1

PROPOSED DEVELOPMENT AREAS
DEVELOPMENT REVIEW PROCESS[1]

BEAVER COVE
UPPER WILSON POND
BIG MOOSE MOUNTAIN
MOOSE BAY
ROUTE 6/15 CORRIDOR
D-CI COMMERCIAL/INDUSTRIAL
ROCKWOOD/BLUE RIDGE
BRASSUA LAKE
LONG POND

COMMENTING PARTIES

- Petitioner Plum Creek

[1] *See* Tab 6 for comments, analysis and recommendations specific to the development review process for the Lily Bay development area.

COMMENTS FILED BY THE PETITIONER

(p. 5)

The recommendations for all of the listed development areas that LURC subdivision/development review be subject to statutory and regulatory criteria and Concept Plan addendum to Chapter 10 -- as modified by pertinent amendments are generally acceptable to Plum Creek, subject to agreeing on the final language in the Land Use Zoning (Permitted Uses); Planning and Design Components within Development Areas; and Scenic, Lighting and Noise Standards as referenced in Footnote 2, page 4.

The recommendation to replace the proposed 3-step process with a 2-step process requiring the filing of a long-term development plan no later than the submission of the first subdivision/ development application is acceptable to Plum Creek.

STAFF/CONSULTANT DISCUSSION AND RECOMMENDATIONS

► DISCUSSION

Comments from parties on this topic present no new information that would cause staff/consultants to reconsider the June 4, 2008 Commission-generated amendments.

► RECOMMENDATIONS

No recommended changes to these June 4th Commission-generated amendments.

2

PROPOSED DEVELOPMENT AREAS:
DISPOSITION OF UNDEVELOPED LAND AFTER 30 YEAR TERM

BEAVER COVE
UPPER WILSON POND
LILY BAY
BIG MOOSE MOUNTAIN
MOOSE BAY
D-CI COMMERCIAL/INDUSTRIAL
ROUTE 6/15 CORRIDOR
ROCKWOOD/BLUE RIDGE
BRASSUA LAKE
LONG POND

COMMENTING PARTIES

- Petitioner Plum Creek
- Intervenors and Interested Persons
  - GrowSmart Maine

COMMENTS FILED BY THE PETITIONER

(p. 6)

[Regarding permanently capping the number of units via restrictive covenants at Upper Wilson Pond, Lily Bay, Indian Pond, and Long Pond and allowing all other development areas to be subject to Commission zoning at the end of the 30-year term:]

This recommendation is generally acceptable to Plum Creek, subject to agreeing on the final language of the restrictive covenant. Plum Creek agrees with the intent to place the restrictive covenants early, however not until after all appeals, or potential appeals, are completed.

Plum Creek agrees with the intent to restrict additional development units, but disagrees with simply restricting the vertical expansion of a structure, when otherwise in compliance with LURC standards, when not adding a development unit. A homeowner, or a commercial structure owner, may desire such a remodel, the addition of a second story room for purposes other than the addition of a development unit. The cap should preclude the addition of development units, but not exclude other lawful actions.

Plum Creek agrees with eliminating the expansion of the Balance Conservation Easement upon build-out and allow Beaver Cove (page 4), Big Moose Mountain (page 18), Moose Bay (page 23), Commercial/Industrial (page 26), Route 6/15 (page 29), and Rockwood / Blue Ridge (page 34) to be subject to Commission zoning at the end of 30 years.

COMMENTS FILED BY INTERVENORS AND INTERESTED PERSONS

► GrowSmart Maine (p. 3)

[Regarding improved smart growth adherence with Principle #1. Location of Development: Proximity to Existing/Future Development and Infrastructure & Services:]

- [Commission-generated amendments] refine the number and location of recommended receiving area development zones that may have the ability to absorb additional residential units from other development zones and capped the number of units at the remaining development zones.

STAFF/CONSULTANT DISCUSSION AND RECOMMENDATIONS

► DISCUSSION

Based on comments received, staff/consultants offer the following analysis:

The intent of the Commission-generated amendments was that restrictive covenants (or to the extent legally necessary an easement, distinct and separate from the Balance and Legacy easements) at Upper Wilson Pond, Lily Bay, Indian Pond, and Long Pond would become effective when all appeals of Concept Plan approval, if any, are completed. With respect to vertical expansion, the Commission-generated amendments intended the restrictive covenants (or easement, as necessary) to apply to expansion for the purpose of adding units, not other expansions that comply with dimensional and performance standards.

► RECOMMENDATIONS

With the above clarifications, staff/consultants recommend no changes to these June 4th Commission-generated amendments.

3

PROPOSED DEVELOPMENT AREAS:
LIMITATIONS ON SHORELAND STRUCTURES[1]

UPPER WILSON POND
BIG MOOSE MOUNTAIN
MOOSE BAY
ROUTE 6/15 CORRIDOR
ROCKWOOD/BLUE RIDGE
BRASSUA LAKE
LONG POND

COMMENTING PARTIES

- ► Petitioner Plum Creek
- ► Intervenors and Interested Persons
  - GrowSmart Maine
  - Native Forest Network
- ► Governmental Review Agencies
  - Maine Department of Inland Fisheries and Wildlife and Maine Natural Areas Program

[1] *See* Tabs 5 and 7 for additional comments, analysis and recommendations specific to limitations on shoreland structures for the Lily Bay and Big Moose Mountain development areas, respectively.

COMMENTS FILED BY THE PETITIONER

(p. 7)

In general Plum Creek believes its intent is similar to that of the Commission in regards to "limitations on shoreland structures" and believes that mutually agreeable language can be worked out with staff. However, in regards to Brassua Lake, the limitations proposed (page 39) need to be amended to allow up to sixteen common water access points that would serve the development area on the south peninsula; no limitations on the northeast shore.

(Plum Creek response to staff/consultant request for additional information, dated 09/02/2008)

[Regarding limitations on shoreland structures on Brassua Lake south peninsula:]

The Commission utilizes 1,320' (one-quarter of a mile) as a standard for walkable community centers. Plum Creek believes that common water access points will function as important "centers" for the development on the Brassua peninsula. It is necessary that the common water access points/docks be within walkable distance for the majority of the 250-300 units developed on Brassua. Approximately 5 miles of the 43.5 miles that Plum Creek owns abutting Brassua will be rezoned to allow for development. Thus, on average, there would be one common access area/dock for every 1,650' feet (approximately one-third of a mile) in the 5 miles. (Looking at all Plum Creek's ownership adjacent to Brassua, this represents one common access point for every 14,355 feet.) Also, it is necessary to consider that these common access points will not be limited to use by shorefront property owners abutting Brassua, but will include backlot owners. These common access points should also be within walkable distance for backlot owners. Sixteen such areas allows for walkable access for backlot owners as well. Backlot owners may have more than one-third of a mile to walk to get to an access point.

COMMENTS FILED BY INTERVENORS AND INTERESTED PERSONS

► GrowSmart Maine (p. 4)

[Regarding improved smart growth adherence with Principle #4. Protection and Preservation of Environmental Quality:]

- [Commission-generated amendments] consolidate shoreland structures such as docks to common/shared structures within development zones with shorefront lots reducing potential visual impacts.

► Native Forest Network (p. 7)

[Regarding general concept plan pros:]

- Limits docks throughout plan area and eliminate [Plum Creek's] vague language to define proposed water-related facilities

► Maine Department of Inland Fisheries and Wildlife and Maine Natural Areas Program (pp. 4-5)

We appreciate LURC's efforts to date to minimize the number of dock structures allowed in each development zone through common dock requirements, however, we recommend that siting, even of temporary docks, be reviewed by both MDIFW and MNAP to minimize unnecessary impacts to nearshore emergent and aquatic bed wetland communities as documented in existing condition surveys completed for long-term development plans. Fragmentation of these wetland types by structures, foot traffic, and prop wash has been shown to be a significant contributing factor to the decline of many damselfly species and has the potential to impact habitat for rare aquatic plant species such as the State endangered Slender Rush (*Juncus subtilis*) known to occur in the area.

STAFF/CONSULTANT DISCUSSION AND RECOMMENDATIONS

► DISCUSSION

Based on comments received, staff/consultants offer the following analysis:

- Brassua Lake south peninsula development area:

  The basis for the Commission-generated amendment limiting the number of shoreland structures to ten common points of water access at the Brassua Lake south peninsula was to strike a balance between providing walkable access to common temporary docks for groups of units in this area and protecting natural and scenic resources along the shoreline.

  Based on calculations submitted by Plum Creek, it appears to staff/consultants that shoreline development would occur within a 5-mile stretch of shoreline. Given the need to serve back lots as well as shoreline lots (up to 300 units – *see* Tab 10), sixteen common docks would satisfy the first part of this balance -- i.e., walkability and each dock serving a reasonable cluster of 15 to 20 units. The second part of the balance could be met as long as the location of the common docks were presented as part of the development area's long-term development plan in consultation with the Maine Department of Inland Fisheries and Wildlife, Maine Natural Areas Program, and the State Soils Scientist; and if the locations of boat launches/water access structures other than common temporary docks are also identified in the long-term development plan and are both sited and minimized in numbers to reduce monitoring demands associated with protecting against invasive species.

- Consultation with state agencies regarding siting shoreland structures:

  Staff/consultants agree with MDIFW/MNAP that siting of shoreland structures should be reviewed by governmental review agencies, including MDIFW/MNAP, to advise applicants and the Commission on ways to avoid or minimize unnecessary impacts. These governmental agencies will have an opportunity at the long-term development plan and/or the subdivision/development application process to provide comment to LURC on the site-specific locations and other design considerations of any proposed shoreland structures.

► RECOMMENDATIONS

Based on the discussion above, staff/consultants offer the following recommendations:

- Regarding the Brassua Lake south peninsula development area:

  Limit shoreland structures to no more than sixteen sites for common temporary docks and one trailered boat launch site to serve the development area on the south peninsula. Include the locations and numbers of shoreland structures in the development area's long-term plan after consultation with governmental review agencies, including the Maine Department of Inland Fisheries and Wildlife, Maine Natural Areas Program, and the State Soil Scientist.

- Regarding the Upper Wilson Pond, Lily Bay, Big Moose Mountain, Moose Bay, Route 6/15 Corridor, Rockwood/Blue Ridge and Long Pond development areas:

  Staff/consultants recommend adding the following language to the shoreland structure limitations for the above development areas:

  Include the locations and numbers of shoreland structures in the development area's long-term plan (or, where long-term plans are not required, in the subdivision/development permit application) after consultation with governmental review agencies, including the Maine Department of Inland Fisheries and Wildlife, Maine Natural Areas Program, and the State Soil Scientist.

4

PROPOSED DEVELOPMENT AREAS: UPPER WILSON POND

COMMENTING PARTIES

- Intervenors and Interested Persons
  - Moosehead Region Futures Committee

► Moosehead Region Futures Committee

(p. 4)

In our post-hearing opening brief submitted March 7, 2008 (pages 31-32 and 35-37), the MRFC Steering Committee requested that the development proposed for Upper Wilson Pond be eliminated and that the land be added to donated conservation. We reiterate our request that LURC protect this high-value natural area from development.

(p. 5)

A demonstrated need has not been proven for the development proposed for Brassua Lake, Indian Pond, Upper Wilson Pond, and Lily Bay. In fact, there is a demonstrated need *not* to develop these areas. They form the "green infrastructure" that will support recreation and nature tourism in the Moosehead region for generations to come.

STAFF/CONSULTANT DISCUSSION AND RECOMMENDATIONS

► DISCUSSION

Based on comments received, staff/consultants offer the following analysis:

The previous staff/consultant recommendations on the appropriateness of the west side of Upper Wilson Pond as an area for limited residential development were based on, *inter alia,* staff/consultants' views that this area meets the Commission's adjacency policy and development here would cause no undue adverse impacts to existing uses and resources.[1]

Further, the recommendations were based on staff/consultants' view that a demonstrated need for this rezoning, as modified by the June 4, 2008 Commission-generated amendments, exists. (*See* staff/consultants' discussion of demonstrated need at Tab 12) Comments from parties on this topic present no new information that would cause staff/consultants to reconsider these amendments.

► RECOMMENDATIONS

No recommended changes to these June 4th Commission-generated amendments.

[1] *Cf.* previous versions of Plum Creek's Concept Plan proposal, which included development areas on the east side of Upper Wilson Pond. Staff/consultants would not have reached the same conclusion on the appropriateness of such areas for development.

5

PROPOSED DEVELOPMENT AREAS: LILY BAY

COMMENTING PARTIES

- ► Petitioner Plum Creek
- ► Intervenors and Interested Persons
  - Appalachian Mountain Club
  - Forest Ecology Network and RESTORE: The North Woods
  - GrowSmart Maine
  - Maine Audubon and Natural Resources Council of Maine
  - Maine Wilderness Guides Organization
  - Moosehead Region Futures Committee
- ► Governmental Review Agencies
  - Maine Geological Survey

(p. 11)

[Regarding removing from the D-RS3M (Lily Bay highlands) zone approximately 2,997 of the 3,224 acres proposed and add this acreage to Balance conservation easement acreage:]

Plum Creek believes the Commission's intent is to achieve a zone that is economically viable, as well as a zone that is sensitive to environmental issues. This is Plum Creek's intent as well. Plum Creek is willing to accept a significant reduction in the size of the Lily Bay zone, consistent with that intent, so long as 404 units can be accommodated in the resulting zone.

Plum Creek is amenable to removing from D-RS3M (Lily Bay highlands) zone approximately 2,600 of the 3,224 acres proposed and adding this acreage to Balance conservation easement acreage. Staff has indicated that they estimate approximately 1,500 acres are adequate to support a resort with 404 resort accommodations at this location. Plum Creek believes that due to the specific characteristics of this site, including numerous types of environmentally constrained areas and numerous buffers and setbacks, and because of the needed acreage for resort amenities, roads and infrastructure, 1,800 gross acres would be necessary to have adequate developable land to support 404 units.

Importantly, Mr. Elowe of Inland Fisheries and Wildlife, was not concerned about a development zone at Lily Bay of even greater than 1,800 acres, from a wildlife habitat standpoint. See Tr. 1/18/08 at 114.

(Plum Creek response to staff/consultant request for additional information, dated 09/02/2008)

[Regarding the exact acreages of (1) the D-GNM zone, (2) the D-RS2M zone and (3) the D-RS3M zone as proposed on the Lily Bay peninsula by Plum Creek in October 2007:]

The D-GN2 zones in Lily Bay depicted on the maps submitted in our April 2007 application totaled 827 acres. 775 of these acres were located on the west side of the Lily Bay Road and 52 were located on the east side of the Lily Bay Road. (The 52 acres on the ease side is the low impact resort area.) While reviewing documents to answer this question we discovered an error in our April 2007 Plan Description. On page 3 of the Concept Plan Summary, it stated that the acreage in the D-GN2M zone on the west side of the Lily Bay Road was 725 acres when it should have read 775 acres. Page 3 of the statistical summary has the correct information.

The correct acreages that were part of the 2007 filing are:

(1) The D-GN2M zone, 827 ac. (775 on the west side of the Lily Bay Road and 52 on the east side of the Lily Bay Road); (2) the D-RS2M zone, 357 ac.; and (3) the D-RS3M zone, 3,224 ac., for a total of 4,356 ac.

[Regarding how much of the D-RS3M zone acreage Plum Creek wishes to retain:]

Plum Creek wishes to retain 683 ac. of the D-RS3M zone acreage.

[Regarding a narrative explanation that specifies (1) the types of environmentally constrained areas and their numbers/acreages, (2) the dimensions of buffers and setbacks, (3) the types of resort amenities and their acreages, and (4) the types of infrastructure and their acreages, including roads, that Plum Creek contends will be necessary to support 404 units:]

The Lily Bay zone that is located west of the Lily Bay Road contains a range of environmental factors that must be taken into consideration when planning for the total area of the zone. These include streams and wetlands with 100 -foot buffers assumed for analysis purposes. However, the Burgess Brook corridor would be a 250-foot setback. Other environmentally

constrained areas contain elements such as vernal pool and associated setbacks, poor soils and steep slopes. Combined, these areas are approximately 700 acres, or 39% of the gross area.

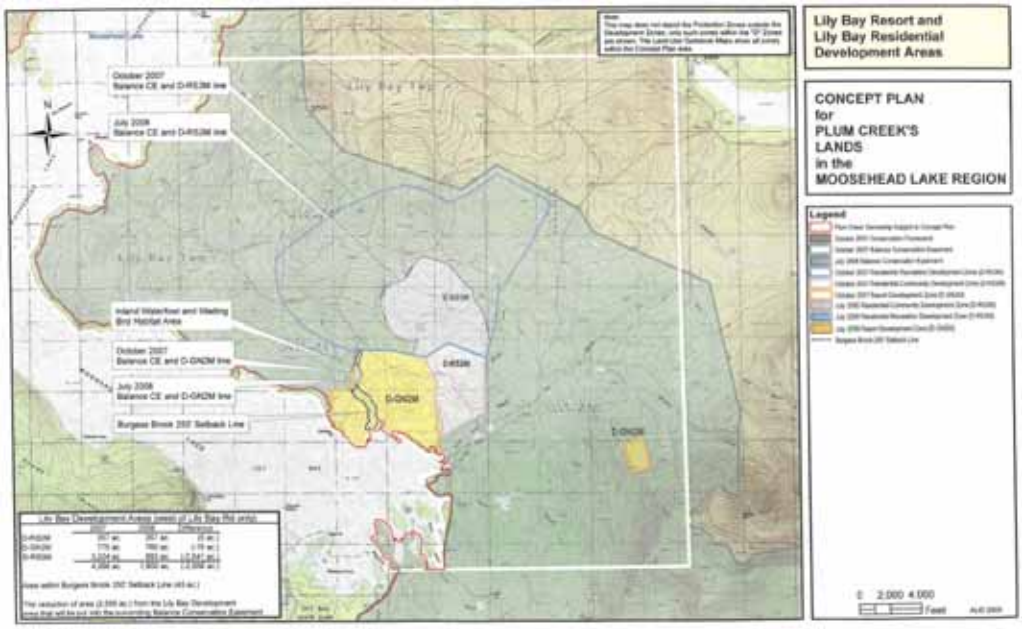
Approximately 400 acres is estimated to provide for potential outdoor recreational uses and amenities. Such amenities could include trails, waterfront access, boat facilities and a golf course (with clubhouse). The golf course would require, at a minimum, approximately 250 acres. In addition, at a minimum, approximately 50 acres of open space would be necessary for other amenities and to maintain a passive open space framework that preserves the natural character throughout the development, and approximately 100 acres of contingency area for unknown potential uses and planning uncertainties. In total, this would be approximately 22% of the total zone. Please note that the specific amenities will be determined in the long range plan application and will be based on then current market conditions.

Infrastructure could comprise approximately 160 acres, or approximately 9% of the zone. Elements included within this would be road rights-of-way. Major internal roads could be 9 to 10 miles in length and minor neighborhood roads may be approximately 6 miles in length. Using a road right of way of 60 feet this would total approximately 110 acres. Additional potential infrastructure elements include a well protection zone of 10 acres, a wastewater discharge area of approximately 23 acres, storm water retention in addition to that contained within road right-of-ways due to site constraints such as steep slopes or poor infiltration rates may need approximately 3 acres, miscellaneous items such as pump houses, telephone relay stations and maintenance areas could need approximately 4 acres. Finally, approximately 10 acres may be needed as a contingency for unforeseen site conditions or unforeseen utility requirements.

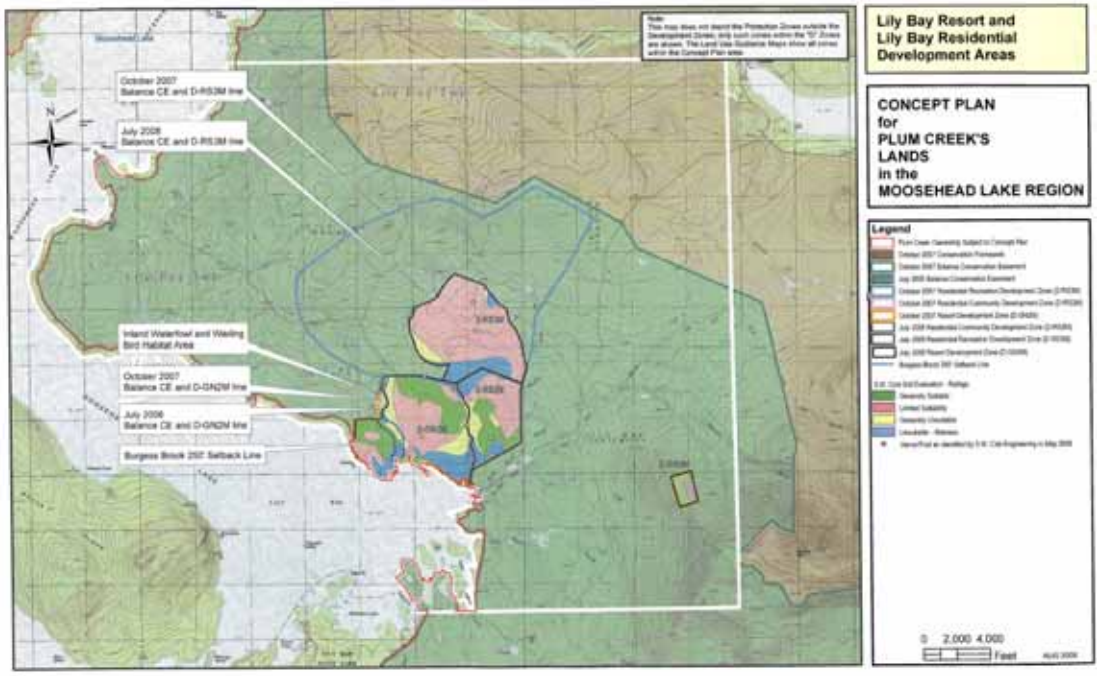
Minor aggregated elements such as general geometric inefficiencies (small, remnant pieces either too remote to efficiently to utilize, or of an awkward shape), and soils and land generally unsuitable for a particular use, could account for approximately 125 acres, or about 7% of the gross land area.

