

Department of Agriculture, Conservation and Forestry

**MAINE LAND USE PLANNING COMMISSION**

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## **Compliance and Enforcement Response Policy**

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## I. **INTRODUCTION AND PURPOSE**

The Maine Land Use Planning Commission (LUPC or Commission)<sup>1</sup> serves as the planning and zoning authority for the unorganized and deorganized areas of the State of Maine, including townships and plantations. The LUPC is responsible for administering [12 M.R.S. Chapter 206-A: Use Regulation](#) for the purpose of extending principles of sound planning, zoning, and development to:

- Preserve public health, safety and general welfare;
- Support and encourage Maine's natural resource-based economy and strong environmental protections;
- Encourage appropriate residential, recreational, commercial and industrial land uses;
- Honor the rights and participation of residents and property owners in the unorganized and deorganized areas while recognizing the unique value of these lands and waters to the State;
- Prevent residential, recreational, commercial and industrial uses detrimental to the long-term health, use and value of these areas and to Maine's natural resource-based economy;
- Discourage the intermixing of incompatible industrial, commercial, residential and recreational activities;
- Prevent the development in these areas of substandard structures or structures located unduly proximate to waters or roads;
- Prevent the despoliation, pollution and detrimental uses of the water in these areas; and
- Conserve ecological and natural values.

Statute requires the Commission to adopt a Comprehensive Land Use Plan (CLUP). The CLUP, initially adopted in 1976, establishes policies to guide the Commission's work. The Commission's *Land Use Districts and Standards* 01-672 C.M.R. Ch. 10 ([Chapter 10](#)), first adopted in 1977, contain the Commission's zoning and land use standards.

In 1980, the Commission adopted its first enforcement policies to guide its compliance program. These policies have been further developed over the years, with the latest in 2013. This document sets forth an updated Commission policy for administering and developing administrative penalties for activities over which it has jurisdiction under 12 M.R.S. Chapter 206-A and serves as a tool for Commission staff to assure compliance that is both effective and fair to safeguard lives, property, and natural resources.

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<sup>1</sup> Prior to the creation of the LUPC in 2012 as established by [Title 5 Section 12004-D, subsection 1-A](#), the Land Use Regulation Commission (LURC) had regulatory authority within the unorganized and deorganized areas of the State.

## II. **STATUTORY AUTHORITY**

### A. **12 M.R.S. § 685-C(8)**

[12 M.R.S. § 685-C\(8\)](#), among other things, provides that the standards, rules, zoning maps, 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. §§ 681 et seq.

The law further provides that any person who violates any provisions of the land use 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. §§ 681 et seq. This Policy seeks to ensure consistent, equitable, and proportionate enforcement of the Commission's rules and regulations.

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 AND GUIDANCE**

This Policy is consistent with statute. In addition, this Policy is consistent with the established goals and policies set forth in the Commission's [2010 Comprehensive Land Use Plan](#). See CLUP, Ch. 1, sec. 1.2(III) and Ch. 6, sec. 6.5.

**V. DEFINITIONS**

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

- A. Commission.** The Maine Land Use Planning Commission. This term also includes the Commission's staff where a Commission action or responsibility has been delegated to staff.
- B. Contractor.** Contractors, operators or agents who are retained by or on behalf of a land owner to perform an activity.
- C. Director.** The Director of the Commission or the 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 the 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 some provisions of the standard or standards may be 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.** The person committing or otherwise responsible for a violation of standards of the Commission.
- H. Standards.** The laws administered by the Commission and rules, regulations, performance criteria, application and permit requirements (including permit terms and conditions), orders and other requirements of the Commission.

## VI. EDUCATION

The Commission regards education of those who live, work, or have occasion to recreate in the Commission’s jurisdiction, in matters relating to land use standards, as an important and integral component of an effective land use regulation program. It finds that having a public and regulated community that 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. The Commission recognizes the value of informational mailings, outreach seminars for the general public, and specialized training programs for the regulated community and other interested persons in achieving desired compliance.

