

Maine Land Use Planning Commission

Compliance and Enforcement Response Policy

April 2013

A LUPC Guidance Document

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Maine Land Use Planning Commission
Compliance and Enforcement Response Policy

I. Introduction and Purpose

The Maine Land Use Planning Commission provides planning and zoning and administers land use standards in the unorganized and deorganized areas of the State of Maine. Those areas today encompass approximately 10.4 million acres, nearly one half the geographic area of Maine. The Commission encourages well-planned and well-managed, multiple use of these lands by the residents of Maine and visitors.

The Commission's statutory purpose and scope provides, among other things, that the Commission should work:

- To encourage appropriate residential, recreational, commercial and industrial land uses;
- To prevent residential, recreational, commercial and industrial uses detrimental to the long-term health, use and value of the unorganized and deorganized areas of Maine while recognizing the unique values of these lands and waters to the State;
- To prevent residential, recreational, commercial and industrial uses detrimental to the long-term health, use and values of these areas and to Maine's natural resource-based economy;
- To discourage the intermixing of incompatible industrial, commercial, residential and recreational activities;
- To prevent the development in these areas of substandard structures or structures located unduly proximate to waters or roads; and
- To prevent the despoliation, pollution and detrimental uses of the water in the unorganized and deorganized areas of Maine.

To fulfill its purpose, the Commission must administer an effective land use program and a necessary component of such a program is enforcement of the Commission's laws, standards, and permits. Effective enforcement 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 followed and this requires enforcement. Moreover, enforcement must provide adequate disincentives for undertaking regulated activities without first obtaining necessary permits, if the Commission's land use 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 program.

This Compliance and Enforcement Response 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 laws and standards are eliminated; that persons are deterred from committing land use 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 planning and regulatory 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 formed the basic policy principles upon which the 1992 policy was developed. This 2013 Policy updates its 1992 predecessor.

II. Statutory Authority

A 12 M.R.S.A. § 685-C(8)

12 M.R.S.A. § 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.A. §§ 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. 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 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.** "Commission" means 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.** "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 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 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.** "Respondent" means the person committing or otherwise responsible for a violation of standards of the Commission.

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

VI. Education

The Commission regards education of those who live, work, or have occasion to recreate in the Commission's jurisdiction, in matters relating to land use standards, as an important and integral component of an effective land use regulation program. It finds that having a public and regulated community which is knowledgeable of land use regulation laws and standards and sound land use practices further the goals and objectives of the Commission, and will result in high levels of voluntary compliance with those laws and standards. 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.

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, West Farmington, 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** 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.
- (3) **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) **Enforcement Action** 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.
- (5) **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:
 - 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.

(6) **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 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 factors that warrant adjusting the penalty up or down from the base (e.g., good faith efforts, degree of willfulness, and history of noncompliance);

- (3) considering the economic benefit of noncompliance and, where appropriate, further adjusting the penalty to avoid incentivizing noncompliance; and
- (4) after making any of the prior categories of adjustments, considering any other factors that warrant final modification of the penalty (e.g., inability to pay, offset provisions, and other unique factors).

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).

(1) Determination of Base Penalty

Two factors are considered in determining the base penalty:

- o Potential for harm to the environment or public health or safety; and
- o Extent of deviation(s) from statutory or regulatory requirements 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 laws and standards, and have been incorporated into a matrix from which the base penalty will be chosen.

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. Staff may select a base penalty amount from within the specified range, but for a typical violation associated with the matrix cell chosen staff should ordinarily select the mid-point of the range (i.e., for a typical Moderate / Moderate violation the base penalty would be \$3,000).

Penalty Matrix

P O T E N T I A L F O R H A R M	EXTENT OF DEVIATION FROM STATUTORY OR REGULATORY REQUIREMENTS			
		Major	Moderate	Minor
	Major	\$10,000	\$9,000	\$6,000
		to	to	to
		\$7,000	\$4,500	\$3,000
	Moderate	\$5,000	\$4,000	\$3,000
		to	to	to
		\$2,500	\$2,000	\$1,500
	Minor	\$1,500	\$1,250	\$1,000
		to	to	to
		\$1,000	\$750	\$500

(2) 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:

- (a) good faith efforts;
- (b) degree of willfulness and/or negligence; and
- (c) history of noncompliance.

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

(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. A downward adjustment of the penalty may be appropriate where the violation was committed by a prior property owner, without the knowledge or involvement of the current owner, and where the current owner is acting in good faith to correct 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 the legal requirements which were violated; and

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 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.

(3) Economic Benefit Derived from Noncompliance

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:

- (a) inability to pay/financial hardship;
- (b) penalty offset provision; and
- (c) 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 demonstrated beyond the means of the respondent. Therefore, the Commission should consider the ability of a respondent to pay a penalty. The burden of proof to demonstrate inability to pay rests with the respondent. When it is determined a respondent cannot afford to pay a portion of a penalty, the Commission may consider the following options:

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

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

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.

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. 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.A. § 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 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 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.A. § 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 5th DAY OF APRIL, 2013

By: 
Nicholas D. Livesay, Director

Effective: April 5, 2013

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