The remaining land area would be approximately 415 acres, about 23% of the gross area of the development zone, for the development of residential or resort units. With a total of up to 404 units allowed, this averages approximately 1 unit per acre of actual site development area net of the uses outlined above.

[Regarding a map of Lily Bay Township consisting of: (1) a USGS topographical map information as a base; (2) outlines of the D-GNM, D-RS2M and D-RS3M zones as proposed by Plum Creek in October 2007; and (3) the area of the D-RS3M zone and/or any other area that Plum Creek wishes to retain per its July 11 filing and its responses above:]



[Regarding a map of Lily Bay Township that identifies the environmentally constrained areas, buffers and setbacks specified in the narrative above:]



► Appalachian Mountain Club (pp. 2-5)

Revisions to the Lily Bay development zone degrade the concept plan's ability to satisfy LURC standards.

AMC has major concerns with the Commission-generated amendments for the Lily Bay area. While the significant reduction in the area allowed for development is a very positive step, the extent and nature of development that would be allowed are incompatible with the protection of this sensitive region. In one important way, the Commission-generated amendments represent a significant step in the wrong direction.

There is no doubt that the eastern side of Moosehead Lake, from the head of Lily Bay to Day's Academy Grant, represents the wildest and least developed part of Moosehead Lake – an ecological, recreational and scenic resource of irreplaceable value to the region. Testimony of Dr. Publicover, 12/6/07, vol. I at 14:10-12. The State has invested considerably in the conservation of this portion of the Moosehead Lake shoreline because of its value to the people of Maine.

The Concept Plan proposed a resort development zone and two extensive residential use zones over 4,300 acres of this area. During the hearings, some parties called for complete elimination of all of these development zones. In contrast, AMC testified in favor of eliminating the residential zones and associated uses, but allowing a low-impact, nature-based resort on the shore of Lily Bay. The Commission-generated amendments move in the opposite direction: although they significantly shrink the acreage available for development (a laudable improvement), they allow residential use at the same intensity as initially proposed by Plum Creek while stripping the development of its nexus to unique recreational opportunities by not requiring development of a resort core. This level and character of development would alter and degrade the natural character of this region, undermine the State's efforts to conserve this part of Moosehead Lake, and be contrary to LURC's mandate to protect the principle values of the jurisdiction.

Through Dr. David Publicover and Heather Clish, AMC testified that a low-impact nature-based resort, focused on providing visitors the opportunity to experience this spectacular landscape, could be an appropriate use in this area.

> 'The [Lily Bay] resort itself, if designed in a manner that is in keeping with the landscape and if its amenities are such that they're dependent on the very nature of the natural offerings of the area may, in fact, help to diversify the recreational offerings in the area, the types of lodging that people might have. However, we felt that the residential areas didn't contribute to the goals in that manner and, therefore, we couldn't support them as a facet of the recreational resources – recreational resource issues. … you look at the residential use and think, okay, is that enhancing transient use, for instance? And not really. They're probably going to be second homes. So when we looked at the areas together, we thought, well, the resort may be acceptable, but we don't find the residential areas acceptable in the context of the grander landscape in keeping the character at the edge of that grander landscape. Testimony of Ms. Clish, 12/12/07, vol. I at 104:18 – 105:13. *See also*, Testimony of Dr. Publicover, 12/6/07, vol. I at 30-34.'

Thus there are benefits to be gained by a low-impact resort that depends upon the natural values of the area, and it is these benefits that justify any development intruding into this sensitive area. *See*, Testimony of Dr. Publicover, 12/6/07, vol. I at 57:13 – 58:10, 60:14-18. By eliminating the resort and allowing all the proposed residential development, any potential benefit is lost and the harms are magnified. Testimony of Dr. Publicover, 12/6/07, vol. I at 27:21 – 28:4 ("having a large residential development in that area [Lily Bay], I think, would be an inappropriate intrusion of the wild character on that part of the region.")

The proposed zone would promote the wrong type of development. Specifically, the proposed residential/resort-optional development zone (D-MH-RS2) does not require that a nature-based resort *ever* be built. Instead, all 404 units could be

single-family housing on 3-acre lots sprawled across the 1,300-acre development zone, without providing any public accommodations. This zone allows public civic facilities and neighborhood-scale commercial facilities, and so will essentially create a new town or service center. Rather than providing a center for publicly-accessible nature-based tourism, this type of development would privatize access to this region. This is contrary to one of the core principles for the development set forth by AMC. Testimony of Mr. Graff, 8/31/07, at 5 (noting one of AMC's eight core principles for assessing the Concept Plan as "The public must be able to access and enjoy the natural, scenic and recreational assets of the region. Development must not lead to privatization of these resources.") This privatization will unduly affect the existing recreational uses and values of the Lily Bay area. LURC Standards, § 10.08.

As Dr. Publicover testified, if Plum Creek's economic model requires residential development with or without a resort at Lily Bay, then either the model must be changed or the location must be changed. Testimony of Dr. Publicover, 12/6/07, vol. I. at 60:14-18 ("If the economic model [for the resort] requires the inclusion of inappropriate uses [such as residential], then either you should adopt a different model or move the resort to a less sensitive location.") If the model is being changed to focus principally on the inappropriate residential use, as proposed in the Commission-generated amendments, then Lily Bay is the wrong location. The resort optional zone proposed for Moose Bay is a far more appropriate site for that economic model.

AMC recommends that the Commission strike the amendment creating a resort-optional zone at Lily Bay and replace it with a new low-impact, nature-based resort zone for the approximately 1,300 acres that does not allow residential use and corresponds with AMC's prior testimony regarding permissible resort uses at Lily Bay.[1]

► Forest Ecology Network and RESTORE: The North Woods

(p. 14)

The staff recommendations also tone down some of the most egregious parts of the development zones. Lily Bay highlands would be taken out of the Lily Bay development zones and added to the conservation areas although, as already noted, allowing the same number of units in the now shrunken development zone will increase the density beyond even what Plum Creek originally contemplated. While FEN-RESTORE applauds staff efforts in this area, in our final comments below we will explain why even the toned-down development remains unacceptable sprawl that will create lasting harm to the region.

(pp. 19-22)

We strongly disagree with staff's decision to allow the resort and residential units to remain at Lily Bay. It is likely that other groups will critique this decision in depth, so we will limit our discussion to a part of the record that is especially troubling. The record suggests that staff made a calculated decision to sacrifice Lily Bay in order to justify requiring the Legacy Easement and the purchase of the Roaches. Since this is a very serious allegation, we reproduce the part of the record that raises the issue…. [*See* pp. 19-21]

What is troubling about this dialogue is the implication that the resort at Lily Bay is needed to "justify" the conservation in the Legacy Easement that is considered so important. Mr. Kreisman said that it was this desire for that conservation that drives and legitimizes waiving adjacency at Lily Bay.

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[1] The Lily Bay resort zone may be more intensive than the proposed primitive resort zone (D-MH-PR), but should be less intensive than the resort zone (D-MH-RT) proposed for Big Moose Mountain. The Commission-generated amendments regarding resort development in the "resort-optional" zones are an improvement from the original Concept Plan. They do state that nature-based resort related commercial facilities and uses should be "compatible - in terms of type, scale and design - with the character, natural and cultural values of the surrounding area." Commission-Generated Amendments at 48. They also reduce the maximum building height for non-residential structures to 60 feet, and impose a "no visibility" standard on the primitive resort facility on Lily Bay Mountain. Commission-Generated Amendments at 63 and 65.

As explained in depth in former Commissioner Carolyn Pryor's direct testimony, the Commission should not consider whether the conservation justifies the development; rather, the Commission must first find that the development is appropriate and only then can it consider whether the conservation is sufficient. Mr. Kreisman obviously realizes as much because the next day he attempted to retract the explanation he gave the day before …

Mr. Kreisman's retraction does not change the fact that the record raises a serious issue about whether staff lowered their standard on Lily Bay in order to justify what they perceived as the more important conservation provided by the Legacy Easement and the sale of the Roaches. Our point in raising this issue is not to attack staff but to convince the Commission to take an independent and critical look at whether Lily Bay is really an appropriate place for a resort. The review of the appropriateness of Lily Bay for a resort – as Mr. Kreisman acknowledges in his retraction – must be independent of the comparable conservation prong of the adjacency test. We continue to support the position of the U.S. Fish & Wildlife Service that the Lily Bay peninsula is not appropriate for a resort or large subdivision. The burden is not on the opponents to show that Lily Bay is inappropriate for development; the burden is on the proponents – now the staff – to show that Lily Bay is an appropriate location for 404 resort and residential units.

► GrowSmart Maine

(pp. 1-2)

First, in its post-hearing brief, GrowSmart had urged the Commission to preclude any residential development at Lily Bay and instead limit such development to a more narrowly defined range of resort accommodation units. The Commission-generated amendments instead essentially increase the number of potential residential units, including entirely single family units, to a maximum of 404 units from Plum Creek's proposal for 154. For the reasons stated in prior testimony, we believe that residential development at Lily Bay is precisely the type of development that would not preserve the region's quality of place.

At the same time, the Commission-generated amendments would allow Plum Creek to develop resort accommodations at Moose Bay, as well as at Moose Mountain as originally proposed by Plum Creek. Given Moose Bay's proximity to Greenville and to the proposed Moose Mountain development, we strongly agree with this amendment and urge the Commission to take the next logical step – approve a Concept Plan that places all resort development on the west side of Moosehead Lake at Moose Bay and Moose Mountain, allow for some increase in residential development at Moose Bay and preclude any further development at Lily Bay as part of the Concept Plan. This would allow not only the development of a core resort area consistent with Plum Creek's, and the region's, long-term economic development strategy but also is more likely of achieving the goals of increasing the number of year-round residents in the area, decreasing the distances people will have to travel to get to existing development and services, and increasing the ability to provide for livable and walkable communities. Such an additional amendment to the Concept Plan would invariably require some further review of the Plum Creek's conservation requirements but changes to those requirements would be well worth the trade.

(p. 3)

[Regarding remaining smart growth weaknesses with Principle #1. Location of Development: Proximity to Existing/Future Development and Infrastructure & Services:]

- [Commission-generated amendments], while recommending the elimination of the large standalone D-RS3M Resort Residential zone at Lily Bay, greatly expands the potential for large lot single family residential development at Lily Bay within the Residential/Resort-optional development zone. As stated above, we believe residential non-resort accommodation development is inappropriate for Lily Bay given its location and incompatibility with surrounding existing development.

(p. 4)

[Regarding improved smart growth adherence with Principle #4. Protection and Preservation of Environmental Quality:]

- [Commission-generated amendments] remove almost 3000 acres of upland area from resort residential development consideration at Lily Bay.

► Maine Audubon and Natural Resources Council of Maine

(p. 2)

Maine Audubon and the Natural Resources Council of Maine oppose the Commission-generated Amendments which fail to eliminate development in the Lily Bay zones.[1] The proposed amendments still allow up to 404 accommodation units on Lily Bay peninsula. This amount of development in the Lily Bay zones in particular has been described by LURC's consultant as approximating the size of a rural town – such as the Towns of Troy, Perry, or St. Agatha. Transcript of Deliberations 409, lines 12-18 (Richert).[2] Rezoning Lily Bay for the construction of what amounts to a whole new town is inconsistent with the Commission's Comprehensive Land Use Plan (the "CLUP"), inconsistent with the "no undue adverse impact" standard for rezoning, and unsupported by any showing of "demonstrated need" on the record.

(pp. 7-18)

<u>The Commission's "Public Comment" Period Must Take into Account the Public's Overwhelming Objection to Any Development at Lily Bay.</u>

The Commission's process here is essentially that of prospective planning. The size and scope of this Concept Plan, and the exercise of deciding where and why to rezone areas around the lake for development, are akin to a regional planning process. The CLUP identifies the Moosehead Lakes region as one of four candidates for prospective zoning within LURC jurisdiction. CLUP, p. 126. The issue of prospective zoning, wherein the Commission takes a proactive approach to future planning in order to avoid "the several limitations of the case-by-case approach" (CLUP, p. 126), was even a recurring theme in the hearings, including the four days of public hearings in Greenville, Augusta, and Portland. Indeed, the public hearings underscore the value of viewing the process as a quasi-legislative zoning process. Dr. Palmer's opinion echoed this approach, through the lens of the "scenic impact" issues and the resulting transformation of a region: "I actually think that if you did a comprehensive study of the whole region, which really should have been done first, you probably would have found sites that aren't very visible from anywhere, where you want to put your landfill, for instance. It would be that same logic. . . . [W]hat I would have preferred would have been at the very beginning that there be some kind of a large site analysis of the whole 400,000 acres. I mean, it isn't clear to me why in the first, second, and third rounds of the concept plans the places that were picked were picked . . . ." Transcript of Proceedings 01/15/08 Palmer, Vol. II at 242-43.

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[1] Despite the reduction in acreage by removing most of the D-RS3M "Lily Bay highlands" zone, the Commission-generated Amendments make no reductions to the 404 total combination of residential units or resort accommodation units, and the "uncapped" number of caretaker/manager housing and employee housing, and potential resort-related commercial development, in the remaining Lily Bay zones.

[2] Indeed, this consultant stated that "At that level Lily Bay Township would then become <u>larger</u> than what those communities are as of the year 2000 . . ." (emphasis added). Transcript of Deliberations 409, lines 19-20 (Richert).

Using Dr. Palmer's phrasing, at the present time, "it isn't clear to" us – either NRCM or Maine Audubon, or to the public at large – why Lily Bay "was picked" by this Commission, or its staff/consultants, as an appropriate place to rezone to build a new town.

The statute governing the present process, 12 M.R.S.A. § 685-A(7-A), supports the view that Commission-generated amendments to a petition for rezoning, be subject both to public comment and hearing and take into account in the rule-making process the public's input on the rezoning recommendations.[5] To date the Commission has received, in this public comment period alone (begun on or about June 4, 2008), 1508 comments opposing rezoning for development at Lily Bay, and just 6 comments in favor.[6] This echoes the extraordinary majority of 25-to-1 written opposition to the Plan – the unprecedented, phenomenal majority which emerged in letters submitted to LURC during the public hearings and comment period of last December and January. That unprecedented majority included comments specifically objecting to development at Lily Bay. It is hard to imagine this Commission receiving any more definitive or resounding public opinion about the planning decision of rezoning Lily Bay for development. The public was given the opportunity to object to the rezoning, and has clearly done so.

Resounding public opposition to development on Lily Bay is directly relevant to the question of whether the applicant has met its burden of proof on the issue of need. LURC's guidelines clarifying the evaluation of factors on the issue of need include "community support."[7] The guidelines note that local, regional and state-wide perspectives are relevant when the proposal has a "far-reaching impact." LURC has never before had before it a project with greater far-reaching impacts than the Plum Creek proposal. And never before has public opinion been so overwhelmingly opposed as it is to development on Lily Bay. The overwhelming opposition is a clear indication that this development on Lily Bay is not needed.

When this Commission deliberated on the staff/consultant recommended Amendments on May 27-28, 2008, the Commission was deliberating on only one set of conceptual, recommended changes – the one conceptual set presented by LURC staff/consultants. That one set of amendments does not entail, and would not purport to entail, the whole range or spectrum of all possible sets of amendments, conceptually ranging from outright denial of all rezoning to greater versions of scaled-back rezoning and development.[8] As a premise, therefore, the LURC staff/consultants were not recommending to the Commission the only way to fix an ill-conceived plan. The current Commission-generated

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[5]The statute provides, in pertinent part:

> 7-A. This subsection governs procedures for the establishment and amendment of land use district standards and boundaries and the amendment of the commission's land use maps.
> A. The commission or its staff may initiate and any state or federal agency, any county or municipal governing body or any property owner or lessee may petition for adoption or amendment of land use district standards, district boundaries or land use maps.
> B. Adoption and amendment of land use district standards, district boundaries and land use maps are rule-making procedures subject to the requirements of Title 5, chapter 375, subchapter II, [etc., with certain exceptions and modifications listed]. 12 M.R.S.A. § 685-A(7-A).

[6] Based on NRCM staff analysis and count of comments received by LURC, as of 11:30 am, Friday, July 11th, LURC had received 1678 letters in opposition to Plum Creek's plan and only 6 in support. Of the 1678, 1508 specifically mention Lily Bay and the other 170 are in general opposition.

[7] LURC Guidance Document, Clarifying the Rezoning Criterion of "Demonstrated Need."

[8] Indeed, as one Commissioner noted near the end of deliberations: "I'll be interested – I'm very interested to hear what some of the comments are and reactions that we get to this over the next 30 days or once the comment period starts because we're still in this process…" Transcript of Deliberations, p. 414 (Commissioner Hilton).

Amendments, therefore, are not the only fix – and indeed, we contend that they are not an appropriate fix at all. The public urges no development on Lily Bay. The Maine Audubon/NRCM resolution, described in more detail below, is an amendment that provides that result. We urge the Commission to adopt it.

Overview of the Resolution Avoiding All Development at Lily Bay

During its deliberations, several Commissioners expressed discomfort with the amount of development proposed both for the entire project (over 2000 units) and for Lily Bay (404 units). Collectively, these statements evince the view that any ability to approve this amount of development, including development at Lily Bay, is dependent on the entire staff-recommended conservation package – a package including not only the "Balance Easement" but also the 266,000 "Legacy Easement" and the 27,000 acre Roach Pond acquisition, all of which must be secured within 45 days of Plan approval and prior to acting on any Plan subdivision permits. These comments from Commissioners ran throughout the deliberations.[9]

In response to a question from a Commissioner, one of the consultants noted that if the amount of development were to decrease, the amount of conservation would need to be "rethought." [10]

We accepted that invitation to rethink the amount of development and the amount of conservation needed to balance that development. For all of the reasons discussed here, as well as for all the reasons listed in our earlier testimony and cited in earlier briefs, we believe that development equivalent to an entire new town, including 404 seasonal houses or resort units, commercial development, golf course, marina, roads and infrastructure is not appropriate for Lily Bay peninsula.

We continue to believe that the total amount of development proposed by Plum Creek will have undue adverse impacts on the natural character of the region, on wildlife, and recreational opportunities as detailed in testimony and briefs filed earlier in this case and in further comments below.

Therefore, we propose that all development be removed from Lily Bay, that the total number of development units in the concept plan be reduced by 404 units, and that the land proposed for development in Lily Bay be, instead, added to the balance easement. Likewise, in recognition of the comment made to the Commission by the consultant cited above, we

[9] A general overview of many of the comments is as follows:
- "without those easements, those 2,000 units certainly become a much different number" (Harvey, 206)
- "I think the previous discussion about how many units are appropriate all has to be seen in light of the easements, and so it's essential." (Laverty, 206)
- "it's the essential piece of the whole package. If you're going to say that 2,000 units is o.k., there's got to be – that's a lot to swallow. So there's got to be something on the other side of the equation, for me anyway. I don't know if any others want to weigh in. (Harvey, 206)
- "Yeah, I totally agree." (Schaeffer, 206)
- "I think the 404 is acceptable but it's only when taken within the context of this whole… If there was a piece missing, you know, if the easements didn't go into effect within 45 days.. I think my heartburn over 404 would be much greater. But it's sort of tempered by all these other pieces when taken as a whole." (Kurtz, 412)
- "Rebecca, I think you stated that very well and that --- that reasoning, I guess, is what gives me some comfort in the total number of units that are being proposed here. This is a package and we've – there's a potential for getting a lot of conservation land out of this, particularly when you combine both the offset or balance conservation easement with the framework and all the recommendations that go along with that and what's being proposed here." (Hilton, 414)
- "my mind is only set at ease when I look at the fact that what this
- "I want to make that absolutely clear that whether it's Lily Bay and 404 units or 975 for the entire project that it's a package deal." (Kurtz, 415) • "Okay. I think we've all said that basically." (Harvey, 416)

[10] Transcript of Deliberations, p. 412, line 1 (Kreisman)

acknowledge that if development is reduced, the amount of regulatorily required conservation may need to be reduced. Therefore, to aid the Commissioners' deliberations, we have identified a parcel of 33,500 acres within the concept plan area that we believe could be removed from the regulatorily required conservation in order to create a package of development and conservation that meets the test of being "publicly beneficial." The map depicting this 33,500 acre parcel is attached as an exhibit. See Exhibit A.

As conservation organizations, it is very difficult for us to propose the removal of any land from the conservation package. Ideally we would like to see it all conserved and would support the continued voluntary conservation of this land through the purchase and sale agreement between Plum Creek and The Nature Conservancy. However, we believe so strongly that development at Lily Bay is not appropriate that we are willing to suggest the removal of this land from the regulatorily required conservation package if necessary to remove all development from Lily Bay.

By protecting the Lily Bay area, our proposal would permanently protect from development a large undeveloped block of matrix forest and wildlife habitat that TNC, IFW, and USFWS have identified as important. It would also connect protected shorefront on the east side of Moosehead Lake northeast to the 100-Mile Wilderness, the Nahmakanta Public Lands Unit, the Debsconeags, and Baxter State Park.

The 33,500 acres on the west side of the lake proposed for removal from the required conservation package were identified by reviewing all available wildlife and natural resource information in the record. A map showing this information is also attached. See Exhibit B. We also considered all available information in the record regarding recreational destinations and use patterns. We sought to identify one contiguous parcel (rather than several smaller parcels) that was, ideally, adjacent to other land owned and managed by Plum Creek with the fewest conflicts with high value ecological and recreation areas. Finally, we considered the configuration of the land to be proposed in relationship to the balance easement.

In considering the number of acres (33,500), we took into account both the amount of acreage proposed to be developed at Lily Bay in the Commission-generated Amendments (approximately 1,350 acres) and the number of units proposed to be removed from the plan. We believe that the 33,500 acres is on the high end of what might be removed and we would support a Commission determination for some lesser amount.

The Record Does Not Support the Commission-Generated Amendments Allowing Development On Lily Bay.

The Commission-generated Amendments to Rezoning Petition ZP 707 which provide for a residential/resort-optional development (D-MH-RS2) zone, "that would allow, but not require, resort-related commercial and residential development (i.e., residential and/or resort accommodation units would be allowed without a resort core)"[11], do not meet statutory and regulatory criteria for rezoning at Lily Bay.

i Public Comments Do Not Support the Rezoning.