The ultimate goal of achieving adherence to the Commission’s rules and regulations starts with education. The regulations and terminology can be daunting for individual homeowners or the public in general. A simple phone call or site visit may be all that is needed to secure compliance. In some cases, the violation stems from unawareness of land use regulation laws and standards, and education again is the key to prompt and continued compliance.

Achieving compliance with the Commission’s rules and statutes through agreeable means is always preferred but cannot always be achieved. Commission staff strive in all its compliance interactions to:

- Understand the perspectives of the regulated community.
- Work cooperatively with the community to encourage voluntary compliance.
- Provide guidance and assistance to those willing to comply.
- Regulate firmly but fairly when required to achieve the Commission’s goals.
- Direct its compliance efforts to matters that pose the highest risk to preserve public health, safety and general welfare and natural resources.
- Commit to continuously improving its compliance approach.

**VII. COMPLIANCE AND INSPECTIONS****A. General**

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

1. maintaining staff in regional offices throughout the jurisdiction, with offices in Ashland, East Millinocket, Greenville, Wilton, and Bangor, 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;
3. 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;
4. investigating complaints of alleged violations; and
5. 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**

1. 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.
2. 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.
4. 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. The Commission recognizes, however, that this goal is not always obtainable. In this regard, full conformance may not be required by the Commission where achieving such compliance 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:

1. the violation does not appear to have been willfully or knowingly caused by the present owner of land;
2. the deviations from standards are minor;
3. there is no threat of continuing environmental damage or public health or safety threats;
4. the costs of requiring full compliance are clearly inappropriate in view of the environmental or other public gains to be realized;
5. the respondent has made sufficient efforts to end the violation and to comply with applicable requirements; and
6. such continued noncompliance will not adversely affect owners of adjacent lands or the public interest.

The monetary penalty should also 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 (OSR)** 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 (LOW)** 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.

3. **Notice of Violation (NOV)** This is a written notice that 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. **Pre-Enforcement Notice (PEN)** This is a written notice that informs a person that Commission staff has identified alleged violations and is considering formal enforcement. Similar to an NOV, a PEN identifies the alleged violation, outlines what corrective actions need to be done to comply, states that a civil penalty will be imposed, and includes an opportunity to correct ongoing violations for a reduced penalty if 1) they are corrected within a limited time period, normally 45 days, or 2) a written acceptable plan with a schedule to bring the property back into compliance is submitted within 30 days of issuance of the PEN, and the plan is implemented as approved.
5. **Enforcement Action (EA)** This is a process preparatory to either a settlement action or referral to the Office of Attorney General. Violations that 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 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.
6. **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 Office 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:
  - (a) identification of the respondent and location of business;

- (b) agreement to the Commission's regulatory authority over the matter;
- (c) admission of responsibility for the violation;
- (d) description of the violation;
- (e) corrective measures that must be taken by the respondent to bring about compliance and a time schedule for implementation of those measures;
- (f) payment of a monetary penalty to the State;
- (g) waiver of rights of appeal by the respondent; and
- (h) conditional release by the Attorney General and Commission for causes of action they may have against the respondent.

7. **Referral to Office 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 discussion 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. Time Frames for Response

The Commission recognizes that timely investigation and enforcement of land use violations are important for an effective compliance and enforcement program, and that those affected by 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

### D. Calculation of Civil Penalty

The purpose of these guidelines is to assist staff in determining appropriate penalties for violations of the Commission's laws, standards, and permits. This policy applies to

administrative enforcement actions for activities over which the Commission has jurisdiction under 12 M.R.S. §§ 681 et seq. Nothing in this policy precludes the Commission from imposing a civil penalty using an alternative approach or requires the Commission impose a civil penalty for a violation. This system is not designed to determine penalties or other remedies in matters that have been referred to the Attorney General for judicial enforcement. Such matters may require consideration of different factors as well as more substantial penalties, up to the legally authorized maximum of \$10,000 per day, together with all appropriate remedial measures.

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. § 402\(3\)](#).

