than 25% for any specified requirement and the activity or development overall deviates from or exceeds the applicable standards by less than 25%.

Enforcement Case Number: EC XX-XXX

Respondent Name: Joe Sample

Assessment of Base Penalty

1. A. Potential for Harm: Moderate

   B. Basis for Determination: Camp is only 35 ft. from lake and highly visible. No evidence of erosion or siltation to lake. Camp is on posts and can be moved back to meet setback requirement and correct any long term issues.

2. A. Extent of Deviation: Major

   B. Basis for Determination: No permit was obtained, and a permit cannot be obtained in current location because of significantly deficient setback from lake (>50%).

3. Matrix Cell Range: $2,100 - $4,200 (1992 Matrix)

CONSIDERATIONS FOR ESTABLISHING MONETARY PENALTIES WITHIN THE IDENTIFIED MATRIX RANGE

I. Cause and Circumstances of Violations

Knowledge of the LURC Laws & Regulations: Considering the violator's employment and experience, past and present, is it reasonable to conclude that the violator should have known of applicable LURC regulations and standards, and how to avoid the violation?

% Increase

Yes, to the extent that an average citizen would know, who hasn't previously corresponded with LURC about applicable standards. _____ (0)

Yes, the violator, or his agent or contractor, has had prior communication with LURC staff regarding applicable LURC requirements, or has had prior experience conducting activities where LURC standards were applicable, to the extent that he should have known the applicable requirements and avoided the violation. X (10)

Supporting Evidence: The respondent was denied a permit for this project, and so was well aware of LURC requirements.

Circumstances of/Ability to Foresee the Violation(s): Given the circumstances surrounding this violation, including evidence of its planning, execution, discovery and response by the violator after discovery, is it reasonable to conclude that the violator could/should have foreseen and prevented the violation or the subsequent adverse effects on the environment or surrounding uses from occurring?

% Increase

Given the evidence, it is unlikely that the violator could have foreseen or substantially altered the effects of his activity prior to discovery by the LURC staff. _____ (0)

Evidence in the file indicates that, prior to discovery, the violator could and should have foreseen, and prevented or minimized the adverse effects of his activity on the environment and the surrounding uses that resulted from this violation. X (10)

Supporting Evidence: Respondent aware of permit requirement and minimum setback requirement, and could foresee that project not approvable prior to constructing.

Discovery and Immediate Response: Was this violation self-reported, and/or did the violator take all reasonable measures to stabilize the site and correct the problem?

% Increase

Yes, the violator self-reported the violation and promptly completed the appropriate site stabilization or other corrective actions necessary to minimize the effect of the activity in violation. If the violation was reported by a source other than the violator, the violator promptly took all reasonable stabilization or other appropriate corrective actions necessary to minimize the effect of the activity upon notification by staff.

_____ (0)

No, the violator did not self-report, and/or did not promptly take all reasonable measures to stabilize the site or otherwise minimize the effects of the activity on the environment or surrounding uses.

X (10)

Supporting Evidence: The violation was reported as a complaint from neighbor.

II. Corrective Actions

Restoration of the Site: Has/Will the site been properly stabilized, and restored to its pre-violation state, or otherwise had all adverse environmental and land-use impacts effectively mitigated?

% Increase

Yes, the site has been/will be stabilized and restored to its pre-violation state, or has/will have otherwise had all adverse environmental and land-use impacts effectively mitigated.

X (0)

No, the site will remain in a partially restored state that does or potentially could continue to cause adverse environmental or land-use impacts.

_____ (10)

Supporting Evidence: Under the terms of the settlement agreement, the respondent will obtain after-the-fact permit to relocate the camp to comply with minimum setback requirement. The current location of camp will be re-vegetated.

Compliance with Commission Standards: Has/Will the site be brought into compliance with all applicable Commission Standards for such activity or development?

% Increase

Yes, the violator has/will obtained all necessary permits, and the site is/will be in full compliance with all applicable standards. X (0)

No, the violator is unable to bring the site into full compliance with all applicable standards. _____ (10)

Supporting Evidence: Respondent will obtain A-T-F BP to relocate camp to meet standards and will re-vegetate current building site.

Quality and Timeliness of Corrective Actions: Did the violator complete all required site stabilization, remediation, and/or mitigation as directed and according to a reasonable implementation schedule?

% Increase

Yes. N/A _____ (0)

No. _____ (10)

Supporting Evidence: No stabilization measures were initially required. Terms of settlement will fully remediate site.

III. Prior History of Violations

How many confirmed LURC violations does the violator have within the last 5 years?

% Increase

None X (0)

One or two (include Insp. Notice, LOW, NOV) _____ (5/V)

Three or more. _____ (10/V)

Supporting Evidence: No prior violations on file.

Quality and timeliness of prior corrective actions? % Increase

The violator has consistently responded to the discovery of LURC violations by promptly and satisfactorily complying with all requests for stabilization and remedial action. X (0)

The violator has a history of failure to promptly or satisfactorily comply with requests for discontinuance of activities, site stabilization or remediation, or to bring the site into compliance with standards. _____ (10)

Supporting Evidence: No prior violations on file.

IV. Level of Cooperation and Responsiveness

Acceptance of Responsibility? % Increase

The violator promptly accepted responsibility for this violation and for the necessary corrective actions after being officially notified by the LURC staff?

Yes _____ (0)

No X (10)

Supporting Evidence: Respondent did not respond to initial NOV. It took 2 NOV's and a site inspection when respondent present to get his attention.

Responsiveness? % Increase

The violator has promptly and satisfactorily responded to staff requests for information, applications, or other materials which were within his/her ability to provide?

Yes _____ (0)

No X (10)

Supporting Evidence: The respondent did not promptly submit the after the fact permit application as requested, and failed to include an HHE-200 in initial submission.

V. Financial Gain

Over and above the penalty established by applying the above criteria I - IV, the Commission shall/may consider adding to the penalty the amount of financial gain, including, but not limited to any profit or economic advantage, cost savings, avoided costs, operational and maintenance savings, increased land values, etc., either realized or potentially realized as a result of having conducted the activity in violation of the Commission's Laws, Regulations or Standards.(*Financial Gain and recommendations related to increasing penalty due to such factors should be discussed with the Division Manager prior to discussion with respondents.)*

Supporting Evidence that Financial Gain should or shouldn't be added to the recommended Penalty: N/A No evidence of financial gain associated with violations.

VI. Financial Hardship

Notwithstanding the penalty established by applying the above criteria I - IV, the Commission may consider decreasing the amount of the penalty due to financial hardship of the violator. The burden shall be on the violator to request such consideration, and to demonstrate by submission of sufficient evidence and documentation that he is unable to pay the established penalty, and to document his ability to pay some portion of that penalty. (*Financial Circumstances and recommendations related to penalty reductions, suspended penalties, delayed penalties, installment payments, etc., should be discussed with the Division Manager prior to discussion with respondents.)*

Supporting Evidence that Financial Hardship should or shouldn't be considered in assessing the recommended Penalty: N/A Respondent has not requested consideration of financial hardship.

VII. Recommended Penalty _____

Low Base Penalty + (Low Base Penalty X Percent Increase) = Recommended Penalty

(1992 Matrix) $2,100 + (2,100 x 0.50) = $3,150 ≈ $3,200