As mentioned above, no person can rationally read the public comment record and conclude that there is anything other than resolute objection on the part of the public to this rezoning. The public comments consist of an outpouring of separate, individual letters and written testimony from the public. Written opposition to the Petition (ZP 707) was 25-to-1 (2,500 letters opposed vs. 100 letters in support)[12] during the previous public comment period before the staff/consultants' recommended amendments. In this current public comment period there are over 1500 letters in favor

[11] See Amendments to Core Elements of Plum Creek's Concept Plan Proposal Generated by the Land Use Regulation Commission at 11.

[12] May 5, 2008, e-mail estimate from LURC staff Amy Hudnor to NRCM: "My best guess at numbers: about 100 in favor, 2500 opposed, and about 400 either: asking a question, or commenting in favor of some aspects and opposed to others."

of avoiding all development on Lily Bay, contrasting with only 6 letters supporting such development. If this rezoning – as a rule-making process under 12 M.R.S.A. § 685-A(7-A) – is to honor the public's right and opportunity to participate, it truly cannot proceed in the face of this overwhelming public opposition.

During the Commission's deliberations, the staff/consultants often searched for what were variously referred to as "metrics" to objectively measure or evaluate the change or impact that proposed development would have on the natural character of the region, at Lily Bay and elsewhere in the plan area. One such "metric" stares us, and the Commission, in the face – the metric of public opposition. In a rule-making proceeding, where LURC exercises its quasi-legislative function of prospective planning and setting new land use district boundaries, the objective, measurable weight of public comment is key. The written public comment record demonstrates overwhelming opposition to rezoning for development on Lily Bay.[13]

ii. The Rezoning on Lily Bay Is Not Consistent With the Statutory Criteria for "Demonstrated Need."

There was absolutely no demonstrated need shown on this record to justify – or even consider – the construction of a new town on Lily Bay.[14] 12 M.R..S.A. § 685-A(8-A). And this Commission should make no mistake – a new town, north of Greenville and situated on the shores of Lily Bay just across from Lily Bay State Park, is precisely what is encompassed by these amendments to Plum Creek's plans: a new town, with all of the subdivisions, commercial activity, infrastructure, and related increased boating activities and land uses that go along with building and maintaining a new town. There need not even be a "resort" or "resort core" at Lily Bay under the current Amendments. It could simply be 404 seasonal homes, scattered across the landscape.

Under these Amendments, all of the parties' and the applicant's testimony about the economics of a resort on Lily Bay becomes entirely moot and irrelevant. There may not even be a resort. Thus, all the testimony from the applicant touting a resort at Lily Bay as the developer's linchpin to this entire development plan, and/or as the source of an economic resurgence in Greenville or potential jobs, is irrelevant. In short, there is no demonstrated need on the record for 404 new single-family residential units, and a private club, restaurants, golf courses, marinas, and other commercial structures these residences would all share, on the shores of Lily Bay. It does not make good policy sense to build anything more on the relatively undeveloped east side of the lake, given the extraordinary amount of development proposed on the western shores and other areas of the Plan. Permitting development on Lily Bay is inconsistent with the values of the CLUP and contravenes the statutory rezoning criteria of "demonstrated need."

The Town of Greenville runs the very real risk of becoming marginalized by new dwellings, new amenities, new stores and infrastructure at Lily Bay. It is not disputed that these new dwellings and amenities are a new and greater "use, type, occupancy, scale and intensity" than the few existing structures there right now (which are seasonal, and most of which have no electricity or foundations).[15] In LURC staff/consultant's own words, the development proposed at Lily Bay

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[13] Another similar "metric" is on the record in the form of the random mail survey of 585 visitors who had camped at Lily Bay State Park. See Chris Seek survey results, contained in Costas Christ Pre-Filed Testimony of 8/31/07. A random mail survey of 585 visitors who had camped at Lily Bay State Park found that 81% would be less likely to return to the Moosehead region if two new resorts and 1000 seasonal homes were built. This number dropped to 58% if the proposed development took place closer to Greenville. 84% said they would be less likely to return to the area if it is noisier because of an increase in cars, boats, development and people. Id.

[14] For a rezoning to be permitted, the statute requires substantial evidence that "[t]he proposed land use district satisfies a demonstrated need in the community or area . . ." 12 M.R.S.A. § 685-A(8-A)(B).

[15] LURC staff/consultants' tendency to refer to the existing structures there today as "a village" is a misnomer. Transcript of Deliberations at 64, line 17 (Pinette) and at 72, lines 13-17 (Richert). A "village" carries connotations of all that a town entails (shops, stop lights, community centers, etc.). No one would venture to argue that there is now a "Lily Bay Village" – and Plum Creek's own witness, David Vail, conceded in cross-examination that what this Plan contemplates building at Lily Bay

would grant to Plum Creek "extraordinary" development rights.[16] The record is bare of any commensurate showing of a demonstrated need for extraordinary development rights at Lily Bay.

iii. The Rezoning on Lily Bay Is Not Consistent With the Statutory Criteria Requiring "No Undue Adverse Impact on Existing Uses and Resources."

Compounding this poor planning decision reflected in the current Amendments, the equivalent of a new town is proposed to be constructed proximate to, and in, the habitat of a federally-listed threatened species, the Canada lynx. The record falls far short of any such planning concept even remotely falling in alignment with this Commission's Comprehensive Land Use Plan, which identifies protection of the natural character of the region and unique wildlife resources as the primary principles guiding decisions on rezoning and growth-planning.

Not only is there no demonstrated need for this new town of Lily Bay, why high value critical lynx habitat would be selected as the location for the new town of Lily Bay is unsupported by any reasonable view of the CLUP's four guiding principles. CLUP, p. 114.

Indeed, the primary rationale for the Commission's acceptance of staff/consultants' removal of the Lily Bay highlands D-RS3M zone, was that rezoning for development should not occur in this high value lynx habitat. See, e.g., Transcript of Deliberations at 46-47 (Laverty). The argument must extend also to the current Lily Bay development zone, which is just as much within this high value lynx habitat as the acres which were removed.[17]

Conservation measures cannot be used to justify the new Lily Bay resort and subdivision town. The regulatory criterion for approving a concept plan requires striking "a reasonable and publicly beneficial balance between appropriate development and long-term conservation . . ." LURC Chapter 10.23, H ¶ 6f. But the Commission does not reach the issue of whether sufficient "conservation" has been proposed to meet this regulatory requirement, until the Commission first determines that the proposed development in issue is appropriate. During the Commission's deliberations, LURC staff and consultants underscored this view, when they made clear on the record on the second day of the deliberations

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is not of the same "use, type, occupancy, scale and intensity" under the standards of the CLUP at 141. Transcript of Proceedings 12/07/07 Vail, Vol. II at 191. This criticism of the staff/consultants' use of the "Lily Bay village" label was also noted by NRCM and Maine Audubon in responding to the LURC staff/consultants' adjacency analysis [see "A Comparison of Development Elements of Plum Creek's Moosehead Lake Region Concept Plan Proposal to the Commission's Adjacency Principle (November 5, 2007)" at 4-6]. See NRCM-MA letter of November 20, 2007 [2007-11-20_NRCMMA_ ExcessLandAdjacencyResponse.pdf] at ¶ 4, pages 2-3.] Perhaps LURC's continuing use of the label, in spite of the fact that no witness used such a characterization during the four weeks of testimony, is implicitly more reflective of the acknowledgment that the equivalent of building a new town north of Greenville and on Lily Bay is, precisely, what is being contemplated here, such that the current few seasonal structures there today must somehow be characterized as "a village" in order to make the rezoning recommendation more palatable to the public that stands in stark opposition to it.

[16] See Footnote 75 of LURC Staff/Consultants' Recommendations.

[17] The testimony of Henning Stabins of Plum Creek corroborated the views expressed by other wildlife scientists – in particular Margaret Struhsacker on behalf of NRCM and MA – that the development zones on Lily Bay peninsula are located in areas of highest probability of lynx occurrence in the critical habitat of this federally-protected species. See Stabins Map, "Exhibit B – Potential Lynx Habitat on Plum Creek Lands in the Moosehead Lake Region," and "Exhibit C – Potential Lynx Habitat in the Concept Plan Area" attached to 8/31/07 Stabins Pre-filed Testimony; see also Exhibit 9 to 8/31/07 Struhsacker Pre-filed Testimony (Plum Creek's April 4, 2006 Map, "Lynx Probability Analysis in the Maine Lynx Critical Habitat Designation"). As set forth in the testimony of Ms. Struhsacker, approving development on Lily Bay would violate the Endangered Species Act. 8/31/07 Struhsacker Pre-filed Testimony at 7-9, 18-19 (see also Exhibit 9 therein). The designation of critical lynx habitat in accordance with the maps submitted by the U.S. Fish & Wildlife Service in the Federal Register, is also fully consistent with Plum Creek's own maps.

that they had not intended in previous responses to questions to suggest that the conservation land had been viewed first as justification for the Lily Bay development. Transcript of Deliberations at 411 (Kreisman). In writing, the LURC staff/consultants characterize the development rights relating to Lily Bay as "extraordinary." The point was echoed by Commissioners when they considered the Lily Bay development.[18]

Extraordinary development, located within critical lynx habitat, is neither appropriate development, nor wise planning; it is not sound prospective zoning on a regional scale.

(pp. 23-25)

iv. The Rezoning on Lily Bay Will Have Undue Adverse Impact on Lily Bay State Park.

During deliberations, the Commission only evaluated the scenic impact and viewshed issues from the campsites at Lily Bay State Park. The Commission did not consider the undue adverse impact of views from the water. From the perspective of users of the park, increased boating activity and its associated noise and disturbance – including within the narrow passageway between Lily Bay State Park and Sugar Island – will forever alter the experience of the existing state resources and uses of the Park that currently do not include that level of noise and disturbance.[22] Furthermore, the adverse impacts on the viewshed from the water of Lily Bay, heavily used by visitors to Lily Bay State Park, are undisputed – we attach, again, the Saratoga Associates maps depicting the views from the water. See Exhibits F3 & F4, Lily Bay Resort Viewshed Maps (Upland and Lowland Alternatives, August 28, 2007). In light of such evidence – derived from the applicant's own witnesses – rezoning for development at Lily Bay is adverse to existing uses of Lily Bay State Park and is indefensible.

v. The Rezoning on Lily Bay Is Not Consistent With the CLUP and Violates the Core Principle That Guided Growth and Development Not Destroy the Natural Character of the Region.

Despite the LURC staff-consultants' notable attention to myriad details in this development proposal of unprecedented size, we believe the more critical, core values of the jurisdiction have been missed. The LURC statute requires that any rezoning be consistent with the Commission's Comprehensive Land Use Plan. 12 M.R.S.A. § 685-A(8-A)(A) ("A land use district boundary may not be adopted or amended unless there is substantial evidence that . . . [t]he proposed land use district is consistent with the standards for district boundaries in effect at the time, the comprehensive land use plan and the purpose, intent and provisions of this chapter") (emphasis added). Rezoning is therefore measured against the CLUP for consistency, and to that end the CLUP "has identified four principal values that define the jurisdiction's distinctive character." CLUP, p. 114. We reiterate them again:

i. The Tradition of a Working Forest. The CLUP at page 114 reads: "The economic value of the jurisdiction for fiber and food production, particularly the tradition of a working forest…"

ii. Primitive Recreational Pursuits. The CLUP at page 114 reads: "Diverse and abundant recreational opportunities, particularly for primitive pursuits . . ."

[18] Transcript of Deliberations, 412-416 (Kurtz, Hilton, Harvey), and see 258, lines 19-20 ("the applicant is requesting extraordinary development opportunities . . .") (Laverty).

[22] LURC's consultant, Mark Anderson, and Plum Creek's witness, John Daigle, also concluded that there will be an adverse impact on the recreational use at Lily Bay State Park by the development proposed across the water at Lily Bay. Transcript of Proceedings 12/11/07 Daigle, Vol. I at 64-67 (discussing "displacement" of Lily Bay State Park users by overcrowded facilities at the Park, and – at page 64 – that the Plum Creek proposed development will displace some of the more primitive recreation activity options that may exist at sites like Lily Bay State Park

iii. Wildlife and Scenic Resources. The CLUP at page 114 reads: "Diverse, abundant and unique high-value natural resources and features, including lakes, rivers and other water resources, fish and wildlife resources, ecological values, scenic and cultural resources . . ."

iv. Natural Character. The CLUP at page 114 reads: "Natural character values, which include the uniqueness of a vast forested area that is largely undeveloped and remote from population centers."

The CLUP then emphasizes: "Remoteness and the relative absence of development are perhaps the most distinctive of the jurisdiction's principal values, due mainly to their increasing rarity in the Eastern United States. . . . The value of natural resources is generally enhanced when they are part of a large, undisturbed area, especially one that encompasses entire watersheds or ecosystems."[23] [Emphasis provided.]

Any rezoning for development at Lily Bay violates these core principles.

► Maine Wilderness Guides Organization (p. 1)

Lily Bay should be off limits to development and should be the mainstay of a "fair-trade" balance offset easement. In light of the state's already significant investment of public funds to provide Mainers a place for primitive pursuits – i.e. Lily Bay State Park and conservation easements on the eastern shoreline of Moosehead – the planned development is, in our opinion, a violation of the current CLUP standards.

► Moosehead Region Futures Committee (pp. 4-5)

The consensus position of the MRFC Steering Committee with regard to development on the Lily Bay peninsula is expressed in our post-hearing opening brief submitted March 7, 2008 (pages 31-37) and our 2006 Citizen Solutions map, submitted as Exhibit 2 in the testimony of MRFC witness James Glavine on August 31, 2007. Our Citizen Solutions map indicates an area that we found to be potentially suitable for limited residential development consistent with smart growth principles (shared water access, clustered housing) and existing development in the immediate area (mostly traditional camps); no resort development is recommended. [Within the boundaries marked on the Citizen Solutions map, land with unsuitable soils and land for which MDIFW/MNAP has recommended protection should be excluded from rezoning to development; this information was not available to us when the map was created.]

The LURC-generated amendments to the proposed Lily Bay development area fall far short of the MRFC recommendations in several important ways, including the following:

- Total acreage to be rezoned for development: Although the LURC-generated amendments reduce the acreage to be rezoned for development, the remaining acreage far exceeds that recommended by the MRFC.
- Total number of development units: The LURC-generated amendments do not reduce the total number of development units allowed at Lily Bay. Restriction of development to the area judged as potentially suitable by the MRFC would necessitate a major decrease in the number of development units.
- Type of development: The LURC-generated amendments would still allow development of a resort and of very large homes. The MRFC recommends that no resort development be allowed and that new homes be similar in scale to existing homes in the immediate area (mostly traditional camps).

We are especially concerned that the development proposed for the Lily Bay peninsula would create a new, unnecessary commercial center sprawling into an area of high ecological and recreational value, located far from the

[23] CLUP, p. 114.

struggling Town of Greenville. We are also very concerned that this development would adversely impact the experience of visitors to Lily Bay State Park and Sugar Island and of boaters on Moosehead Lake.

A demonstrated need has not been proven for the development proposed for Brassua Lake, Indian Pond, Upper Wilson Pond, and Lily Bay. In fact, there is a demonstrated need *not* to develop these areas. They form the "green infrastructure" that will support recreation and nature tourism in the Moosehead region for generations to come.

COMMENTS FILED BY GOVERNMENTAL REVIEW AGENCIES

► Maine Geological Survey (p. 1)

[Regarding restricting development over the mapped sand and gravel aquifer to facilities/uses identified as acceptable in consultation with the Maine Geological Survey:]

1) The Maine Geological Survey accepts the role of consultant as specified in this recommendation.

2) Potentially acceptable land uses over sand and gravel aquifer:

a. Development necessary for a public water system. The primary reason for restricting land use over the mapped aquifer is to protect the quality of the water resource for potential future use as a water supply for the proposed resort and/or residential housing.
b. Open space.
c. Low-impact recreational use – this includes development of walking trails, snowmobile trails, hunting, and other similar uses.
d. Best-practice forestry activities.

STAFF/CONSULTANT DISCUSSION AND RECOMMENDATIONS

► DISCUSSION

Of the development-related issues presented by this Concept Plan and the June 4th Commission-generated amendments, none has elicited more interest than the development proposal for the Lily Bay peninsula. In addition to the party comments reproduced herein, LURC received more than 1,700 letters and e-mail communications from members of the public, approximately 1,500 of which expressed concern regarding development at Lily Bay.[3] Although these public comments are not explicitly referenced in this discussion, staff/consultants have reviewed and considered all of these comments (as staff/consultants have done with all public comments received by LURC throughout this proceeding) before reaching the conclusions and developing the recommendations below.

Based on comments received, staff/consultants offer the following analysis:

Parties and members of the public expressing concern regarding the development proposed for Lily Bay raise issues that go especially to two statutory criteria for rezoning[4]:

- Consistency with the Comprehensive Land Use Plan, particularly with regard to the "natural character" of the jurisdiction. (CLUP, p. 114) By "natural character," the CLUP means "the uniqueness of a vast forested area that is largely undeveloped and remote from population centers." (Emphasis added)

- Demonstrated need in the community or area and no undue adverse impact on existing uses or resources.

The following discussion addresses, in order, each of these statutory criteria, meaning natural character, demonstrated need, and no undue adverse impact, all in the context of the concerns raised about the Lily Bay development proposal.

Natural character and remoteness

As certain parties contend, there is much about Lily Bay Township and the townships immediately surrounding it that is undeveloped and remote. However, staff/consultants conclude that (1) the character of that portion of Lily Bay Township in the which the proposed development would be built is not remote, and (2) with proper design, management, and permanent containment, the proposed development will not unduly compromise the natural, undeveloped and in many instances remote character of the larger region within which the development would sit.

The natural character of Lily Bay Township

Lily Bay Township is within a growing, high natural resource value area. Its profile is varied and includes:

- an established and slowly expanding seasonal community along its southern shore fronting Lily Bay;
- a protected shoreline with a variety of lake-oriented recreational opportunities, from primitive to managed, along its southwestern and western shores, including most of its frontage on Spencer Bay;
- a densely roaded but otherwise undeveloped working forest in the interior of the peninsula;
- a variety of important natural resources, including species that are threatened and/or of special concern; and

[3] Copies of these public comments were delivered to the Commission in a separate mailing in early September 2008.

[4] Staff/consultants note that the statutory criterion that requires demonstration that "a new district designation is more appropriate for the protection and management of existing uses and resources within the affected area" [12 M.R.S.A. §685-A(8-A)] may be triggered by a rezoning to a P-RP subdistrict. Staff/consultants are not analyzing the proposal against this criterion in this document, as no parties invoked it in their comments.

- nearby recreational settings with non-intensive recreational facilities (offering both primitive and motorized uses), including the state-owned Lily Bay State Park, Sugar Island, and the Roach River.

It is in this context – an accessible township with an established pattern of settlement that also harbors high value natural, scenic, and recreational resources -- that the Commission regards Lily Bay Township overall as an "area of special planning needs." The CLUP's objective in this area is not to exclude development but to "allow growth to be accommodated in these areas without compromising the resources that make them so special." (CLUP, p. 113, emphasis added)

Below, staff/consultants present facts and their analysis of (1) the location and accessibility of Lily Bay Township, (2) the township's development pattern, (3) the township's place on the Recreation Opportunity Spectrum, (4) major wildlife resources, and (5) adjacent recreational resources. These facts and analysis further support the conclusion that additional development as proposed by staff/consultants can be accommodated in Lily Bay Township without compromising its special resources.

Location and accessibility of Lily Bay Township:

- The township is approximately 12 miles north of the service center of Greenville
- It is adjacent to the organized Town of Beaver Cove and the historical settlement of Kokadjo (located 7 miles north of the existing settlement at Lily Bay. Kokadjo is at the head of First Roach Pond, which has a substantial number of house lots on both its north and south shores)
- Lily Bay Road (a two-lane, public road classified by MDOT as a major collector) connects Lily Bay to Greenville, Beaver Cove, and Kokadjo. Kokadjo marks the terminus of Lily Bay Road and the transition to the private road system that serves the largely undeveloped interior north and east of Moosehead Lake

Development pattern of Lily Bay Township:

- Lily Bay Township is developed with approximately 141 structures.[5] These structures are mostly seasonal dwellings, ranging from primitive camps to new or renovated contemporary structures, and most are located along a 3- to 4-mile stretch of the township's southern shoreline along Moosehead Lake.
- The Moosehead Lake shoreline in Lily Bay Township changes in character: The southern shore (fronting on Lily Bay) hosts most of the township's development, including a developed cove, seasonal home development at Carleton Point, and a small third cluster off Casey's Road to the west. This shoreline is a mix of private ownership and state-owned easements. The western tip and northern shore (fronting on Spencer Bay) includes several campsites, a sporting camp and private campground at Stevens Point, and very little other development. Most of this shoreline is under state easement.
- Approximately 30% of dwellings (43) were built between 1971 and 2005, making Lily Bay Township the 53rd most developed township out of the 459 minor civil divisions in LURC jurisdiction; the 20th most developed out of the minor civil divisions in Piscataquis and Somerset counties that are in LURC's jurisdiction; and the 6th most developed out of the minor civil divisions in the Concept Plan area (source: LURC permitting records)

[5] This is an estimate as of 2004 (source: Petition, Tab 9b, p. 4); it represents the number of lots with structures valued at $1,000 or more. If a lot contains only an accessory structure, it over-counts the number of dwellings. If a lot contains more than one dwelling unit, it undercounts the number of dwellings.