When assessing a civil penalty, the Commission must consider penalty adjustment factors such as, but not limited to:

- Willfulness or culpability of the violator
- Good faith efforts
- Alleged violator's history of prior offenses
- Extent of compliance attained through resolution
- Economic benefit of noncompliance
- Other unique factors

#### Summary of Civil Penalty Calculation

A civil penalty is calculated by: (1) determining a base penalty dependent on the potential for harm and extent of deviation from a requirement, (2) considering the willfulness and extent of the person's knowledge of the law, and (3) adjusting the penalty for special factors and circumstances.

$$\text{Civil Penalty} = (\text{Base Penalty}) \times (\text{Willfulness}) +/ - (\text{Adjustment Factors})$$

This policy also explains how to factor into the calculation of the seriousness-based component the presence of multiple and multi-day (continuing) violations. For each day for which multi-day penalties are sought, the penalty amounts should be determined using the multi-day penalty matrix.

#### **1. Determining the Base Penalty Using the Matrix**

In determining the initial base penalty, enforcement staff should evaluate the relationship of two factors to any given violation. These two factors are: potential for harm and extent of deviation from the statutory or regulatory requirement. Below is an explanation of these factors, followed by a description of how they form the civil penalty matrix axes enabling the calculation of a

matrix penalty. These two factors constitute the seriousness of a violation and are incorporated into a penalty matrix from which a base penalty is chosen.

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. Staff may select a base penalty amount from within the specified range. For a violation associated with the matrix cell chosen staff should ordinarily select the mid-point of the range.

Table: *Base Penalty Matrix*

	Extent of Deviation From Statutory or Regulatory Requirements			
		Major	Moderate	Minor
Potential for Harm	MAJOR	\$10,000	\$9,500	\$6,500
		to	to	to
	MODERATE	\$7,500	\$5,000	\$3,500
		to	to	to
	MINOR	\$5,500	\$4,500	\$3,500
		to	to	to
		\$3,000	\$2,500	\$2,000
		to	to	to
		\$2,000	\$1,500	\$1,000
		to	to	to
		\$1,500	\$1,000	\$500

a. Potential for Harm to Human Health or the Environment, or to Values Protected by the Commission.

The potential for harm resulting from a violation may be determined by:

- The likelihood and degree of harm to the environment or human health;
- The sensitivity of the affected resource and extent of area or resource impacted;
- Duration of each violation; and
- The degree of adverse effect of noncompliance on statutory or regulatory purposes and values protected by the rules or laws violated.

The emphasis is placed on the potential harm posed by a violation rather than on whether harm actually occurred. The penalty should be proportionate to potential harm and/or actual damage, the sensitivity of the affected resource and extent of area impacted, the number of days of

violation,<sup>2</sup> and/or when the violation undermines the statutory or regulatory purpose. The longer a violation continues without remediation, the greater the potential or actual harm to the affected natural resource or public health. The potential for harm may be major, moderate, or minor.

For example, violations that threaten especially valuable natural or recreational resources or human health or safety are on the higher end of a scale of harm OR the violation fails to substantially meet requirements that are based on protection concerns and are fundamental to the overall goals and statutory duties of the Commission.

In determining the potential for harm, the following should be used:

**MAJOR:**

- 1) The violation poses a major threat to human health or safety or the environment;
- OR
- 2) The violator's actions may have a major adverse effect on the statutory or regulatory purposes.

**MODERATE:**

- 1) The violation poses a moderate risk to human health or safety or the environment;
- OR
- 2) The violator's actions may have a moderate adverse effect on the statutory or regulatory purposes.

**MINOR:**

- 1) A violation poses no immediate threat to human health or safety or the environment;
- OR
- 2) The violator's actions may have a small adverse effect on the statutory or regulatory purposes.

b. Extent of Deviation from Requirement

The extent of deviation from the statutory, rule, or permit requirements relates to the degree to which the statutory, rule, or permit requirement is violated. This focuses on the importance of the violated requirement for successfully achieving the purpose of the regulation. For any violation, there exists a range of noncompliance with the subject requirement. A violator may be only slightly out of compliance with the requirement, or they may have totally disregarded the requirement.