- At the township level, Lily Bay and Frenchtown Townships appear to represent a divide between the developing fringe and the undeveloped interior on the east side of Moosehead Lake:

Approximate New Dwelling Units in Concept Plan Area
East Side of Moosehead Lake, by Township/Town (1971-2005)
(Source: LURC permitting records)

Beaver Cove	166
Elliotsville Twp	77
Frenchtown Twp	56
Lily Bay Twp	43
Days Academy Grant Twp	7
Bowdoin College Grant West Twp	4
Shawtown Twp	2
Spencer Bay Twp	1
T1 R13 WELS	1
Bowdoin College Grant East Twp	0

- Infrastructure for development is available along the Lily Bay Road corridor, including: the public road to Kokadjo; electrical power that runs to Kokadjo and serves development on First Roach Pond; a county solid waste transfer facility in Lily Bay Township off Casey's Road; and municipal fire protection services provided by the Town of Greenville -- estimated 22 minute response time to the developed portion of Lily Bay (Shrum, Aug. 31, 2007, p. 104)
- Both the CLUP and Chapter 10 (Section 10.25,Q,2) recognize Lily Bay Township as an "area of special planning needs" that has either experienced rapid growth and possesses concentrations of high-value natural resources or has characteristics that make significant future growth likely -- "The challenge…is to allow growth to be accommodated in these areas without compromising the resources that make them so special." (CLUP, pp. 110-113)[6]

Major wildlife resources associated with Lily Bay Township:

- The region centered on Big Spencer Mountain north of Lily Bay Township has been identified by The Nature Conservancy as a "matrix-forming forest" of high conservation priority. (Rumpf/Tetreault, Aug. 31, 2007, pp. 8-9)
- Among the wildlife of conservation concern in and around Lily Bay Township are:
  - Canada lynx: Lily Bay Township is part of a large block of high quality habitat, with documented presence in parts of the township but more prevalent north of Lily Bay and Kokadjo (U.S. Fish and Wildlife Service, Sept. 4, 2007, pp. 10, 12);
  - Rusty blackbirds (a species of special concern) associated with wetlands;
  - Wild brook trout and salmon in streams that border the proposed development zone;

[6] The Moosehead Lake Region generally falls into this category, and Lily Bay is among the communities singled out in describing the area as having special planning needs. (CLUP, p. 111) As a result, for example, Lily Bay is one of 42 communities in the Commission's jurisdiction where Level 2 subdivisions are allowed. (Chapter 10, Section 25,Q,2; see also the Commission's *Basis Statement and Summary of Comments for Subdivision and Development Rule and Policy Changes*, April 1, 2004, and *A Policy Statement on the Commission's Level 2 Subdivision Program,* February 11, 2004)

- Amphibian species associated with potentially significant vernal pools; and
- Common loon: 4-5 estimated (but not documented) pairs of Common loon in Lily Bay (Evers, 8/31/07, p. 49)

Lily Bay Township's Place on the Recreation Opportunity Spectrum (ROS):[7]

- Lily Bay Township ranges within the middle part of the ROS[8] from semi-primitive to rural. The settled area of Lily Bay Township and the immediate Lily Bay Road corridor line up with the "rural" part of the spectrum. The interior of Lily Bay Township is characterized as Roaded Natural due to the lack of structural development but the presence of many accessible roads and managed land use activities. Parts of the north and west shores of Moosehead Lake bordering Spencer Bay could be characterized as semi-primitive, with "the most valuable area on the lake for shoreline camping" and "the highest concentration of remote campsites on the lake." (Publicover, Aug. 31, 2007, p. 5)

Adjacent recreational resources:

- Lily Bay (the water body) has a surface area of nearly 5,900 acres, with depths ranging from shallow to more than 100 feet. The character of the bay is determined in part by factors such as visibility of shoreline development and amount of human interaction on its waters. Seasonal homes and their appurtenances (e.g., docks and boats) are readily visible in the eastern coves of the bay and along the first few miles of the township's southern shore, including at Carleton Point. There is virtually no factual record testimony on the level of boating in the bay. With

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[7] As explained by LURC consultants Mark Anderson and James Palmer and Plum Creek consultant John Daigle, the Recreation Opportunity Spectrum is a means of characterizing and planning for an area according to its combination of physical, biological, social, and managerial characteristics. (Anderson, Aug. 31, 2007, Appendix B, pp. 7-10; Palmer, Aug. 31, 2007, pp. 14-15; Daigle, p. 18) These characteristics encompass natural qualities (topography, vegetation, scenery, etc.), qualities of remoteness v. development (distance from development, amount and types of development), evidence of human presence, levels of human interaction, and levels and types of recreational use.

[8] The spectrum, as established by the USDA Forest Service, with modifications by Moore et al. for a New England setting, include:

- Primitive – area of at least 3,000 to 5,000 acres with an unmodified natural environment, greater than 2-3 miles from all roads, very little contact with other people and evidence of others unnoticeable, no motorized use
- Semi-Primitive Non-Motorized – area of at least 2,500 acres with a largely unmodified natural environment, at least 0.5-mile from all roads, minor evidence of trails or signs, little contact with other people, evidence of others subtly noticeable, no motorized use
- Semi-Primitive Motorized – area of at least 2,500 acres with a largely unmodified or natural appearing environment, at least 0.5-mile from any improved, maintained roads or motorized trails; but may contain unimproved roads or secondary trails with some motorized use; timber harvesting a compatible use
- Roaded Natural (or Semideveloped Natural) – natural appearing, evidence of the sights and sounds of people are moderate, interactions with others are low to moderate but evidence of others is prevalent; resource use and modification are evident but harmonize with the natural environment; area is within 0.5-mile of improved, maintained roads or trails; some rustic facilities; motorized uses are present; on-site management may be noticeable; timber harvesting a compatible use
- Rural – near primary roads, served by designed roads, interaction between users often is moderate to high and sights and sounds of people are readily evident, but density levels decline with distance from developed sites; area is a substantially modified natural environment; resources are managed to enhance specific recreation activities and maintain vegetative cover; managed facilities (e.g., boat launches) are present; recreationists pass through both developed and natural appearing landscapes; on-site management and controls are obvious
- Urban – on or near primary highways, designed environment, numerous facilities to manage and accommodate intensive use, frequent contact with other people but design can also enable solitude, sights and sounds of others are expected and desired

more than 100 shore camps and a state park with two campgrounds and boat launches, it may be surmised that it, like the land base of Lily Bay Township, falls within the middle range of the ROS.[9]

- Sugar Island falls within the semi-primitive non-motorized area of the ROS. (Palmer, p. 46) It provides a visual barrier between Lily Bay and the southern part of Moosehead Lake. It lies a little less than 2 miles across the water from Plum Creek's proposed development zone in Lily Bay Township. It is mostly undeveloped and has several campsites, both maintained and primitive. Access is by boat only.
- Lily Bay State Park, located two miles south of Lily Bay Township in Beaver Cove, is a 924-acre, well-visited facility with 91 campsites, two boat launch areas with slips, and a swimming beach. As a managed park with maintained motorized road access, campsites that are proximate to each other with easy visual and sound contact between most campsites, and constructed and managed facilities in a natural-appearing setting, the park falls in the Rural area of the ROS. (Palmer, p. 46, Daigle, p. 20)
- The Roach River is a well known and popular fishing river. It forms the northern boundary of the Lily Bay peninsula. The river's corridor is protected by a state-owned conservation easement.

Impact on the natural character of the area proposed for development[10]

Staff/consultants conclude that the location of the development area is consistent with Commission policies for an "area of special planning needs." It is close to an existing pattern of development and the roads and utilities that serve it. It has hard boundaries (meaning its geographic size will never grow), and the number of units will be capped in perpetuity, thus reasonably meeting the CLUP objective of allowing growth in an area of special planning needs and of knowing with certainty what its maximum extent, both geographically and in numbers, will be.

Staff/consultants also conclude that the proposed development will substantially alter the existing natural character of the primary development area footprint itself, changing it from working forest to an area of relatively intense development. Even so, that footprint now would exclude certain high value natural resources that are part of Lily Bay's natural character.

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[9] The Forest Service's ROS has been modified to make it more applicable to water-based settings. (Palmer, August 31, 2007, p. 183-184) The Water ROS associates the range of surface acres per boat that can be on the water at the same time with the familiar ROS classes. For example, a range of 50 to 110 surface acres per boat on the water at the same time is associated with the Roaded Natural (also called Rural Natural or Semi-Developed Natural) part of the ROS spectrum; 20 to 50 surface acres per boat on the water at the same time is associated with the Rural part of the spectrum. But without record data on boating activity either on the bay as a whole or in particular sections of the bay (e.g., the coves that dominate the eastern section), it is not possible to classify it definitively by this metric.

[10] The June 4, 2008 Commission-generated amendments called for a significant cutback of boundaries of the Lily Bay development area. The cutback would leave the two southern-most zones in Plum Creek's October 2007 Concept Plan, plus an additional contiguous area to the north to provide sufficient room for siting and design of the development and buffering of natural resources. Staff/consultants estimated that an area of 1300 to 1400 acres may be sufficient to accommodate the proposed development. Plum Creek, in its response of July 11, asserted that "1800 gross acres would be necessary to have adequate developable land to support 404 units." (Plum Creek, p. 11) Additional information filed subsequently by Plum Creek (Sept. 2, 2008) at the request of staff/consultants indicated that the total of 1800 acres is based on a number of assumptions concerning the amount of buffering of natural resources that may be required, the land needed for roads and infrastructure, irregularities in the configuration of the development area, and the types of recreational facilities and amenities that will be planned. Staff/consultants conclude that the down-sized zoning district can be set at 1800 acres, as defined in the Sept. 2, 2008 additional information filing, *provided that*, as part of a long-term development plan, the applicant shows how use of the additional acres will be the result of best siting and design practices, including buffers to protect natural resources, proposed amenities and recreational facilities, needed infrastructure, and compensating for irregularities in the configuration of the development area.

The following facts and analysis are presented to illustrate some of the specific considerations that led staff/consultants to reach these conclusions:

- Based on the Commission-generated amendments, the proposed development area, as significantly reduced in size by the amendments, now encompasses less than one-tenth of the Lily Bay peninsula[11]. The principal development area (all but the 52 acres east of Lily Bay Road, which will be limited to "low-impact resort accommodations") straddles Casey's Road, starting about 0.25-mile west of Lily Bay Road. None of the development will front on Lily Bay Road. The development area is irregularly shaped but at its longest dimensions is about 2 miles east-to-west, extending to Carleton Point and Burgess Brook; and about 2 miles south-to-north, including 9,888 feet of shorefront along Lily Bay.
- A maximum of 404 units plus recreational and other support facilities would be located within the development area. The permanent unit cap would be enforced by means of a restrictive covenant or easement on any unused lands within the development area, and the remainder of Lily Bay Township in Plum Creek's ownership would be placed into permanent conservation prior to any development occurring, thereby preventing future expansion of the development area both in terms of location and intensity.
- A majority of the proposed development area is within one road mile of the established settlement at Lily Bay (LURC staff/consultant adjacency analysis, Nov. 5, 2007, pp. 6, 8), thus meeting the distance portion of the Commission's adjacency policy. The proposed maximum of 404 units and related non-residential uses, however, are more intensive both as to numbers and type than what exists at Lily Bay. They therefore exceed the "compatible development" portion of the adjacency policy and invoke the requirement in the Resource Plan Protection Subdistrict for "comparable conservation measures."[12]
- The 404 proposed resort accommodation and/or residential units will inevitably affect the natural character of the development area itself by converting the working forest contained within the development area to a developed or otherwise structured environment, allowing types of recreational facilities in the primary development area that likely will be more intensive and potentially more exclusive than those elsewhere on the Lily Bay peninsula and in surrounding areas. The ROS for the footprint will migrate to the "Rural" part of the spectrum (substantially modified natural environment, sights and sounds of people readily evident, interactions between users moderate to high) from the "Roaded Natural" part of the spectrum.
- Specific natural resources within the development area will be protected. For example:
  - While part of the large habitat region for Canada lynx as identified by the U.S. Fish and Wildlife Service, the scaled-back development area is a very small and, according to the record, transitory portion of it. By scaling back its footprint, the amendments remove development from the higher elevations of the peninsula where most of the documented lynx sightings have occurred.
  - The footprint's boundaries were drawn to exclude certain important adjacent natural resources (e.g., waterfowl and wading bird habitat). Other specific natural resources within the development area would be subject to "no disturbance" buffers (e.g., a 250-foot buffer either side of Burgess Brook). Development over a mapped sand and gravel aquifer would be restricted.
  - Any development will be subject to a long-term development plan review process as well as subdivision or development permit processes and their criteria for approval, including no undue adverse effect on natural resources (Section 10.24 of the Commission's Land Use Districts and Standards).

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[11] In Plum Creek's October 2007 Concept Plan, the Lily Bay development area would have been about 23% of the peninsula.

[12] The Commission must determine whether the Balance and Legacy easements and other measures constitute "comparable conservation" per Chapter 10, Sec. 10.23,H,6,d: "The plan, taken as a whole, is at least as protective of the natural environment as the subdistricts which it replaces. In the case of concept plan, this means that any development gained through any waiver of the adjacency criteria is matched by comparable conservation measures."

Impact on the natural character of the larger, surrounding area

The proposed development area will be permanently contained by a "hard boundary" and surrounded by required conservation on the east side of Moosehead Lake. Within the development area, the number of units will be permanently limited by restrictive covenants or easements on land that is undeveloped after 30 years. With these permanent limits in place, staff/consultants conclude that zoning for the 404-unit development:

- Will help sustain the undeveloped forest in the area east of Moosehead Lake surrounding the proposed development area that is at the heart of the natural character of the region, of which the development area comprises less than 2% of the total;

- Will not unduly compromise primitive recreational opportunities and experiences in the region, so long as staff/consultant recommendations regarding the required inclusion of a resort core that offers self-contained recreational opportunities for visitors, homeowners, and others are adopted and implemented;

- With the development of a resort core and proper management that "holds" visitors and homeowners and thereby reduces external vehicular trips, can be projected to generate modest increased traffic levels that, while a meaningful increase over current levels, will not unduly reduce the sense of remoteness in the core area of the jurisdiction north of Kokadjo;

- Has the potential to fit harmoniously into the scenic character of the area, so long as staff/consultant recommendations regarding scenic standards for back lots are adopted and implemented (*see* Tab 15);

- With the development of a resort core that limits the capacity of marinas and docks to serve the development and manages boating and other recreational activity, will contain the impacts of boating on adjacent bays.

The following facts and analysis are presented to illustrate some of the specific considerations that led staff/consultants to reach these conclusions:

- Effect on surrounding undeveloped forest: Because the development area's boundaries are hard and permanent and no new development elements can be located outside of these boundaries, except as allowed by the terms of conservation easements, the surrounding forest will remain intact in perpetuity. The surrounding forest encompasses, most immediately, the rest of Lily Bay and the four townships and one town closest to Lily Bay (Day's Academy Grant, Spencer Bay, T1 R13 WELS, Frenchtown, and Beaver Cove). The acres proposed for conservation easements in this area total about 91,000. By directing development to a single, confined area within Lily Bay, the surrounding forest to which parcelization and development may otherwise advance will be protected.

- Effect on remoteness: As stated earlier, the record in this proceeding and staff/consultant analysis of development patterns and past Commission actions do not support the notion that Lily Bay Township is "remote," although there are sections, especially along Spencer Bay and from the peninsula's ridgeline north, that have remote qualities. The region north of Lily Bay and beyond Kokadjo and the mountainous territory east of Lily Bay, however, clearly are part of the jurisdiction's remote, interior area. The question is whether the off-site effects emanating from a development of the scale proposed at Lily Bay will compromise the remoteness of these areas. The record addresses off-site effects to varying degrees in terms of (1) potential overuse of non-intensive recreational settings in the region, (2) visual and noise impacts, (3) traffic impacts, and (4) boating activity in the adjacent bays. Each issue is addressed below.

Regarding overuse of existing non-intensive recreational resources:

Except at Lily Bay State Park, the record does not include extensive data on actual use of the many non-intensive recreational facilities and settings in the region, because there are in fact few reliable data available on recreation use in the Moosehead region (Anderson, Aug. 24, 2007, p. 10). The recreational destinations that offer primitive recreational opportunities were inventoried by the applicant (Daigle, Aug. 31, 2008, Exhibit 3) and by MA/NRCM (see, e.g., Struhsacker, Aug. 31, 2007, Exhibit 8). MA/NRCM identified at least 10 "remote recreation destinations" within the east side of the Concept Plan area, and another nine in townships that border the Concept Plan area on the east side of Moosehead Lake. These did not include known destinations on the east side that MA/NRCM evidently did not consider "remote" but do offer opportunities for primitive recreational activities, such as Prong Pond.

MA/NRCM witness Costas Christ provided the only record projection of the number of people and vehicles that would "head off into surrounding wilderness areas" on an average summer day as a result of the Lily Bay development, predicting that between Memorial Day and Columbus Day, the Lily Bay development at build-out would generate an average of 59 vehicles per day carrying 118 persons visiting "wilderness areas." (Christ, Aug. 31, 2007, p. 7) Presumably, many would be visiting the remote destinations inventoried by MA/NRCM, although no estimates were provided by Mr. Christ on how they would distribute their trips. Any attempt to distribute the trips leads to small numbers. For example, if as many as 10% of the projected travelers decided to visit a given "remote recreational destination" on the same day, resulting in 6 vehicles with 12 visitors, those visits likely would be divided further by time of day, yielding few visitors at any one time attributable to the Lily Bay development.[13] The significant number of "remote recreational destinations" will dilute the impact of a larger population on any one.

LURC consultant Mark Anderson did not hazard a projection of use of recreational areas because historical data are unavailable, but he surmised that the impact on primitive recreation would be different in two scenarios: one in which resorts were built with recreational amenities and one in which second home communities were built with minimal resort amenities. He concluded that the former may enhance the diversity of recreational opportunities, including primitive recreation, while the latter would diminish them. (Anderson, Aug. 21, 2007, pp. 17-19). This is because, in the latter case, more people would be in the region but few additional recreational opportunities, developed or primitive, would be available to accommodate them. Further, a resort with recreational amenities will "hold" a larger share of its visitors to the resort itself, decreasing the need or desire to travel beyond the resort to satisfy recreational demands.

Some of the campsites in Lily Bay Township and the many remote, shoreline sites on Spencer Bay and Cowan Cove may see more use if Lily Bay State Park, which is already close to capacity at times, exceeds capacity, either as a result of background growth or side effects of Concept Plan development. However, these appear to have the capacity to accept increase use (Daigle, Aug. 31, 2007, Exhibit 3, pp. 10-11). No concerns were raised by the Bureau of Public Lands.

Regarding visual and noise impacts:

Public visual impacts of development in the prescribed area will be limited to Lily Bay (the water body), Sugar Island, and a small section of Lily Bay State Park (the Mud Brook group camp ground). The development area is visually isolated from the rest of Moosehead Lake and most of Lily Bay State Park by Sugar Island and the complex shoreline of Beaver Cove and southern Lily Bay Township. (Palmer, Aug. 31, 2007, pp. 46-67)

The development area is visible from Sugar Island, two miles across the water, and from the bay itself. The greatest extent of visibility from Sugar Island and the bay is along the Lily Bay shoreline from Carleton Point west, most of which,

[13] Using a "logical formula" (i.e., not based on empirical information), Christ's projections for trips to wilderness destinations from all development in the Concept Plan area was 287 vehicles carrying 576 people per average summer day. MA/NRCM mapped some 35 "remote recreation destinations" in the Concept Plan area and surrounding region, not including other areas where primitive recreation also is popular, such as Prong Pond and West Outlet.

except for Carleton point, is outside of the development area, and Lily Bay Heights, most of which now lies outside of the development area. Existing development along Lily Bay's shoreline, depending on colors, materials, and the presence of docks and boats, is moderately visible from these vantage points. According to LURC consultant James Palmer, if clearing around homes is limited and vegetative buffers are in place, "the visual impact [from Sugar Island, the bay, and Mud Brook camp ground] is minor." (Palmer, Aug. 31, 07, p. 49) The most sensitive concerns will be the location and configuration of a central lodge and the location, size, and materials of a potential marina.

Importantly for conserving the visual character of the larger region, none of the proposed development will front on Lily Bay Road. While the Commission's standards would in any case require a vegetated buffer along the road, the proposed development boundary is at least 1,000 feet from the road. The only visual evidence of it along Lily Bay Road is likely to be the entry road.

The record includes little documentation of potential noise impacts from development. Plum Creek's expert witness testified that noise from development would be similar to existing ambient noise conditions (Sciremammano, Aug. 31, 2007, p. 2). On the other hand, Palmer suggested that the nature of Lily Bay may be more impacted by an increase in noise from motorized recreation activity than by the visual effects of structures, if appropriately screened. (Palmer, Aug. 31, 2007, p. 49) The June 4th Commission-generated amendments re-instated existing noise standards (Section 10.25,F,1) that Plum Creek proposed in its Concept Plan to remove.

Regarding traffic impacts:

In reviewing projected traffic volumes, staff/consultants have accepted the analysis of Gorrill-Palmer, consultants to Plum Creek, as approved by the Maine Department of Transportation and subsequently revised to consider the potential distribution of trips into areas of wildlife sensitivity. (Supplemental Testimony of Gorrill, Jan. 14, 2008)

The following table summarizes projected Average Annual Daily Traffic (AADT) volumes on Lily Bay Road at the state park entrance, south of the Lily Bay development area, and at Kokadjo to the north.

	Lily Bay Rd n/e of State Park	Lily Bay Rd at Kokadjo
2005 AADT (vehicles per day)	630	430
2024 AADT @ 1.5%/year background growth plus approved but unbuilt development as of 2007	1263	710
After full build-out of Concept Plan, all elements	3528	1080
- Increase due to Concept Plan	2265	370
- Portion of this attributable to Lily Bay development (250 resort accommodation units, 154 other residential units, total of 404 units)	1874	208

At build-out, the Lily Bay development is projected to add nearly 1,900 vehicles per day (AADT) to Lily Bay Road headed toward or from Greenville and about 200 vehicles per day headed toward or from Kokadjo. When added to background growth and to new trips from development elsewhere in the Concept Plan area, AADT at Kokadjo, which is arguably the jumping off point to the remote interior in this region, will increase to nearly 1,100. This volume will drop farther north (e.g., to about 900 at Sias Hill Road south of Golden Road).

A major concern of traffic is its impact on wildlife, which is addressed below. But it also is relevant to natural character and remoteness. Lily Bay Road, as a paved, two-lane, major collector, with power lines and many signs of human presence, has already influenced the natural character of the area up to Kokadjo, creating accessibility and accommodating a moderate existing level of vehicular movement that, by definition, limits the corridor's remoteness.

The addition of traffic south of the development area, where Lily Bay Road already serves a significant number of homes and visitor activity and approaches the service center of Greenville, will not be inconsistent with the existing character of this stretch of road. The addition of traffic north of the development area is of greater concern because it approaches the interior. The addition of 370 vehicles per day at Kokadjo, including about 200 attributable to the Lily Bay development, is high percentage growth but modest in gross numbers and will mix with growing traffic from the Kokadjo area itself (the result of development at First Roach Pond). Because of Kokadjo's proximity to the interior, it is important that the Lily Bay resort include a mix of nature-based and other recreational offerings that will tend to hold visitors and seasonal home owners within the immediate area, preventing traffic from increasing beyond these levels.

Regarding boating activity in adjacent bays:

As discussed earlier, the record does not include specific testimony on existing boating levels in Lily Bay or Spencer Bay, and it is not possible to describe with authority where on the ROS they fall. However, it is reasonable to surmise that most of Spencer Bay is in the semi-primitive range and different sections of Lily Bay fall within the semi-primitive to rural range, with the characterization moving to the rural part of the range – at least visually if not also in terms of boating activity -- as one approaches the coves at the eastern end of the bay and Lily Bay State Park. The proposed development area is at this "rural" end.

Based on the Water ROS classification scheme, boating activity in the nearly 6,000-acre Lily Bay, if distributed across the whole, would have to stay within the following limits to be classified as "primitive," "semi-primitive non-motorized," "rural natural," and "rural developed":

- Primitive: 12 boats at one time, non-motorized
- Semi-primitive, non-motorized: 53 boats at one time, non-motorized
- Rural natural: 118 boats at one time, including motor boats
- Rural developed: 294 boats at one time, including motor boats

These numbers would need to be less if concentrated in one section of the bay. For example, if all the boating activity at a given time were concentrated in the eastern (more rural) third of the bay, the maximum number of boats at one time would be:

- Primitive: 4 boats at one time, non-motorized
- Semi-primitive, non-motorized: 18 boats at one time, non-motorized
- Rural natural: 39 boats at one time, including motor boats
- Rural developed: 98 boats at one time, including motor boats

The record does not include specific projections of boating activity. A metric used by the Commission to avoid crowding of surface waters is no more than one shore lot per 10 surface acres of water. Applying this metric to this proposed development zone is not straightforward, since most of the units and lots in the here would be back lots. If they were shore lots, the limit for Lily Bay would be approximately 588.

Demonstrated need

Staff/consultants believe that the proposed Resource Plan Protection (P-RP) subdistrict must be considered both for its development and conservation components in evaluating whether the rezoning meets a demonstrated need in the area. The proposed rezoning is not merely for the Lily Bay development area in isolation, but rather for the entire P-RP subdistrict.

From the record and based on the CLUP, staff/consultants conclude that the most urgent need for the area is for zoning that promotes long-term, orderly growth – growth that is directed and confined to specific, appropriate areas, especially at and around the fringe of the jurisdiction, while at the same time protecting large blocks of working forestland,

shorelines and the natural resources and ecological systems embedded within them. This need is acute in "areas of special planning needs," including the Moosehead Lake region generally and the Lily Bay area specifically. (CLUP, pp. 110-113)[14]

After carefully reviewing the record, staff/consultants conclude that this Concept Plan, as amended by the staff/consultant recommendations herein, will satisfy this acute, demonstrated need.

See Tab 12 for a complete discussion of demonstrated need.

Undue Adverse Impact on Existing Uses and Resources

The companion criterion to demonstrated need is satisfaction of the criterion of "no undue adverse impact on existing uses and resources." Even if there are gains in the "plus" column of demonstrated need, thethe statute also requires that the rezoning not cause losses in the form of undue adverse impacts to existing uses and resources.

The existing uses and resources especially in contention by parties related to the Lily Bay development area are: (1) Canada lynx; (2) vernal pools; (3) natural resource-based outdoor recreational uses; (4) Lily Bay State Park; and (5) Greenville's local economy and services.

Staff/consultants conclude that the proposed development in Lily Bay Township, as amended by the staff/consultant recommendations herein, will cause no undue adverse impact on existing uses and resources. The following facts and analysis are presented to illustrate some of the specific considerations that led staff/consultants to reach this conclusion:

Canada lynx and undue adverse impact

According to the record, there is potential for adverse impacts to individual Canada lynx, but not the population, from the loss and fragmentation of immediate habitat, and from road mortality.[15]

Staff/consultants conclude that the potential risk due to loss of immediate habitat has been avoided, minimized, and/or mitigated by the following measures contained in the Concept Plan, the Commission's June amendments, and the recommendations proposed herein by staff/consultants if adopted by the Commission. First, the boundaries of the development area have been greatly shrunken, excluding most of the uplands of the Lily Bay peninsula where the U.S. Fish and Wildlife Service appears to have had particular concern. (US FWS, Sept. 14, 2008, p. 12[16])

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[14] In the context of this unprecedented, landscape-scale concept plan (and other long-term, prospective zoning), the criterion of "demonstrated need" cannot reasonably be understood to be referring to each individual development area standing or falling on its own, nor to only economic needs, but also to the need for rezoning that will ensure the protection of resources and the sound management of the uses of those resources. The Rangeley region prospective zoning plan recognized this. It sought to anticipate long-term (20-year) need for development, but thought about "demonstrated need" in different terms than under the usual "reactive" zoning process, in which the Commission is responding to case-by-case requests to re-zone particular parcels of land for development. "The challenge of planning is to shape the course of development toward a desired outcome rather than merely to respond to demand and development pressures." (Rangeley plan at p. 20)

[15] According to MDIFW/MNAP, an increase in road mortality can be expected, but wildlife populations will not be significantly jeopardized. (Elowe, MDIFW/MNAP, July 11, 2008, p. 2)

[16] U.S. Fish and Wildlife Service's concerns were both location of the development and number of units. (US FWS, Sept. 14, 2008, p. 22)

Second, this smaller development area, combined with the permanent conservation easement surrounding it and covering the rest of Lily Bay Township and points east and north within Plum Creek's ownership, addresses the concern about habitat fragmentation that could impact lynx movement by preserving a vast area of contiguous habitat surrounding the development zone. MDIFW and MNAP state that the surrounding easement serves as "refugia that, if managed appropriately, will in fact compensate for development impacts by ensuring the long-term conservation of potential habitat." (Elowe, July 11, 2008, pp. 2-3).

Third, although staff/consultants conclude that the risk of road mortality to individual Canada lynx from increased traffic is real, the risk is mitigated in several ways:

- With the reduced development area, the northern entry road which was located in the vicinity of documented lynx sightings has been eliminated.

- At build-out traffic moving north of the development where a majority of the documented lynx sightings have occurred is projected to still be at a level that is below the threshold for adverse impact on carnivores.[17]

- The adaptive management approach now being recommended by staff/consultants. The Commission-generated amendments in June called for a "bifurcated" review process, in which, at the point that permits granted do not exceed 284 units and at least 135 units have been built, a fresh traffic analysis would be required based on actual travel behavior of the development's occupants to determine whether the risk to lynx is greater than it appears based on the rezoning record. Both Plum Creek and MA/NRCM, for different reasons, were critical of this approach. Plum Creek proposed an adaptive management approach as an alternative (see Plum Creek response, July 11, 2008, pp. 13-15). Staff/consultants recommend adopting this approach, with provisions that are described at Tab 6 (Proposed Development: Lily Bay – Development Review Process), and with the understanding that the Commission retains its authority to condition, reduce, or deny a permit based on findings from the monitoring and analyses included in this approach.

Vernal pools and undue adverse impact

In its September 2nd filing in response to a staff/consultant request for additional information, Plum Creek provided a map identifying the locations of several vernal pools of unknown significance within the proposed Lily Bay development area. In August 2007, Woodlot Alternatives, Inc., had identified the presence of several potential vernal pools in this area as well, but had not determined their significance. MA/NRCM has raised concerns that the number and configuration of the recently identified vernal pools at Lily Bay signifies the presence of "a complex and valuable system that would be severely degraded and compromised given the current proposal to develop resort, commercial facilities and 404 houses." (MA/NRCM comment, Sept. 12, 2008, p. 4)

Consistent with longstanding LURC practice and as followed throughout this proceeding, the Commission has required reconnaissance-level natural resource surveys to evaluate the appropriateness of rezoning, and more detailed natural resources inventories at subsequent subdivision/development permit review stages. The record developed for purposes of evaluating this rezoning petition includes coarse-scale natural resource surveys (so-called "meander surveys") of proposed development areas. These meander surveys intentionally did not attempt to map the presence of all potential vernal pools within development areas; thus, a formal vernal pool inventory of the development areas was neither conducted nor required, nor was pool significance determined (via egg mass counts) for those vernal pools that were incidentally recorded.

[17] The threshold is 3,000 to 6,000 vehicles per day (Charry, Aug. 31, 2007, p. 31), while the projected AADT is 1,080 at Kokadjo (Gorrill, Jan. 14, 2008, Figure 1A). This also is within the guidance offered for roads similar to Lily Bay Road as it transitions to serve a more remote area ("Limit new traffic on 500-1500 vehicles/day remote roads to <2000-2500 vehicles/day"; Charry, *op. cit.*, p. 33).

The record is, however, well developed with respect to best practices for vernal pool protections.[18] The most rigorous protections appear to be embodied in the U.S. Fish and Wildlife Service recommendations to the Commission, which include (1) avoidance of impacts to the vernal pools and the habitat within 100 feet of the pool's edge, (2) minimization of impacts to the "critical terrestrial habitat" within 100-750 feet of the pool's edge, and (3) where vernal pools appear in clusters, provision for forested corridors to connect the pools.

The record is also clear that Concept Plan approval and rezoning does not imply approval of any particular development project that may subsequently be proposed within that development zone. The legality of each development project must ultimately be judged on detailed information submitted at the time of permit applications with the Commission evaluating, *inter alia,* how well the project complies with the Commission's "harmonious fit" criterion (Section 10.24 of the Commission's Land Use Districts and Standards). Consequently, the June 4th Commission-generated amendments required the establishment of rigorous review processes at the area-specific level (via long-term plan review) and the site-specific level (via subdivision/development permit review) that impose standards designed to minimize impacts on natural resources such vernal pools. [19] The amendments state that submission requirements (such as detailed natural resource inventories necessary to identify all vernal pools within development areas and determine their significance) would need to be addressed during the second tier, implementing phase.

Based on this, staff/consultants conclude that (1) the June 4th Commission-generated amendments assure that processes and standards will be in place to ensure that significant vernal pools are identified and appropriately protected, and (2) with the adoption of the staff/consultant recommendations, below, regarding the approximate size and configuration of the development area, it is plausible for Plum Creek to develop up to 404 units and associated resort-related facilities and infrastructure while protecting vernal pools, including those identified in Plum Creek's September 2, 2008 filing, utilizing the best practices as presented in the record. Therefore staff/consultants conclude that, with the adoption of the recommended amendments, the proposed rezoning will have no undue adverse impact on vernal pools in the Lily Bay development zone.

Natural resource-based outdoor recreation and undue adverse impact

Considering both the Concept Plan as a whole and Lily Bay specifically, staff/consultants conclude that the weight of evidence supports a finding of no undue adverse impact, although staff/consultants recognize that the record contains competing arguments on the impact of the Concept Plan on natural resource-based outdoor recreational uses.[20] The Concept Plan's development will compromise primitive recreational activities in some locations, such as Indian Pond (although wilderness guides suggest that it has already passed a tipping point; Cochrane and Fake, MWGO, Tr. 2007-12-10, p. 181). But primitive recreational opportunities will simultaneously be enhanced significantly as a result of, *inter alia:*

- guaranteed public access to permanently conserved lands with multiple remote recreation destinations (e.g., remote ponds and the East and West Outlets);

[18] E.g., *See* MA/NRCM Aug. 31, 2007 testimony of Barbara Charry at pp. 16-18; U.S. FWS Aug. 31, 2007 comments at pp. 109-20; and MDIFW/MNAP August 31, 2007 comments at pp. 10, 19.

[19] E.g., The long-term plan includes an objective to promote habitat preservation within development areas (*see* p. 55 of the June 4th Commission-generated amendments).

[20] Supporters of the plan assert that the more than 360,000 acres of permanent conservation easements with guaranteed public access will be a boon to traditional outdoor recreational pursuits, and will remove their greatest fear of the future, namely parcelization of the landscape and future denial of access to these lands for hunting, fishing, snowmobiling, and similar recreational activities. Opponents of the plan, as written, assert that the proposed development in the Concept Plan generally, including Lily Bay specifically, will have an undue adverse impact on existing primitive recreational uses and settings, will degrade the natural assets of the region such that a sustainable, eco-tourism industry will be unable to grow.

- protected access rights to 57 miles of private roads that connect to important remote recreation destinations;
- easements for and expansion of trails for hiking and snowmobiling;
- protection of thousands of acres of conserved land adjacent to the narrow lake shoreline easements currently in state ownership through the Lily Bay, Spencer Bay, and Day's Academy region, thereby increasing protection for the remote camping and boating opportunities there; and
- fee transfer of about 29,500 acres at the Roaches and subsequent conservation easement to protect remote, undeveloped, primitive and non-motorized backcountry recreational opportunities.

All of these protections would be executed before any permits can be granted for development in the Concept Plan area.

Staff/consultants agree that growth of an eco-tourism industry would align well with the vision of the CLUP. The record does not convincingly demonstrate that existing assets will be compromised such that this part of the economy will not have continued opportunities to grow if the Concept Plan is adopted, and in fact the Commission received a significant amount of testimony from tourism experts stating that implementation of the Concept Plan would enhance eco-tourism in the Moosehead Lake region. For example, most of the areas identified on Moosehead Region Future Committee's Citizens Solutions Map as "suites of high value nature tourism experiences" will be under conservation easement with public access, including the Moosehead Lake Trail, the Thorndike Refuge, the Moose River Brassua Corridor, the Cold Stream Reserve, Prong Pond Family Recreation Area, Moose (Squaw) Mountain Resort, and much of the Moosehead East Recreation Area (Glavine, Aug. 31, 2007, Exhibit 3).

Lily Bay State Park and undue adverse impact

Lily Bay State Park, located about two miles south across the bay from the proposed Lily Bay development, is a popular destination for family camping, boating, and swimming. Staff/consultants conclude that the Concept Plan will not have an undue adverse impact on the park. The following record evidence leads us to this conclusion:

The park appears to be managed as a "rural" facility on the Recreation Opportunity Spectrum (near primary roads, served by designed roads, interaction between users often is moderate to high and sights and sounds of people are readily evident, resources are managed to enhance specific recreation activities and maintain vegetative cover; managed facilities). The heart of the park, including its camping, boating, and swimming facilities, is located one mile or farther from Lily Bay Road, creating a natural visual and noise buffer from increased traffic on the road. It is visually isolated from the proposed Lily Bay development area, with no views of the development area from any of the camp sites in the primary park. The Mud Brook group camping area north of the park has a view line to Carleton Point. Boaters launching from the park and headed north into Lily Bay will have views of portions of the development area. Part of the shoreline of this area is presently populated with dwellings without vegetative buffering that meet current standards and therefore are clearly visible from the water today, although many are small camps. Commission-generated amendments call for new scenic impact standards for back lot development, which will be designed to significantly reduce the impact that might otherwise occur. Staff/consultants also note that the Bureau of Parks and Lands, the manager of the Park, testified at the party hearings but declined to raise concerns about adverse impacts to the Park or its visitors from the proposed development.

According to the record, Lily Bay State Park operates at or near capacity during peak seasonal periods. It can be expected to be overcapacity as a result of background growth and as a side-effect of Concept Plan development. The effect of the Lily Bay development likely will be indirect, since, according to the record, it may appeal to an older demographic market than the one that tends to use the park (Daigle, Aug. 31, 2007; Philips, Aug. 31, 2007, Exhibit 2, page 15). However, it will be important for the development at Lily Bay to include amenities that will help to hold visitors and home owners. Partly for this reason, staff/consultants conclude that the Lily Bay development area should revert to a resort zone, with a required resort core.

Whether the result of natural growth or the Concept Plan, some potential visitors to Lily Bay State Park may need to

seek out alternatives. Comparable camping and hand-carry boating alternatives exist on the east side of Moosehead, including campgrounds at Spencer Bay and Cowan Cove and the boating opportunities at Prong Pond, the shores of which will be protected by conservation easement.

Downtown Greenville and undue adverse impact

Certain parties expressed concern that the development at Lily Bay will have an undue adverse impact on the commercial viability of businesses in Greenville. The concern arises from the possibility of commercial uses in the development zone at Lily Bay. The record includes no objective analysis that such impacts will occur. The zoning for the Lily Bay resort zone would allow some commercial activity to serve visitors and home owners in the Lily Bay area, but the type of activities likely to be supported by the seasonal population there generally would not directly compete with businesses in Greenville, a service center that draws year-round from a much larger trade area. Downtown Greenville is in an intercepting position for virtually all of the traffic that will be headed to Lily Bay. At build-out, the traffic level through downtown is projected to triple from current volumes to more than 15,000 AADT (Gorrill, January 14, 2008, Figure 1A). While this will require Plum Creek to build or install improvements according to its Traffic Movement Permit from Maine Department of Transportation, it also will benefit downtown businesses.

► RECOMMENDATIONS

Based on the discussion above, staff/consultants offer the following recommendations:

- Regarding numbers and types of units:

  Staff/consultants do not recommend any changes from the June 4, 2008 Commission-generated amendments.

- Regarding the ability to transfer in additional residential units:

  Staff/consultants do not recommend any changes from the June 4, 2008 Commission-generated amendments.

- Regarding the approximate size and configuration of development areas:

  1800 acres, as described on a map presented at Tab 1 of Plum Creek's September 2, 2008, *Response to a Request for Additional Information Concerning Plum Creek's July 11, 2008 Filing*, provided that, as part of a long-term development plan, the applicant show how use of acres north of the original D-RS2M zone, as shown on that map, is required to meet best siting and design practices, including buffers to protect natural resources, proposed amenities and recreational facilities, needed infrastructure, and compensation for irregularities in the configuration of the development area.

- Regarding land use zoning:

  Return the Lily Bay development area to a single resort zone (D-MH-RT) that would (1) require nature-based resort development (i.e., residential and/or resort accommodation units would be allowed only with a resort core), and (2) require employee housing needs (if any) created by short-term units.[21]

- Regarding the development review process:

  See Tab 6.

- Regarding reservation of excess lands:

  Staff/consultants do not recommend any changes from the June 4, 2008 Commission-generated amendments.

- Regarding disposition of undeveloped land after 30-year term:

  Staff/consultants do not recommend any changes from the June 4, 2008 Commission-generated amendments.

- Regarding community services:

  Resort will be self-sufficient in water, sewer, solid waste, and fire prevention needs.

[21] *See* Tab 13, Land Use Zoning (Permitted Uses).

- Regarding sequencing of development:

  The resort development must consist of a resort core in the first phase of development, and construction of a minimum ratio of one short-term visitor accommodation for every eight other resort accommodation units, up to the 404-unit cap. The Commission may approve a ratio of less than one short-term visitor accommodation for every eight other resort accommodation units if the applicant demonstrates that a resort core containing hospitality and recreational amenities and community services typical of a resort core, as well as full-time management of those amenities and services, is fully operational or will be fully operational by the time 100 resort accommodation units are built.[22]

- Regarding limitations on shoreland structures:

  As part of the required long-term development plan, the applicant should document existing levels and patterns of boating capacity in Lily Bay and, in consultation with LURC and the Bureau of Parks and Lands, the carrying capacity of the bay and its major sections, and the number of boats accommodated at shoreland structures, if they are proposed, should be limited accordingly. Carrying capacity includes, *inter alia*, consideration of hazards, capacity of thoroughfares, and the minimum surface acres needed per boat on the water at one time to maintain the desired character of the bay.

  See also Tab 3.

[22] Staff/consultants have concluded that a resort core with a full-time management structure is important to reduce the off-site recreational, wildlife and other impacts of this development (i.e., such a resort would "hold" a larger share of its visitors within the footprint of the resort development, thereby decreasing the need or desire for visitors to venture beyond the resort to satisfy recreational demands). Such a resort core must be sized and structured so that it achieves this objective. Based on evidence in the record, staff/consultants conclude that a one-to-eight ratio of short-term visitor accommodations to other units will likely result in a resort core that is appropriately sized and structured for a 404-unit development. However, there may be other ways to achieve this objective; thus, staff/consultants recommend that the Commission not preclude consideration of alternative approaches, so long as a resort core that is appropriately sized and structured to the accommodation units being proposed is operational by the time a significant number of resort accommodation units (e.g., 100 units) are built.

6

PROPOSED DEVELOPMENT AREAS: LILY BAY
DEVELOPMENT REVIEW PROCESS
(BIFURCATED SUBDIVISION REVIEW)

COMMENTING PARTIES

- ► Petitioner Plum Creek
- ► Intervenors and Interested Persons
  - GrowSmart Maine
  - Maine Audubon and Natural Resources Council of Maine
- ► Governmental Review Agencies
  - Maine Department of Inland Fisheries and Wildlife and Maine Natural Areas Program

(pp. 12-15)

The Commission's recommendation to require additional analysis after build-out of a minimum 135 units before any units past 284 can be constructed is unworkable economically because the infrastructure, amenities and market plan proposed for Lily Bay in the Long-Term Development Plan will be based on 404 units. It is unworkable to proceed with a project at Lily Bay where infrastructure and amenities must be planned and financed for 404 units if there is uncertainty whether 404 units can be permitted. As Mr. Tinson testified, if 404 units are not predictable, the development will not occur. See Tr. 1/18/08 at 103. Therefore, Plum Creek cannot agree to the recommended change.

As Mr. Tinson testified, the development proposed for Lily Bay is critical to the success of the entire Plan, because it is the element of the Plan that provides a connection to the signature defining natural feature – Moosehead Lake. See Tr. 12/7/07 at 125-126. Thus, it is essential for the entire Plan that the proposed development at Lily Bay be both viable and successful.