For example, a site may have a 250 square foot opening in the forest canopy

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<sup>2</sup> The number of days can be considered as a factor to select an appropriate penalty from the matrix when the violation(s) continue for more than one day and when a multi-day component is not part of the calculation.

within the 100-foot vegetative buffer of a lake versus a site that has a clearing of the entire 100-foot vegetative lake buffer, in which the former meets most of the Commission's Vegetation Clearing standards while the latter no longer functions as a vegetative buffer and exceeds all or most of the standards. Likewise, an activity for which the Commission would not have issued a permit more seriously undermines the applicable statutory or regulatory goals than an activity which, except for failure to obtain Commission approval, is otherwise in compliance.

As with potential for harm, extent of deviation may be major, moderate, or minor. In determining the extent of deviation, the following should be used:

**MAJOR:** The violation significantly deviates from the requirements of the regulation or permit requirements to such an extent that *most of the requirements are not met* resulting in substantial noncompliance.

**MODERATE:** The violation deviates to a moderate extent from the regulatory or permit requirements to such an extent that *some of the requirements are met*.

**MINOR:** The violation deviates somewhat from the regulatory or statutory requirements but *most of the requirements are met*.

## 2. Degree of Willfulness or Culpability (Multiplier of penalty)

Willfulness addresses whether the person recognized that their conduct or action violated the law.

Basic Liability	= 1
Negligent/Reckless	= 2
Deliberate	= 3

**Basic Liability:** No level of willfulness needs to be established. Regardless of whether the respondent knew the legal requirements, an act or omission resulted in a violation of statute, rule, or permit requirement. This level of liability should generally only be employed when circumstances are present demonstrating that the violation resulted from factors beyond the control of the violator, the violation could not reasonably have been prevented, or where the violator took reasonable precautions against the events constituting the violation. Lack of knowledge will not be used as a basis to reduce the penalty.

**Negligent/Reckless:** Because it is the responsibility of anyone conducting activities or owning land within the unorganized territories to act in compliance with applicable laws, this level of liability should generally be applied unless, as

discussed above, there are compelling or extenuating circumstances suggesting that the violator was not aware of the legal requirements or that the violation was the result of factors outside of the respondent's control. This level of liability is appropriate when the respondent's actions or omissions violated the requirements. This may include failure to prevent the violation due to lack of diligence, or failure to recognize, correct, or prevent a condition which the violator could and should have recognized. It may also be appropriate in cases where the respondent failed to adequately minimize the adverse effects of the activity on the environment and surrounding uses that resulted from the violation.

**Deliberate:** The respondent had actual or constructive knowledge of the legal requirements, duties, and obligations and made a conscious decision to act with the knowledge that the act was a violation. Application of this level of liability will generally be appropriate where the violator has had prior communication with LUPC staff regarding the specific applicable requirements or has had prior experience conducting activities where LUPC standards were applicable, to the extent that they should have known the applicable requirements and avoided the violation.

### 3. **Penalty Adjustment Factors**

The seriousness of the violation determines the base penalty. The reasons the violation was committed, the intent of the person who committed the violations, and other factors related to the respondent are not considered in choosing the appropriate base 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 total penalty amount paid by the respondent. This section sets out several adjustment factors that should be considered when determining the overall penalty. These include:

- good faith efforts;
- history of noncompliance;
- extent of compliance attained through resolution; and
- economic benefit of noncompliance.

In general, these adjustment factors will apply only to the base penalty.

#### a. Good faith efforts (Reduction of penalty)

Factors such as how promptly a violation is corrected, or if it was self-reported by the violator, can be considered an indication of good faith on the part of the violator. A deduction may be given based on the violator's attempt to attain compliance.



In instances where the violator has not taken corrective actions or has demonstrated a lack of good faith in taking corrective action, a good faith reduction in the proposed penalty assessment will not be considered. Likewise, there will be no good faith adjustment for violations stemming from deliberate willfulness and/or negligence.

b. History of noncompliance (Upward adjustment only)

Where a person has violated land use 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 a violator's past record are:

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

c. Extent of Compliance Attained Through Resolution

Depending on the specific facts of a case, remediation required by a settlement should provide full compliance. However, in some cases, full compliance is not practical or possible. In such cases, it is appropriate to impose a higher penalty than in a case where full compliance will be obtained. This reflects the fact the violation will remain partially resolved. It also considers the fact that the violator will incur less expense and burden for remediation than full compliance would require.