The record demonstrates, through testimony from IF&W and others, that 404 units can be built over time at Lily Bay without causing undue adverse impact or jeopardy to the Canada lynx as a species at the landscape level. See Tr. 1/18/08 vol. II at 85, 112, 114. The record supports the finding that landscape level impacts are fully mitigated by the two conservation easements and the management plan. See Tr. 1/18/08 vol. I at 84-85.

The record demonstrates 404 units can be developed at Lily Bay without causing undue adverse impact or incidental take of individual Canada lynx at the localized level. See Tr. 1/16/08 vol. II at 269-273; Tr. 1/18/08 vol. II at 105. The record shows that there are traffic levels below which undue adverse impacts are not likely. See Tr. 1/16/08 vol. II at 239-241; Tr. 1/17/08 at 109. It also shows that there are many means by which traffic can be reduced and by which impacts, once identified, can be avoided, minimized and mitigated to keep localized impacts at levels that will not be "undue" or cause prohibited incidental takes (under the federal Endangered Species Act). See Tr. 1/18/08 vol. II at 212-214; see also, for example, the United States Fish and Wildlife Service ("U.S. FWS") Biological Opinion dated December 21, 2005 attached hereto at Appendix 2. See also, U.S. FWS, Maine Field Office, Biological Opinion dated March 13, 2007 attached hereto at Appendix 3.

The record shows models using reasonable assumptions project a range of traffic volumes from approximately 3,200 to 3,500 AADT. See Gorrill 1/11/08 at 20-21 (Figures 1A & 1B). Even assuming a worst case, the impacts from these levels of traffic volumes can be mitigated. See Tr. 1/17/08 at 70; Leeson 8/31/07 at 8-10; Leeson 9/28/07 at 6; Leeson 11/27/07 at 3

It should be noted that there will be a substantial reduction in the size of the Lily Bay development area. This substantially reduced development area, and its location, reduces the potential localized impacts to the lynx. The reduced development area not only protects habitat but it also eliminates the upper, or northern, road to the previously proposed D-RS3M Development Zone. Eliminating this northern road significantly reduces the traffic impacts in the area where the record shows sightings of lynx. It is significant to note that IF&W testified that it had no wildlife concerns with either the number of units or acreage proposed for the Lily Bay development. See Tr. 1/18/08 vol. II at 114.

Plum Creek understands the Commission's concern regarding the inherent uncertainty in the projected traffic numbers and possible impacts to lynx resulting from traffic. The Commission's bifurcated approach, however, makes the development economically unworkable.

Plum Creek believes that an alternative strategy can meet the Commission's intent. Such an alternate approach would address the concerns about the inherent uncertainty in the projected traffic numbers. It would be based on a recognition of the following principles previously discussed:

1. Landscape level impacts are fully mitigated by the two conservation easements and the management plan. The Commission's proposal to eliminate a significant portion of the development area in the region of recorded lynx sightings already results in a reduction of the potential localized impacts to the lynx.
2. Site development impacts, if any, from a specific project can be identified and mitigated so there is no undue adverse impact or incidental take of individual Canada lynx at the localized level.
3. There are many means by which a project's traffic can be managed and reduced to produce lower AADT rates.
   Even assuming worst case AADT traffic volume ranges, the impacts from these levels of traffic volumes can be mitigated.

Plum Creek proposes an "adaptive management" approach to impact assessment and mitigation that eliminates the challenge of attempting to "achieve perfection" in traffic projections on a "one time shot" basis. This method is closely aligned with the Commission's statutory requirement of no undue adverse impact. A general outline of this common, yet robust, approach follows:

- Lynx habitat and movement would be monitored before, during, and after development at Lily Bay.
- A specific project would be proposed to the Commission through the Long Term Development Plan process.
- Traffic analysis would be prepared for the specific project as part of that review process.
- Traffic analysis would be repeated, or updated, at the subdivision level for each implementing subdivision or project phase.
- Undue adverse impacts to lynx, if any, would be identified. If identified, a mitigation plan would be designed and implemented to reduce or eliminate impacts to lynx, and/or traffic management programs could be established to reduce the AADT levels of the project to levels where impacts are reduced or eliminated.
- A monitoring program would be established to survey actual traffic volumes, impacts of the project and the performance of mitigation strategies.
- Regular reporting of the monitoring results would be presented to the Commission. Based upon the findings of actual traffic volumes and patterns, and the actual performance of any mitigation, or of the effectiveness of any traffic management programs, mitigation strategies could be periodically adjusted (up, down, added) to continuously avoid undo adverse impacts over time.

This management approach is closely aligned with the statutory requirement of no undue adverse impact, and it allows adjustment and fine tuning to ensure that goal is met over time. Therefore, it eliminates the problem of potentially under-estimating or over-estimating traffic. Similarly, it avoids under-estimating or over-estimating impacts and it allows the opportunity to adjust mitigation strategies, up or down, to reflect actual impacts. .

This adaptive management approach was approved by the United States Fish and Wildlife Service in almost identical circumstances relating to development traffic impacts on lynx at a proposed mountain resort in Colorado. See USF&W Biological Opinion dated December 21, 2005 attached hereto [Appendices 2 and 3 of Plum Creek's Comments]. Adaptive management approaches to protect wildlife are a modern, sophisticated and science based approach developed under the ESA. Adaptive management is used in many regulatory contexts.

► GrowSmart Maine (p. 4)

[Regarding improved smart growth adherence with Principle #5. collaborative Process and Predictable Decision-making:]

- [Commission-generated amendments] apply a two-step subdivision/development review process to Lily Bay (in addition to the long-term development plan) that assesses development impacts at 1/3rd potential build-out before additional units can be considered

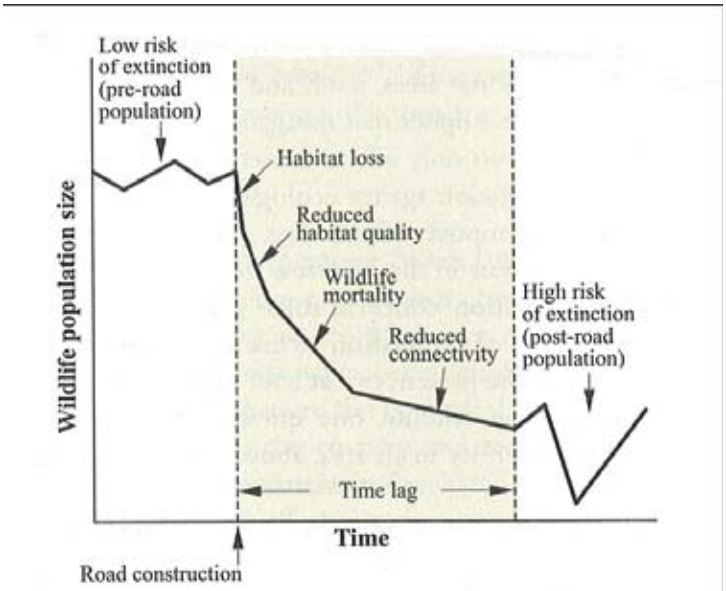
► Maine Audubon and Natural Resources Council of Maine (pp. 18-23)

In addition, the idea of permitting up to 284 buildings in the Lily Bay development , and then "checking" to see if it has unduly and adversely extirpated wildlife species or impacted other existing wildlife resources, by performing new traffic studies, is not a workable curative fix. Such a "check in the system" is neither a safeguard nor any check at all – because the concept is based on a faulty understanding of the impacts on wildlife. It is doomed to fail because it ignores a critical premise of the very traffic analyses upon which the idea is supposedly based, and substitutes the faulty premise that an increase in traffic, as a tool or measure of degradation, fragmentation, and destruction of wildlife habitat and wildlife generations, will immediately result in a detectable adverse impact on wildlife. In fact, the impacts are not detected overnight. And the timeline of a developer who wants to develop land does not keep a measured pace with generational life-cycles of an ecosystem impacted by the development.

The increase in traffic is a measurement – a measurement of the range of adverse impacts caused by increased development, human activity and land use, the transformation of a landscape from undeveloped to developed. As such, there is a "time lag" between when the increases in traffic adversely impact the wildlife habitat and populations, and when those impacts are detected. That is the importance of avoiding the critical AADT thresholds – when those thresholds are reached, it is too late. The undue adverse impacts have happened, the die is cast, and those impacts will be detected, not necessarily immediately, but over time. Thus, the Lily Bay "pause" designed by LURC staff/consultants to assess impacts of traffic on wildlife after a certain build-out is completed, is inconsistent with LURC regulations and inconsistent with the best available science. The goals of the proposed "pause" study cannot be met because impacts to affected wildlife populations will not be detectable within the recommended time period of the study. These issues are discussed in more detail, below.

a. Inconsistent with LURC regulations: Granting a rezoning application based on future studies to document impacts to wildlife and wildlife habitat after the project is built or even partially built contravenes the "no undue adverse impact" criterion of 12 M.R.S.A. § 685-A(8A). The criterion, as an essential element to allow a rezoning, must be established by substantial evidence. Id. Any suggestion that the "substantial evidence" is presently unavailable to justify the rezoning – and that such evidence can be "gathered later" after a certain amount of development has been finished – patently turns the statutory criterion on its head. Quite literally, such analysis permits the rezoning first, in hope that the criterion will be met later. It amounts to a concession that the statutory criterion is not presently met, and certainly not met with "substantial evidence." It is also poor public policy and will set a bad precedent. Assessment of future impacts for any proposed project is always predictive by nature and must rely on relevant information from studies from other areas. Moreover, the burden of proof is and has always been on the applicant to show before the project is built (not afterwards) that there will be no undue adverse impacts. The proposed bifurcated permitting process or "pause" acknowledges that LURC is not persuaded (without more studies) that the development as proposed (404 residential or resort lots plus associated commercial development) meets current regulatory requirements. Therefore, Plum Creek has not met its burden of proof of showing there will be no undue adverse impacts on wildlife and wildlife habitat.

b. Inconsistent with best available science: Equally egregious is the fact that the proposed studies required before the next phase of development or during the "pause" will not work. The impacts of the proposed development on Lily Bay, including impacts from roads and increased traffic will display a time lag (sometimes called an extinction debt) between when habitat degradation takes place and when its full ecological effects are detectable.[19] Forman et al discuss this issue in their book, Road Ecology: Science and Solutions (2003), and provide the following graph[20] (reproduced here on the next page) to help visualize the four different types of ecological effects of roads and how they impact wildlife populations over time, specifically identifying the time lag for detecting cumulative impacts:



To explain why there is a long lag time between the road impacts and the detection of those impacts on relatively short-lived birds, mammals and frogs, one must look at how the ecological impacts play out across the landscape. Forman's graph places the ecological impacts of roads into four main categories:

1. Habitat loss,
2. Reduced habitat quality,
3. Wildlife mortality, and
4. Reduced connectivity (animals can no longer travel freely to and from the habitats essential for survival).

As the above graph depicts, the first category - Habitat loss – has a virtually immediate response, but represents only a small fraction of the total impacts. Reduced habitat quality, the second category, happens over a longer period of time (e.g. water quality degrading from runoff, increased threats from predators associated with human developments, etc.). Still, these impacts often affect an animal's breeding success and will take at least a generation to be detectable. The third category – Wildlife mortality from roads – varies from species to species, but detectable population declines

[19] Reh, W. & A. Seitz. 1990. The Influence of Land Use on the Genetic Structure of Populations of the Common Frog Rana tempraria. Biological Conservation. 54: 239-249.
Rosen, P.C. & C.H. Lowe. 1994. Highway Mortality of Snakes in the Sonoran Desert of Southern Arizona. Biological Conservation. 68: 143-148.
Findlay, C.S. & J. Houlahan. 1997. Anthropogenic Correlates of Species Richness in Southeastern Ontario Wetlands. Conservation Biology. 11(4): 1000-1009.
Forman, R.T.T. et al. 2003. Road Ecology: Science and Solutions. Island Press. Washington, DC. 481 pp.
Findlay, C.S. & J. Bourdages. 2000. Response Time of Wetland Biodiversity to Road Construction on Adjacent Lands. Conservation Biology. 14(1): 86-94.

[20] Forman, R.T.T. et al. 2003. Road Ecology: Science and Solutions. 2003. page 135.

generally take at least 1-2 generations (Forman, 2003, page 135). To put this in perspective, two generations for Canada lynx is 20-30 years (the life span of the lynx is 10-15 years in the wild); it is even longer for wood turtles, for example, which have a life span of approximately 40-50 years.[21] The impacts of roads on wildlife due to reduced connectivity (the fourth category) take the longest to observe or detect, usually several generations (Forman 2003, page 135).

For wetland dependant animals including birds, mammals and frogs/turtles, the estimated lag time is between 30-40 years (Reh & Seitz, 1990, Findlay & Houlahan 1996, Findlay and Bourdages 1999). Wetland-dependent species most at risk at Lily Bay include wood turtle, rusty blackbird and brook trout.

These facts clearly show the most dramatic and cumulative impacts of roads on wildlife populations happen during the time lag and therefore will not be detectable for decades after the project is built. Therefore, the studies proposed to assess changes in wildlife populations after partial development on Lily Bay will likely detect only the impacts of direct habitat loss, not the more significant and substantial impacts of reduced habitat quality, wildlife mortality and reduced connectivity.

The Commission's Amendments are in error in relying on future studies (as outlined in Footnote 17 of the Amendments) to determine the suitability of development on Lily Bay. If it is the Commission's conclusion on the present record that there remain serious questions and concerns about the impacts of development at Lily Bay on wildlife and habitat, then the applicant has failed to demonstrate by substantial evidence that no undue adverse impact will occur there. That conclusion supports denial of rezoning for development at Lily Bay, rather than the current "phased" approval of it. The Lily Bay development must be removed from the plan.

[21] Life span estimates from University of Michigan Museum of Zoology: Animal Diversity Website. http://animaldiversity.ummz.umich.edu/site/accounts/information/Clemmys_insculpta.html

► Maine Department of Inland Fisheries and Wildlife and Maine Natural Areas Program (pp. 2-3)

Build out of the Plum Creek Concept Plan will inevitably result in increased traffic throughout the Moosehead region. We recognize the concern that increased traffic will likely result in increased wildlife mortality on roads in the region. However, we do not feel that wildlife populations will be significantly jeopardized by the increased road traffic. Although we understand LURC Commission reasoning in requiring updated wildlife resource studies after 135 Lily Bay units are developed and occupied, and before any further development proposal can bring the total number of units to 284, we have based our Concept Plan recommendations to date on the assumption that habitat functions and values within the re-zoned areas will be significantly degraded. Similarly we have viewed the surrounding compensatory easement lands as refugia that, if managed appropriately, will in fact compensate for development impacts by ensuring the long-term preservation of potential habitat.

Should the proposed traffic studies be required during the bifurcated development process, MDIF&W biologists request the ability to review study methodology and offer input as needed. We remain primarily concerned that a significant increase in deer and moose collisions resulting from increased traffic between Lily Bay and Kokadjo could pose a public safety issue. We look forward to future opportunity to work with the project developers in the interest of incorporating necessary safety improvements into the design and upgrade of both public and private roads.

STAFF/CONSULTANT DISCUSSION AND RECOMMENDATIONS

► DISCUSSION

Based on comments received, staff/consultants offer the following analysis:

At Concept Plan build-out, staff/consultants believe that the traffic level on Lily Bay Road between the Lily Bay development area and Lily Bay State Park will likely increase to a level that approximates the threshold at which adverse impacts on carnivores, including Canada lynx, could occur. There have been no documented sightings of lynx in this area. Further, only land on the east of Lily Bay Road at this point is characterized by the U.S. Fish and Wildlife Service as having a high probability of lynx occurrence, suggesting that if lynx are in the vicinity, they may not be attracted to habitat across the road.

To the north of the development area, where lynx sightings have been documented, traffic volumes also are expected to increase significantly, but not to the threshold level where the literature cited in the record indicate adverse impacts could occur.

Nevertheless, in view of conflicting projections by traffic experts, and in view of documented lynx sightings to the north along Lily Bay Road and their status as a threatened species, the June 4th Commission-generated amendments called for a bifurcated review process for development proposed on the Lily Bay peninsula. This process would require that when permits authorize no more than 284 units and at least 135 units have been built, a fresh traffic analysis be conducted based on actual travel behavior of the development's occupants to determine whether the risk to lynx is greater than it appears based on the record of these proceedings.

Both Plum Creek and MA/NRCM, for different reasons, were critical of this approach. For the record, it is important to note that MA/NRCM misapprehended the intent of the bifurcated review process. These organizations apparently thought the purpose of such a bifurcated process was to verify whether or not the traffic being generated at a point in time was having an undue adverse impact on Canada lynx. In fact, staff/consultants recommended adopting this approach after concluding that, based on their evaluation of record evidence in this proceeding, traffic levels of 3,000 AADT or greater were a potential indicator of adverse impacts to Canada lynx. Using Plum Creek's traffic consultant's model, which utilized a number of assumptions about future traffic patterns and volumes, staff/consultants *projected* that traffic levels would approach 3,000 AADT once 284 units were built and occupied. Thus, the June 4th Commission-generated amendments established a bifurcated review process to test the assumptions built into those traffic projections against *actual* traffic flows based on *actual* behavior of the occupants of a minimum of 135 units, in order to reassess the final built-out number of units and/or to determine required mitigation measures. The purpose of the bifurcated review process was not to defer any assessment of adverse impacts on Canada lynx, since evidence in the record of this proceeding led staff/consultants to conclude that adverse impacts would begin to occur when traffic levels reached 3,000 AADT. Updated biological information and studies were simply requested in order for the Commission, at subsequent review stages, to make decisions regarding adverse effects on Canada lynx based on the most current available science.

This explanation notwithstanding, staff/consultants conclude that an alternative approach – proposed by Plum Creek and referred to as an "adaptive management" approach (Plum Creek, July 11, 2008, pp. 13-15) – is superior to the one-time review incorporated in the bifurcated review process. "Adaptive management" refers to a system of ongoing data gathering and monitoring and responding in near real time to avoid, minimize or mitigate impacts, as needed, based on information then available. Ongoing monitoring and assessment will be more likely to catch and enable effective response to issues if and as they arise than a one-time approach. This is also more consistent with the type of process used by resource agencies, *e.g.*, in Section 7 reviews under the Endangered Species Act. (*See* Plum Creek, Response Comment Letter, July 11, 2008, Appendices 2 and 3.)

► RECOMMENDATIONS

Based on the discussion above, staff/consultants offer the following recommendations:

- Regarding the development review process:

  Retain the 2-step review process (long-term development plan followed by individual subdivision/development application reviews).

  Replace the bifurcated review of traffic-Canada lynx effects with an adaptive management process intended to assure no undue adverse impact on Canada lynx, provided that:

  - A final, comprehensive approach will be designed in the development of final Concept Plan language that includes the major categories of (1) ongoing monitoring and data gathering -- both before applications (including a long-term development plan) are filed and following phases of development -- according to a research and monitoring plan prepared in consultation with MDIFW and other relevant resource agencies; (2) analysis of the results for submittal to the Commission, MDIFW, and other relevant resource agencies for review; and (3) development of avoidance, minimization and mitigation plans as required, to be incorporated into permit applications and/or as conditions of permit approvals;

  - The geographic reach of the monitoring and analysis is specified in the research plan, likely to include, *inter alia,* the segment of Lily Bay Road from Beaver Cove to Kokadjo and potentially points north to capture the extent of the Lily Bay development's influence on traffic flow; and

  - It is explicitly understood that the Commission retains its authority to require the phasing of development and at the long-term development plan or subdivision/development review phases to condition, reduce, or deny a plan or permit application based on findings from the monitoring and analyses included in this approach.

7

PROPOSED DEVELOPMENT AREAS: BIG MOOSE MOUNTAIN

COMMENTING PARTIES

- ► Petitioner Plum Creek
- ► Intervenors and Interested Persons
  - Appalachian Mountain Club
  - Forest Ecology Network and RESTORE: The North Woods
  - FPL Energy Maine Hydro LLC et al.
  - GrowSmart Maine
  - Moosehead Region Futures Committee
  - Maine Wilderness Guides Organization
- ► Governmental Review Agencies
  - Maine Department of Inland Fisheries and Wildlife and Maine Natural Areas Program

COMMENTS FILED BY THE PETITIONER

(p. 9)

These recommendations are generally acceptable subject to working with staff to identify more specifically the actual locations of the viewshed boundaries. Plum Creek believes that the prohibition on the transfer of residential units into this development zone until 160 short-term visitor accommodation units have been approved and built should be eliminated. The intent to encourage resort development to occur more toward the east is understood, however this prohibition only provides a penalty with regard to the relocation of development units displaced from areas such a Long Pond, and is not related to conditions that would induce a resort to locate further to the east as proposed. This restriction should be eliminated.

COMMENTS FILED BY INTERVENORS AND INTERESTED PERSONS

- Appalachian Mountain Club

  (pp. 5-8)

  <u>Development on the shore of Indian Pond degrades the concept plan's ability to satisfy LURC standards.</u>

  AMC recognizes that primitive resort accommodations with water views and water access are an important economic component of the Concept Plan and agrees that it can be an appropriate use within the Concept Plan area. However, Indian Pond is simply the wrong location for such development.

  Because the Indian Pond shoreline is owned by FPL and regulated by FERC, the resort development zone proposed for its shores faces two insurmountable hurdles. First, in accordance with the FERC Settlement Agreements, the resort will lack private water access. Testimony of Dr. Kimball, 8-31-07; Testimony of Mr. Clark, 12/11/07, vol. II at 239:16-19. AMC questions the logic of locating this resort in close proximity to a water body but without the dock facilities and private access that would be expected by users of such a facility. This sets the stage for unavoidable enforcement problems, as guests to the resort will be expecting direct water access, and it is impractical to expect them readily to drive inland over the resort roads to access the Pond at the public landing. Testimony of Dr. Kimball, 12/11/07, vol. II at 235:2-10.

  Because the FERC Settlement Agreement provides for *public* pedestrian access, the guests will go directly to the Pond by creating multiple, ad-hoc access points. *See, e.g.* Testimony of Mr. Kraft, 12/11/07, vol. II at 233:10-13 (noting that resort guests will be walking directly to the water). More likely than not, guests may land their boats on the shore and, over the course of their stay, repeatedly drag them to and from the Pond in locales out of the sight of the resort caretakers and without regard to the boundary between the development and restrictive covenant areas. Absent dock or boardwalk infrastructure, such improvised access points are likely to degrade the quality of the shoreline. FPL Letter, 1/9/08 (private docks and boardwalks prohibited); Testimony of Dr. Kimball, 12/11/07, vol. II at 228:4-15. Such access points will be aimed at convenience rather than compliance with LURC regulations, and inevitably will become unmanageable, chronic sources of conflict with the FERC Settlement Agreement. Because LURC cannot legally grant Plum Creek this private access, the best solution is to eliminate the proposed development area.[2]

[2] Should the Commission decline to eliminate the Indian Pond resort zone then, at a minimum, some provision should be made to require notice to future owners and resort guests of the FERC Settlement Agreement and conservation easement requirements. *See,* AMC Post-Hearing Reply Brief at 4 (footnote 3), and Exhibit A to Plum Creek's 3/12/08 Letter.

Second, this development is contrary to the spirit and intent of the FERC Settlement Agreement in which the State and twenty-seven other parties identified as a principal goal protecting the undeveloped character of Indian Pond. Testimony of Mr. Wiley, 12/11/07, vol. II at 238:13-18 ("when the settlement was negotiated, it was with the intent of being a back-country experience.") The proposed shorefront resort zone would disrupt the extensive undeveloped shoreline between the more developed southern end of the lake and the northern end, where use pressures will be increased due to the proximity of the Big Moose Mountain resort. Prohibiting shorefront development on this mid-lake area preserves the remote character of the lake for those users who enter the lake at the northern public launch and are willing to paddle farther to escape the growing crowds associated with the loop trails at the northern end of the Pond. *See, e.g* Testimony of Dr. Kimball, 12/11/07, vol. II at 229:11-230:3 (noting that the linear and narrow characteristics of Indian Pond exacerbate recreation management concerns). Allowing this resort zone will eliminate that more remote paddling experience by interrupting this stretch of undeveloped shoreline, and so will compromise the FERC Settlement Agreement contrary to LURC's policy to recognize the value of cooperative approaches to resource management. CLUP at 143.

However, AMC does believe that this type of facility is appropriate within the Concept Plan area, and, if properly located, can be a valuable addition to the nature-based tourism infrastructure of the region. In addition to the Moose Bay and Lily Bay sites already identified by the Commission as locations possibly suitable to waterfront resorts,[3] AMC suggests the following areas (*See* Exhibit 1, attached hereto) as examples of places within the Concept Plan area that are more suitable locations for this type of primitive waterfront resort facility:

- The eastern side of Brassua Lake, originally proposed as D-RS3M zone. Residential units proposed for this area could be relocated to other development zones within the Brassua Lake region.
- Brassua Peninsula, at the northeastern tip. Any residential units now proposed for this area could be relocated to other locations within the proposed Brassua Peninsula development.
- The southeastern corner of Long Pond to the outlet of the Moose River, presently occupied by Balance Easement lands.

Considered in relation to existing and proposed development, none of these sites constitute development "sprawl" to the extent that the proposed site on Indian Pond does (though they could be located with sufficient separation from residential development to maintain the appropriate experience). And unlike Indian Pond, where restrictions on shoreline access are already in place, a low-impact resort subject to the 10,000 square foot area limitation in one of these locations could provide the water access that would be expected with this type of facility. The Moosehead Lake and Long Pond options provide guaranteed water access for a primitive resort accommodation because Plum Creek actually owns the shorefront. And on Brassua Lake, where the shorefront is owned by the Dam Owners, the shore is not yet restricted by 'no development' conservation easement requirements under the ongoing FERC relicensing process.

These alternative sites would have less adverse impact on other recreational users. They also would not decrease the amount of Balance Easements lands because the Moosehead Lake and Brassua Lake options are already within development zones. In the case of the Long Pond option, a swap between the proposed resort development zone on Indian Pond and the Balance Easement acreage on the southeast shore of Long Pond would result in a neutral effect on, or slight increase of, the total Balance Easement acreage. *See* Exhibit 1.

AMC recommends that the Commission further amend the Concept Plan by eliminating the resort development zone on the shore of Indian Pond. Should the Commission and Plum Creek determine that the economic model requires a primitive waterfront resort development, AMC recommends that it consider allowing primitive resort development as a permissible use in one of the locations identified above.
(pp. 9-10)

[3] The 'resort optional' zoning proposed for Moose Bay and Lily Bay (D-MH-RS2) allows a more intensive resort use than the primitive resort being relocated off Indian Pond (D-MH-PR). If the economic model favors a primitive resort, Plum Creek should have the option for that use in either of these two areas.

Reduction of Development Area at Big Moose Mountain.

AMC applauds the Commission for recognizing the importance of certain areas within the proposed Big Moose Mountain development zone, in particular by adopting the recommendations of MDIFW to remove certain sensitive wildlife areas from development zones and protect them as part of the Balance Easement. Commission-Generated Amendments at 16. AMC recommended reducing the size of this resort zone by removing from development those portions of Big Moose Mountain that are most directly in the viewshed of Indian Pond. Testimony of Dr. Publicover, 8/31/07 at 35 (Exhibit B identifying viewshed) and 37 (Exhibit C identifying area of resort zone proposed for protection.) While recognizing the importance of the Indian Pond viewshed, the Commission instead proposes incentivizing Plum Creek to locate its resort development outside of this viewshed. Commission-Generated Amendments at 19, Footnote 29. As an incentive, Plum Creek will be released from the sequencing requirement for development at Big Moose Mountain.[4] Although this is an improvement from the Concept Plan as proposed by Plum Creek, protection of the Indian Pond viewshed should not be at the option of the developer, but instead should be a requirement. No development should be located within the viewshed of Indian Pond and, in return, it would be appropriate to release Plum Creek from the sequencing requirement.

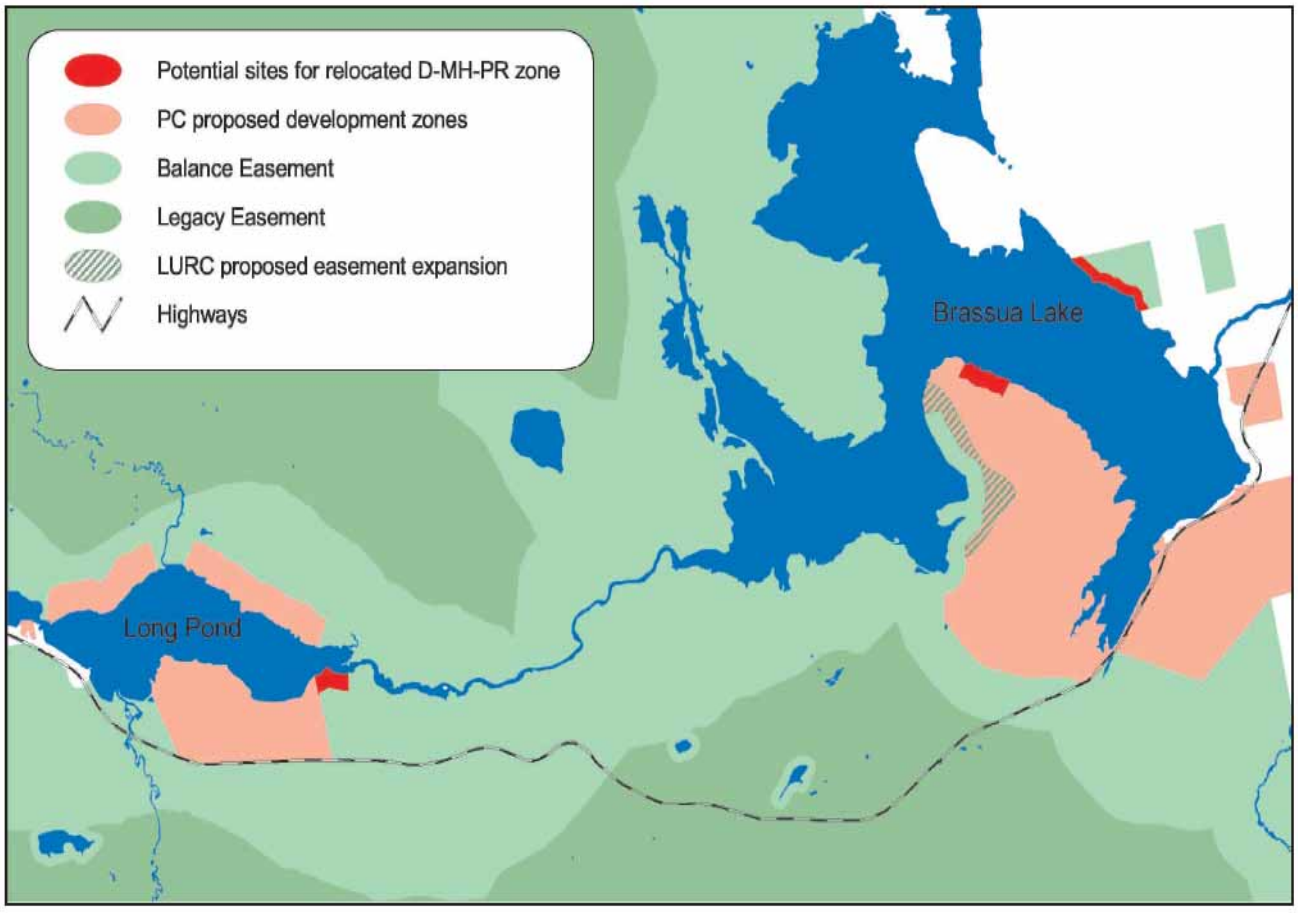


Exhibit 1. Proposed alternate locations for Primitive Resort Development Zone (D-MH-PR) currently proposed for the eastern side of Indian Pond. Areas are intended to show general potential locations rather than precise zone boundaries.

[4] The Commission-generated amendments propose requiring (a) an initial 1:4 ratio of short-term accommodation units to other resort units, and (b) build-out of 160 short-term resort accommodation units

► Forest Ecology Network and RESTORE: The North Woods (p. 14)

The staff recommendations also tone down some of the most egregious parts of the development zones. … Sequencing is added to the Big Moose Mountain development zone in an attempt to assure that a resort core is actually built there before other residential units are approved. While FEN-RESTORE applauds staff efforts in this area, in our final comments below we will explain why even the toned-down development remains unacceptable sprawl that will create lasting harm to the region.

► FPL Energy Maine Hydro LLC, *et al.* (pp. 2-3)

Renewed Request for Amendments to Concept Plan Regarding Notices to Prospective Purchasers and Identification of FERC Project Boundaries

In the Post-Hearing Opening Brief, the Dam Owners informed the Commission that they had come to an agreement with Plum Creek under which the two parties were prepared to stipulate and/or request that Plum Creek's Concept Plan be amended to include a Notice to Prospective Purchasers of Plum Creek development lands about FERC Boundaries, Dam Owners' rights and obligations, lake level fluctuations, the protection of existing Project uses, and requirement of Dam Owner permission for use of Project lands. Dam Owner Opening Brief, p. 2 and Exhibits B, C & D.

Specifically, the Dam Owners and Plum Creek agreed that these issues be addressed by jointly requesting that the Commission incorporate revisions to the Concept Plan approval requiring (i) that the Notices attached to the Post-Hearing Opening Brief as Exhibits B, C or D, as appropriate (and reattached to these Comments), be provided to prospective purchasers of lands developed by Plum Creek at or near Indian Pond, Brassua Lake and Moosehead Lake within all deeds of land being developed or sold within 250 feet of a Project Boundary, and (ii) identification of the locations of Owner's FERC Project Boundaries on substantially all concept, subdivision, zoning and site plans submitted for government approvals, recorded surveys and recorded plans. Dam Owner Opening Brief, p. 2. Plum Creek subsequently filed a separate letter dated March 12, 2008 with the Commission affirming the above agreement with the Dam Owners.

To the extent that the agreed upon Notices to Purchasers and requested amendments to the Concept Plan are not part of the Commission Amendments or any revised Concept Plan that will result from this process, the Dam Owners renew their above-stated requests to amend the Concept Plan to include the agreed upon Notices to Purchasers and to identify the locations of the Dam Owner's FERC Project Boundaries on substantially all concept, subdivision, zoning and site plans submitted for government approvals, recorded surveys and recorded plans.

► GrowSmart Maine (p. 2)

[Regarding Improved Smart Growth Adherence with Principle #1. Location of Development: Proximity to Existing/Future Development and Infrastructure & Services:]

- [Commission-generated amendments] revise zoning at Indian Pond to a much less intensive Primitive Resort Development zone (D-MH-PR) from the proposed D-GN2M Resort Development zone.

► Maine Wilderness Guides Association (p. 1)

We strongly oppose the development planned for the west shore of Indian Pond, which we feel violates the current CLUP and FERC standards.

► Moosehead Region Futures Committee

(p. 4)

In our post-hearing opening brief submitted March 7, 2008 (page 37), the MRFC Steering Committee requested that the resort development proposed near the shore of Indian Pond be relocated away from the pond to avoid adverse impacts on recreational fishing and paddling. As discussed in more detail below, MDIFW/MNAP also requested that the proposed resort zone at Indian Pond be removed from development zoning and added to the Balance easement. We reiterate our request that LURC protect this high-value nature tourism site from development.

(p. 5)

A demonstrated need has not been proven for the development proposed for Brassua Lake, Indian Pond, Upper Wilson Pond, and Lily Bay. In fact, there is a demonstrated need *not* to develop these areas. They form the "green infrastructure" that will support recreation and nature tourism in the Moosehead region for generations to come.

COMMENTS FILED BY GOVERNMENTAL REVIEW AGENCIES

► Maine Department of Inland Fisheries and Wildlife and Maine Natural Areas Program (p. 3)

We look forward to working with LURC and the future project developers in incorporating habitat connectivity needs into future design plans for Burnham and Indian Pond. During long-term development planning, habitat connectivity issues should not be limited to providing terrestrial connections necessary for white-tailed deer movements between deer wintering areas, but should also consider connectivity issues such as enhanced riparian buffering as discussed in our August 31, 2007 comments, and road crossing designs that maintain stream channel and riparian zone connectivity for fish, aquatic invertebrates and stream associated terrestrial species. We anticipate that MDIFW and MNAP biologists and ecologists will be consulted prior to long-term development plan drafting and will be involved throughout the process for review and consultation. Additional comments regarding long-term development plans follow below.

MDIFW Regional biologists are confident that the unmapped deer wintering area on Big Moose Mountain can be appropriately safeguarded as a result of proper development placement, design and construction. As stated above, we anticipate that MDIF&W and MNAP staff will be consulted prior to the drafting of long-term development plans for this area, and that we will be involved in the design of habitat inventory methodology, development of any management plans for relevant natural features (e.g. deer wintering area, rare plants), and review of project designs specifically focusing on appropriate use of buffers and maintenance of habitat corridors for seasonal movements of deer and other species into and out of this area.

STAFF/CONSULTANT DISCUSSION AND RECOMMENDATIONS

► DISCUSSION

Based on comments received, staff/consultants offer the following analysis:

- Sequencing of development:

  A development at Big Moose Mountain with a resort core that has the potential to diversify recreational facilities, provide recreational and resource management capacity, create the potential for permanent jobs, and provide an element of self-containment that can reduce impacts beyond the footprint of the development area due to an increased seasonal population in the development area is central to the Concept Plan. The sequencing contained in the Commission-generated amendments is an appropriate method to assure that residential development is of a scale proportional to the resort actually constructed.

- Big Moose Mountain development area boundaries:

  The Commission in its previous deliberations carefully considered the competing considerations of development within the Big Moose Mountain development area boundaries, including, *inter alia*, the western portion of the development area and the area around Burnham Pond. Comments from parties on this topic present no new information that would cause staff/consultants to reconsider the June 4, 2008 Commission-generated amendments.

- Indian Pond Primitive Resort Development zone:

  This zone, as described in the June 4th Commission-generated amendments, would restrict permitted uses to primitive resort accommodations, uses and structures modeled on LURC's current definition of commercial sporting camps. Subdivisions would be prohibited.[5] As a result, this zone confers no greater development rights on the applicant than currently exist under the Commission's Land Use Districts and Standards (Chapter 10), as commercial sporting camps are presently allowed with a permit in the General Management (M-GN) Subdistrict and by special exception in the Great Pond Protection (P-GP) Subdistrict.

  As an accommodation that cannot have separate ownership units (*i.e.*, cannot be subdivided), the allowed low-impact resort use lends itself to centralized management by a single owner (including, potentially, the Big Moose Mountain resort owner) who can more easily control *ad hoc* boating access and will be more easily subject to enforcement actions if there are violations of rules or adjacent property owners' rights (such as the FERC project boundaries) by visitors.

  Staff/consultants agree with AMC that the FERC settlement precludes granting the developer of this primitive resort any *private* rights of access to Indian Pond. However, AMC also correctly acknowledges that the FERC settlement allows *public* pedestrian rights of access to the Pond.[6] Plum Creek's proposed Notice to Purchasers[7] on Indian Pond embraces this distinction and in so doing confirms Plum Creek's intent that users of the proposed resort will be limited in their ability to access the Pond to those pre-existing rights of pedestrian access.

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[5] *Cf.* previous versions of Plum Creek's Concept Plan, which called for 44 residential lots in two development envelopes affecting nearly 2 miles of Indian Pond's shoreline.

[6] On this point the settlement embodies principles of Maine common law, which recognizes a public right of access to great ponds for purposes such as boating and fishing.

[7] See Exhibit A to letter of March 12, 2008 from James Kraft to Agnieszka Pinette.

Staff/consultants/counsel interpret those public rights to include the right to hand-carry canoes, kayaks and the like over the FERC project area to the water's edge. AMC's concerns about multiple, *ad hoc*, points of access can be addressed through the LURC approval process by requiring a single point of access from the proposed resort to the threshold of the FERC project area.

- Dam Owners' rights and obligations

  Staff/consultants are aware of and have regarded the notices and inclusion of FERC project boundaries on all regulatory maps and related documents, as requested by FPL Energy Maine Hydro LLC and agreed to by Plum Creek, as a second tier issue that must be included in the final language of the Concept Plan. To clarify this intent, we include FPL's request in the recommendations here.

► RECOMMENDATIONS

Based on the discussion above, staff/consultants offer the following recommendations:

- Regaring sequencing of development:

  No recommended changes to this June 4th Commission-generated amendment.

- Regarding the Big Moose Mountain development area boundaries:

  No recommended changes to this June 4th Commission-generated amendment.

- Regarding limitations on shoreland structures on Indian Pond:

  Change the language to read:

  On Indian Pond: Prohibit shoreland structures such as temporary docks and trailered boat launches. Limit water access to one common site within the D-MH-PR (Primitive Resort Development) zone, which may be located up to, but not cross, the threshold of the FERC project area.

  See also Tab 3.

- Regarding recognizing adjoining landowners' rights and obligations:

  Include in final Concept Plan language requirements that (a) notices be given to prospective purchasers by seller in association with deeds of land being developed or sold within 250 feet of a Project Boundary, substantially as set forth in Exhibits B (Indian Pond), C (Brassua Lake), and D (Moosehead Lake) of the Post-Hearing Opening Brief of FPL Energy Maine Hydro LLC *et al.*, and (b) on maps required as part of long-term development and subdivision/development review for development areas bordering a FERC project boundary, the applicant delineate the FERC Project boundary as part of this mapping.

8

PROPOSED DEVELOPMENT AREAS: MOOSE BAY

COMMENTING PARTIES

- Intervenors and Interested Persons
  - GrowSmart Maine
  - Maine Audubon and Natural Resources Council of Maine
  - Native Forest Network

► GrowSmart Maine

(p. 1)

At the same time, the Commission-generated amendments would allow Plum Creek to develop resort accommodations at Moose Bay, as well as at Moose Mountain as originally proposed by Plum Creek. Given Moose Bay's proximity to Greenville and to the proposed Moose Mountain development, we strongly agree with this amendment and urge the Commission to take the next logical step – approve a Concept Plan that places all resort development on the west side of Moosehead Lake at Moose Bay and Moose Mountain, allow for some increase in residential development at Moose Bay and preclude any further development at Lily Bay as part of the Concept Plan. This would allow not only the development of a core resort area consistent with Plum Creek's, and the region's, long-term economic development strategy but also is more likely of achieving the goals of increasing the number of year-round residents in the area, decreasing the distances people will have to travel to get to existing development and services, and increasing the ability to provide for livable and walkable communities. Such an additional amendment to the Concept Plan would invariably require some further review of the Plum Creek's conservation requirements but changes to those requirements would be well worth the trade.

(pp. 2-3)

[Regarding improved smart growth adherence with Principle #1. Location of Development: Proximity to Existing/Future Development and Infrastructure & Services:]

- [Commission-generated amendments] expand development zone at Moose Bay to Residential/ Resort-optional which recognizes: 1) the potential synergy between the Big Moose Mountain development zone and the Moose Bay development zone and 2) the greater potential economic and social benefits of development there due to the development zone's close proximity to Greenville and other existing development.

► Maine Audubon and Natural Resources Council of Maine (p. 2)

There was also no reduction in the amount of overall proposed development throughout the whole plan area … [The Commission-generated amendments] even add a third "resort-optional" zone at Moose Bay and would permit even more development after 30 years in the Rockwood/Blue Ridge and Brassua Lake zones. There was no discussion at the deliberations of the essential element of "demonstrated need" in considering this level of intensity of development. The record does not rationally support this intensity.