Also, in cases where full compliance will not be obtained, implementation of mitigation measures should be considered to compensate for the remaining impacts of the violation. The cost of mitigation measures will be considered in the determination of a higher penalty.

d. Economic benefit of noncompliance (Addition to penalty)

This factor considers when a significant economic benefit or significant savings has accrued to a violator because of noncompliance. A penalty assessment may include an amount equal to the cost savings, avoided costs, increased land values or economic benefit gained, etc., either realized or potentially realized by the violator from noncompliance and added to the penalty.

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.

An “economic benefit” component is calculated and added to the adjusted 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 that 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, to 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 and 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 standards in a Fish and 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.

#### **4. Other Factors Warranting Final Penalty Adjustment**

After determining the base penalty, adjusting the penalty up or down from the base amount based on the factors noted above in Section VIII(D)(2), and then considering any further adjustment to account for economic benefit as discussed in Section VIII(D)(3), final adjustments may be warranted based on the three following factors:

- inability to pay/financial hardship;
- penalty offset provision; and
- other unique factors.

Each of these factors is discussed further below.

a. Inability to pay/financial hardship (downward adjustment only)

There is little to be gained from seeking penalties that are demonstratively 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.

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

b. 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.

c. Other unique factors

This policy allows for a limited adjustment, both up or down, for unanticipated and unusual factors which may arise on a case-by-case basis, at the discretion of the Commission. Included in this consideration is the cost of any remediation.

## **E. Penalties for Multiple and Multi-day Violations**

### **1. Multiple Violations.**

In certain situations, several violations may have been committed. Violations of different sections of the Commission's rules will each constitute a separate violation.<sup>3</sup> However, penalties for multiple violations may not be appropriate

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<sup>3</sup> A given violation is a separate and distinguishable violation when it requires an element of proof not needed by others.

when the violations are not independent or substantially distinguishable.

Example. A site that has been cleared in excess of the Commission's Vegetative Clearing standards, and a road that has been constructed in noncompliance of the Commission's Road and Water Crossing standards are generally two violations. Each violation should be assessed separately, and the amounts totaled.

In other situations, separate violations may be grouped for the purpose of applying this policy.

Example. A site has been cleared, filled, and graded for a path to the lake, this violation may, at the Commission's discretion, be grouped and assessed as one violation, but each standard not being met must still be cited in the Settlement Agreement.

A separate penalty worksheet will be completed for each violation (or group of violations). In general, each violation or group of violations will be considered as a separate violation for the purpose of calculating a civil penalty if it results from independent acts or compliance failures and is substantially distinguishable from any other violation cited in the same NOV. Multiple violations require enforcement staff to substantiate different sets of factual allegations. The total penalty assessed in an enforcement case may include penalties for several violations or a group of violations, each calculated pursuant to this policy.

## **2. Multi-Day Violations**

In some situations, violations should be treated as multi-day violations, meaning one penalty with a multi-day component. These situations include, but are not limited to, instances when the violation continues past a compliance schedule deadline cited in a LOW, NOV, or in cases of continuing violations that demonstrate a major potential for harm and/or a major extent of deviation. The multi-day violation penalty may also be calculated in the case of other continuing violations. A penalty may be assessed based on the date of issuance of the LOW or NOV or the date a violation has been substantiated. A PEN should be sent to the violator that includes language that the Commission will seek penalties up to \$10,000 per violation per day, with each day that noncompliance continues to be assessed as a separate violation until the violation is corrected.

The penalty derived from the matrix calculation is multiplied by the number of days of violation in order to obtain the civil penalty.

*Table: Multi-day Penalty Matrix*

	Extent of Deviation From Statutory or Regulatory Requirements		
	Major	Moderate	Minor
Potential for Harm	MAJOR	\$5,500	\$4,400
		to	to
	MODERATE	\$900	\$700
		to	to
	MINOR	\$2,000	\$1,500
		to	to
		\$350	\$250
		\$500	\$250
		to	to
		\$110	\$110

The dollar figure to be multiplied by the number of days of violation will be generally selected from the range provided in the appropriate multi-day cell. The figure selected should not be less than the lowest number in the range provided. The selection from the range of penalty amounts should be made on an assessment of case-specific factors, discussed in the determination of base penalty.

Where a violation continues for more than one day, enforcement staff have the discretion to calculate a penalty for the entire duration of the violation. In determining whether to assess multi-day penalties, the enforcement staff must carefully analyze the specific facts of the case. This analysis should be conducted in the context of the Policy's broad goals of (1) ensuring fair and consistent penalties which reflect the seriousness of violations, (2) promoting prompt and continuing compliance, and (3) deterring future non-compliance.

While this Policy provides general guidance on the use of multi-day penalties, nothing in this Policy precludes or should be construed to preclude the assessment of penalties of up to \$10,000 for each day of any given violation. Particularly in circumstances where significant harm has occurred and immediate compliance is required to avert a continuing threat to human health or the environment, it may be appropriate to demand the statutory maximum.

## F. Delegation

Where circumstances arise that 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 Office 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 may be held in executive sessions. Settlement agreements or other final actions by the Commission require Commission action at a scheduled public meeting.

### **IX. LAND OWNER RESPONSIBILITY**

#### **A. General**

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:

- (1) nature of the activity which resulted in the violation;
- (2) impact of the activity on the land owner;
- (3) land owner's involvement in planning, arranging for, supervising, conducting, or allowing the activity;
- (4) land owner's knowledge of the activity;

- (5) competitive advantage or other benefit gained by a contractor by the act of noncompliance;
- (6) deterrent effect to be realized by the Commission's enforcement response to the violation;
- (7) whether the contractor has a history of conducting work in violation of the Commission's requirements; and
- (8) 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 Office 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.

#### **B. Landowner Liability for Actions of Others**

Pursuant to 12 M.R.S. § 685-C(11):

"An owner, lessee, manager, easement holder or occupant of premises is not subject to criminal sanctions or civil penalties or forfeitures for a violation of laws or rules enforced by the commission if that person provides substantial credible evidence that the violation was committed by another person other than a contractor, employee or agent of the owner, lessee, manager, easement holder or occupant. This subsection does not prevent the commission or a court from requiring an owner, lessee, manager, easement holder or occupant of premises to remediate or abate environmental hazards or damage or to reimburse the commission for the cost of remediation or abatement. An owner, lessee, manager, easement holder or occupant of premises is subject to criminal sanctions or civil penalties or forfeitures for failure to comply with a lawful administrative order or court order to remediate or abate environmental hazards or damage.

- A. The commission shall investigate substantiated allegations by an owner, lessee, manager, easement holder or occupant that the violation was caused by another person.
- B. If an owner, lessee, manager, easement holder or occupant is subjected to criminal sanctions or civil penalties or forfeitures, or is such a person is required to remediate or abate environmental hazards or damage as a result of violations by another person, the owner, lessee, manager, easement holder or occupant has a cause of action against the actual violator to recover all damages and costs, including attorney's fees, incurred in connection with the environmental damage, and all costs, including attorney's fees incurred in bringing the action to recover."

**X. 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 judicial remedy. The Commission encourages the Director, in cooperation with the Office 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 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:

- (1) 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
- (3) 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 Commission'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.



**XI. 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 Office of the 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. § 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 the unorganized and de-organized areas of the State. 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**

Pursuant to 12 M.R.S. § 685-C(9), the Commission has statutory authority to enforce its land use laws and rules in District Court under Maine Rules of Civil Procedure Rule 80K. Staff of the Commission may become certified in Rule 80K procedures as provided under Title 30-A, § 4453. However, as noted above, the Commission encourages staff to seek resolution of violations of its land use laws and rules through administrative settlement agreements. Where settlement discussions are not productive in resolving

significant violations, staff, in consultation with the Commission, should discuss appropriate courses of enforcement action, including the use of Rule 80K prosecution, with the Attorney General's Office.

#### **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.

## **XII. EFFECTIVE DATE**

This Compliance and Enforcement Response Policy is applicable after adoption by the Maine Land Use Planning 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 PLANNING COMMISSION THIS 8<sup>th</sup> DAY OF MAY, 2024