► Native Forest Network (p. 8)

[Regarding specific concept plan cons:]

- Allows for 3rd resort at Moose Bay

STAFF/CONSULTANT DISCUSSION AND RECOMMENDATIONS

► DISCUSSION

Based on comments received, staff/consultants offer the following analysis:

- Regarding numbers and types of units at Moose Bay:

  As reflected in the June 4th Commission-generated amendments, staff/consultants continue to regard the location of Moose Bay as suitable for resort-related development. Its proximity to Greenville, an existing ski area, an already developed part of Moosehead Lake, and the transportation network all make resort-related uses appropriate for this development area. These uses might range from a bed-and-breakfast to a more complete resort core. A resort at Moose Bay would not add units to the total proposed in the Concept Plan: any resort accommodation units located here would be deducted from the 800 capped resort accommodation units at Big Moose Mountain (*see* Commission-generated amendments, p. 21). At the same time, staff/consultants do not recommend requiring resort accommodation units here or forcing the relocation of another resort to this location.

► RECOMMENDATIONS

No recommended changes to this June 4th Commission-generated amendment.

9

PROPOSED DEVELOPMENT AREAS: ROCKWOOD/BLUE RIDGE

COMMENTING PARTIES

- Petitioner Plum Creek
- Intervenors and Interested Persons
  - GrowSmart Maine
  - Maine Audubon and Natural Resources Council of Maine
- Governmental Review Agencies
  - Maine Department of Inland Fisheries and Wildlife and Maine Natural Areas Program

COMMENTS FILED BY THE PETITIONER

(p. 8)

[Regarding requiring a certain amount of developable land to be reserved for future community needs:]

Plum Creek agrees with the recommendation at Rockwood/Blue Ridge …

COMMENTS FILED BY INTERVENORS AND INTERESTED PERSONS

► GrowSmart Maine (p. 3)

[Regarding improved smart growth adherence with Principle #1. Location of Development: Proximity to Existing/Future Development and Infrastructure & Services:]

- [Commission-generated amendments] reserve the balance of several proposed development zones in proximity to existing development for development after the 30 year period to allow future growth flexibility in the Concept Plan area.

► Maine Audubon and Natural Resources Council of Maine

(p. 2)

There was also no reduction in the amount of overall proposed development throughout the whole plan area … [The Commission-generated amendments] would permit even more development after 30 years in the Rockwood/Blue Ridge and Brassua Lake zones. There was no discussion at the deliberations of the essential element of "demonstrated need" in considering this level of intensity of development. The record does not rationally support this intensity.

(p. 29)

Reserving a significant portion of the land in the Rockwood/Blue Ridge Corridor zone for more development after 30 years appears to be the Commission's recognition of that fact – but it is a concept that the public in Rockwood has not had full opportunity to consider because it is a new concept raised for the first time formally on May 27-28, 2008 (or the few days prior to deliberations when the staff/consultant recommendations were released). It is a concept that literally contemplates Rockwood's future intention of incorporating – divorcing itself from LURC jurisdiction – based in part upon the level of development contemplated in this very plan. It is a legitimate question for the Commission to determine whether in fact there has been enough input from the public on these new concepts.

(pp. 30-31)

Setting aside 50% of "net developable land in contiguous blocks" in the Rockwood/Blue Ridge zone, and 25% in the Brassua Lake zone, would allow for additional development after the 30 year life of an approved concept plan. This was a concept that was never before the public in the hearings. It is entirely unclear why this Commission is approving more development and growth on the applicant's land than the applicant itself has applied for. It is also entirely unclear what "deficiency" in Zoning Petition ZP 707 this "future build-out" amendment could possibly be aimed at addressing. There is no substantial evidence on this record that there is a demonstrated need to reserve land for greater future development, potentially allowing Rockwood to grow to the size of Greenville or greater. There is no substantial evidence on the record that doing so has no undue adverse impact on existing uses and resources, including the critical wildlife travel

corridor in the Rockwood/Blue Ridge area that was so much a part of the testimony of wildlife biologists and comments from USF&W and DIF&W during the hearing. See, e.g., Map of Exclusion Zones Identified in Testimony of IFW, USFWS, & MA-NRCM (attached to Opening Brief of MA-NRCM); Joint Comments of MNAP and MDIFW of 8/31/07 (discussing the Rockwood/Blue Ridge wildlife travel corridor: "At full build-out development of these proposed envelopes could significantly alter, restrict and possibly eliminate movement of various wildlife species along and over this ridge.") The Commission made no explicit findings at the deliberations that more development than what was currently proposed by the applicant met, by substantial evidence, the statutory and regulatory rezoning criteria. And indeed, this "minimum land" reservation or "set aside" concept does not meet either the demonstrated need or the no undue adverse impact standards.

COMMENTS FILED BY GOVERNMENTAL REVIEW AGENCIES

► Maine Department of Inland Fisheries and Wildlife and Maine Natural Areas Program (pp. 3-4)

MDIFW Regional biologists and MNAP staff ecologists are confident that landscape level habitat connectivity can be maintained in this area through the strategic designation of undeveloped open space and proper road design and construction directed by a long-term development plan developed cooperatively with the applicant and our agencies. As stated above, we request that MDIF&W and MNAP staff be consulted prior to the drafting of long-term development plans for this area, and that we will be involved in the design of habitat inventory methodology, existing connectivity analysis, development of any management plans for proposed open spaces or forested corridors.

STAFF/CONSULTANT DISCUSSION AND RECOMMENDATIONS

► DISCUSSION

Based on comments received, staff/consultants offer the following analysis:

- Regarding reservation of excess lands:

  The proposed reservation of excess lands applies only in two areas – the Brassua Lake south peninsula and Rockwood/Blue Ridge – both of which appear to have a large amount of excess buildable land, and both of which are areas that Commission policies regard as potentially suitable for development.[1] A policy to reserve excess lands for future consideration by the Commission will encourage a more efficient form of development than would be the case if all available lands were simply swept into development zoning even if they were not needed for development. Conversely, under the Concept Plan as proposed by Plum Creek, in the absence of an excess lands reservation policy all useable land not developed within 30 years must automatically be placed in permanent conservation easements, regardless of the general suitability of the area to help meet future community needs and regardless of what those unforeseen needs may be at the end of 30 years and beyond. An excess lands policy in these two areas will provide a modest amount of leeway for the Commission to meet those needs.

  There is not a predisposition that the excess land must be reserved for more housing development. As stated in the June 4th Commission-generated amendments (p. 57), the land could potentially be available for different types of open space, civic, or other community needs. Staff/consultants advise that the Commission defer for 30 years any determination of the appropriate use and zoning of this excess land.

  As noted by MDIFW and MNAP, there is ample opportunity to design for landscape-level habitat connectivity at the long-term development plan and subsequent subdivision/development permitting phases.

► RECOMMENDATIONS

No recommended changes to this June 4th Commission-generated amendment.

[1] For example, a portion of the Rockwood/Blue Ridge development area meets the Commission's adjacency criterion, and much of it is bounded by the region's major transportation route, connecting it to services in Rockwood.

10

PROPOSED DEVELOPMENT AREAS: BRASSUA LAKE

COMMENTING PARTIES

- Petitioner Plum Creek
- Intervenors and Interested Persons
  - Appalachian Mountain Club
  - GrowSmart Maine
  - Maine Audubon and Natural Resources Council of Maine
  - Moosehead Region Futures Committee

(p. 8)

[Regarding requiring a certain amount of developable land to be reserved for future community needs:]

Plum Creek agrees … with the intent of the recommendation at Brassua, but some revision is necessary there. The Brassua Development Zone has been identified as having the capacity to receive additional development units. Combined with the reduction in shorefront lots on Long Pond, and further restrictions recommended on Big Moose Mountain as a receiving zone, Plum Creek believes that the 25% reservation at Brassua should be reduced to 15%, and the 50 acre minimum size for reserved land should be reduced to 25 acres. Additionally, this development area should be classified as a receiving zone.

In view of the proposed lot reductions at Long Pond, proposed limitations on transferring development units to Big Moose Mountain, and the proposed reduction in available development area through set-asides at Brassua and Rockwood/Blue Ridge, Brassua Development Zone should be utilized as a receiving zone for additional residential units. However, Plum Creek would agree to limit development units transferred from other areas into Brassua to 50 units. The Brassua zone can accommodate additional units due to its suitable soils and generally agreed upon developability. See Howell 8/31/07 at Attachment 2, Map Sheet 3.

(Plum Creek response to staff/consultant request for additional information, dated 09/02/2008)

[Regarding reservation of excess lands on Brassua Lake south peninsula:]

The Brassua Lake south peninsula contains a range of environmental factors that must be taken into consideration when planning for the total area of the zone. These include streams and wetlands with 100 -foot buffers assumed for analysis purposes. However, the Misery Brook corridor would be a 250-foot setback. Other environmentally constrained areas contain elements such as vernal pools and associated setbacks, poor soils and steep slopes. Combined, these areas are approximately 900 acres, or 40% of the gross area.

Approximately 200 acres is estimated to provide for approximately 75 acres of open space necessary to maintain a passive open space framework that preserves the natural character throughout the development, and approximately 125 acres of contingency area for unknown potential uses and planning uncertainties. In total, this would be approximately 9% of the total zone. Please note that any specific amenities will be determined in the long range plan application and will be based on then current market conditions.

Infrastructure could comprise approximately 225 acres, or approximately 10% of the zone. General geometric inefficiencies (small, remnant pieces either too remote to efficiently to utilize, or of an awkward shape), and soils and land generally unsuitable for a particular use could account for approximately 150 acres, or about 7% of the gross land area.
The remaining land area would be approximately 760 acres, or about 34% of the gross area of the development zone. Approximately 115 acres of this remaining land area would be left undeveloped for 30 years by reserving 15%. This is compared to approximately 190 acres that would be set aside at 25%.

These calculations are general estimates based on the level of detail currently known about the characteristics of the land and in the absence of a specific development plan. Plum Creek agrees with the intent to reserve some land for future community needs. The area estimated to be reserved using 15% appears to be appropriate and sufficient for this purpose. There is not a specific development plan currently proposed for this area, nor is the level of detailed information and analysis that would be prepared at subsequent development stages. Further, it is not possible to predict the market conditions and amenities that may be identified in a long range development plan application. Plum Creek believes that

deference should be given to supporting the success of the Concept Plan during its 30 year period, and that a set aside of 15% is practical and appropriate.

Requiring 50 acre blocks has a high risk of using up otherwise developable acres that may be necessary for up to 300 units. By reducing this requirement to 25 acre blocks Plum Creek has a greater degree of confidence that 300 units could be developed. In our experience, blocks of this lesser size can support meaningful development. Certainly development occurs in blocks of 25 acres or less throughout Maine.

COMMENTS FILED BY INTERVENORS AND INTERESTED PERSONS

► Appalachian Mountain Club (p. 9)

The removal of development along the north shore of Long Pond and along the northwestern shore of the Brassua Peninsula is a critical amendment that significantly reduces the adverse impact on existing recreational values in the Plan Area.[4]

► GrowSmart Maine (p. 3)

[Regarding improved smart growth adherence with Principle #1. Location of Development: Proximity to Existing/Future Development and Infrastructure & Services:]

- [Commission-generated amendments] reserve the balance of several proposed development zones in proximity to existing development for development after the 30 year period to allow future growth flexibility in the Concept Plan area.

► Maine Audubon and Natural Resources Council of Maine

(p. 2)

There was also no reduction in the amount of overall proposed development throughout the whole plan area … [The Commission-generated amendments] would permit even more development after 30 years in the Rockwood/Blue Ridge and Brassua Lake zones. There was no discussion at the deliberations of the essential element of "demonstrated need" in considering this level of intensity of development. The record does not rationally support this intensity.

(p. 29)

Reserving a significant portion of the land in the Rockwood/Blue Ridge Corridor zone for more development after 30 years appears to be the Commission's recognition of that fact – but it is a concept that the public in Rockwood has not had full opportunity to consider because it is a new concept raised for the first time formally on May 27-28, 2008 (or the few days prior to deliberations when the staff/consultant recommendations were released). It is a concept that literally contemplates Rockwood's future intention of incorporating – divorcing itself from LURC jurisdiction – based in part upon

[4] In rezoning Brassua, the Commission-generated amendments imposed limits on the number of docks on the south peninsula, but not elsewhere. Commission-Generated Amendments at 39. While this is a significant improvement, AMC's prior recommendation to require notice of the FERC licensing requirements – as manifested in a draft notice agreed-to by Plum Creek and the Dam Owners – is an important detail to facilitate the Commission's intent at the 'second tier' stage of review and it affects the entire shore of Brassua Lake. AMC Post-Hearing Reply Brief at 3-4, Exhibit A of AMC's Post-Hearing Brief at ¶ 9; Exhibit B of Plum Creek's 3/12/08 Letter.

the level of development contemplated in this very plan. It is a legitimate question for the Commission to determine whether in fact there has been enough input from the public on these new concepts.

(pp. 30-31)

Setting aside 50% of "net developable land in contiguous blocks" in the Rockwood/Blue Ridge zone, and 25% in the Brassua Lake zone, would allow for additional development after the 30 year life of an approved concept plan. This was a concept that was never before the public in the hearings. It is entirely unclear why this Commission is approving more development and growth on the applicant's land than the applicant itself has applied for. It is also entirely unclear what "deficiency" in Zoning Petition ZP 707 this "future build-out" amendment could possibly be aimed at addressing. There is no substantial evidence on this record that there is a demonstrated need to reserve land for greater future development, potentially allowing Rockwood to grow to the size of Greenville or greater. There is no substantial evidence on the record that doing so has no undue adverse impact on existing uses and resources, including the critical wildlife travel corridor in the Rockwood/Blue Ridge area that was so much a part of the testimony of wildlife biologists and comments from USF&W and DIF&W during the hearing. See, e.g., Map of Exclusion Zones Identified in Testimony of IFW, USFWS, & MA-NRCM (attached to Opening Brief of MA-NRCM); Joint Comments of MNAP and MDIFW of 8/31/07 (discussing the Rockwood/Blue Ridge wildlife travel corridor: "At full build-out development of these proposed envelopes could significantly alter, restrict and possibly eliminate movement of various wildlife species along and over this ridge.") The Commission made no explicit findings at the deliberations that more development than what was currently proposed by the applicant met, by substantial evidence, the statutory and regulatory rezoning criteria. And indeed, this "minimum land" reservation or "set aside" concept does not meet either the demonstrated need or the no undue adverse impact standards.

► Moosehead Region Futures Committee

(pp. 3-4)

In our post-hearing opening brief submitted March 7, 2008 (pages 26-29), the MRFC Steering Committee made several requests regarding the development proposed for Brassua Lake that have not been addressed by the LURC-generated amendments. These include:

- Leaving the remote, northwesterly section of the Brassua south peninsula undeveloped, and adding this land to donated conservation (see MRFC 2006 Citizen Solutions map, submitted as Exhibit 2 in the testimony of MRFC witness James Glavine on August 31, 2007). [The LURC-generated amendments provide for a slight modification of the western boundary of the Brassua south peninsula development area in order to protect Little Brassua Lake from scenic impacts. This modification covers only a fraction of the land recommended for protection on our Citizen Solutions map.]
- Eliminating the proposed development area on the northeastern shore of Brassua that is accessible only by water, and adding this land to donated conservation.
- Reducing the number of proposed units from 250 (capped) to no more than half that number.
- Eliminating the commercial zoning proposed for the Brassua south peninsula. [The LURC-generated amendments reduce the maximum aggregate acreage for commercial uses from 91 to 50 and, as compared to Plum Creek's proposed D-GN3M zone, appear to provide somewhat stricter limitations on the scale of commercial facilities. However, the LURC-generated amendments still allow a substantial level of commercial activity.]

We are especially concerned that development proposed for the Brassua south peninsula would create a new, unnecessary commercial center sprawling into what is now raw, undeveloped territory, far from the struggling communities of Rockwood and Greenville. The proposed development would cause undue adverse impacts to high-value wildlife habitat and to nature tourism opportunities, including the Northern Forest Canoe Trail.

With regard to the potential number of lots, the LURC-generated amendments actually take a step backward, paving the way for even more lots than Plum Creek has proposed. Footnote 43 to the amendments suggests that the Brassua south peninsula could become a receiving area for lots relocated from other development areas (LURC-generated amendments, June 4, 2008, page 36). During the May 27-28 deliberations, Aga Pinette indicated that shorefront units proposed for the north shore of Long Pond might be relocated to the shore of the Brassua south peninsula, even if this relocation necessitated reduction of the minimum shore frontage requirement below the 150 feet currently proposed by Plum Creek, which is already lower than the LURC standard of 200 feet (transcript pages 128-130). The Brassua south peninsula is a high-value natural area that should not be used as a "dumping ground" for relocated lots. Furthermore, at the end of the 30-year term of the concept plan, Plum Creek has proposed adding undeveloped land at Brassua to the Balance easement, whereas the LURC-generated amendments would subject undeveloped land to Commission zoning, thereby creating the potential for additional development in the future.

(p. 5)

A demonstrated need has not been proven for the development proposed for Brassua Lake, Indian Pond, Upper Wilson Pond, and Lily Bay. In fact, there is a demonstrated need *not* to develop these areas. They form the "green infrastructure" that will support recreation and nature tourism in the Moosehead region for generations to come.

► DISCUSSION

Based on the comments received, staff/consultants offer the following analysis:

- Regarding the numbers and types of units:

  Plum Creek proposes to utilize the Brassua south peninsula development area as a receiving area for up to 50 additional units, with a new cap of 300 total units. The June 4th Commission-generated amendments (p. 36, fn 43) noted the potential for significant excess lands in this area and that the south peninsula could serve as a receiving area for additional units transferred from other areas and/or as an area where use of excess lands could be considered by the Commission at the end of the 30-year Concept Plan period. Based on soils and other natural resource information available on the record, and subject to more detailed information that will be submitted as part of a long-range development plan and subdivision/development applications, staff/consultants conclude that this development area can accommodate up to 300 units.

- Regarding impacts to wildlife and recreation:

  Staff/consultants do not agree that development on Brassua Lake, as recommended herein, would cause undue adverse impacts to wildlife habitat and recreational resources. Staff/consultants note that Plum Creek has accepted a revised development area boundary line that would prevent shorefront lots or other housing development in the viewshed of Little Brassua Lake and would place waterfowl and wading bird habitat off limits to development. Combined with easement lands that now will cover the north peninsula and remaining north shore of Brassua Lake, the Demo Pond area, and the entirety of the Moose River between Long Pond and Brassua Lake, this revision will further minimize adverse impacts to the "Moose River Brassua Corridor Nature Tourism Suite" as shown on Moosehead Region Futures "Citizens Solutions" map (Glavine, Aug. 31, 2008, Exhibit 2).

  See also Tab 12 for staff/consultants' discussion of the cumulative impact of the Concept Plan on primitive recreational uses.

- Regarding land use zoning:

  See discussion of commercial uses at Tab 13.

- Regarding reservation of excess lands:

  The staff/consultant-recommended reservation of excess lands applies only in two areas – Brassua Lake south peninsula and Rockwood/Blue Ridge – both of which appear to have a large amount of excess buildable land, and both of which are areas that Commission policies regard as potentially suitable for development.[1] A policy to reserve excess lands for future consideration by the Commission will encourage a more efficient form of development than would be the case if all available lands were simply swept into development zoning even if they were not needed for development. Conversely, under this Concept Plan, in the absence of an excess lands reservation policy, all useable land not included in development will be placed in permanent conservation easements, regardless of the general suitability of the area to help meet future community needs and regardless of

[1] For example, Brassua Lake is a Management Class 3 lake, identified as potentially suitable for development; the south peninsula is the area of the lake closest to a major transportation route connecting to services at Rockwood. The development area is confined to the "south room" of the lake, while other areas of the lake are conserved.

what those unforeseen needs may be at the end of 30 years and beyond. An excess lands policy in these two areas will provide a modest amount of leeway for the Commission to meet those needs.

There is not a predisposition that the excess land must be reserved for more housing development. As stated in the June 4th Commission-generated amendments (p. 57), the land could potentially be available for different types of open space, civic, or other community needs. Staff/consultants advise that the Commission defer for 30 years any determination of the appropriate use and zoning of this excess land.

In the June 4th Commission-generated amendments (p. 57), the Commission stated that if the Brassua Lake south peninsula (or Rockwood/Blue Ridge) were to be used as a receiving area, its reserved land requirement might be relaxed at the time of submission of a long-term development plan. The intention was to provide the developer an opportunity to demonstrate as part of a long-term development plan that the addition of units should reduce the amount of reserved land and/or the size of contiguous reserved blocks of land. The size of contiguous blocks might also be defined by the natural lay of the land, logical circulation patterns, or similar factors, which in some cases may warrant a block size smaller than the standard described in the amendments. The vehicle for seeking modification of the default standard is the long-term development plan.

- Regarding demonstrated need:

  For a discussion of demonstrated need in the context of a landscape scale Concept Plan, *see* Tab 12.

► RECOMMENDATIONS

Based on the discussion above, staff/consultants offer the following recommendations:

- Regarding numbers and types of units:

  Residential units – Capped (300 units)

- Regarding ability to transfer in additional residential units:

  No change recommended by staff/consultants.

- Regarding land use zoning:

  See Tab 13.

- Regarding reservation of excess lands:

  No change recommended by staff/consultants.

- Regarding limitations on shoreland structures:

  See Tab 3.

11

PROPOSED DEVELOPMENT AREAS: LONG POND

COMMENTING PARTIES

- Intervenors and Interested Persons
  - Appalachian Mountain Club
  - Forest Ecology Network and RESTORE: The North Woods
  - GrowSmart Maine

► Appalachian Mountain Club (p. 9)

The removal of development along the north shore of Long Pond and along the northwestern shore of the Brassua Peninsula is a critical amendment that significantly reduces the adverse impact on existing recreational values in the Plan Area.

► Forest Ecology Network and RESTORE: The North Woods (p. 14)

The staff recommendations also tone down some of the most egregious parts of the development zones…The north shore of Long Pond would be spared from development though the rest of Long Pond would not be protected…While FEN-RESTORE applauds staff efforts in this area, in our final comments below we will explain why even the toned-down development remains unacceptable sprawl that will create lasting harm to the region.

► GrowSmart Maine (p. 2)

[Regarding improved smart growth adherence with Principle #1. Location of Development: Proximity to Existing/Future Development and Infrastructure & Services:]

- [Commission-generated amendments] remove North Shore of Long Pond as a development zone.

STAFF/CONSULTANT DISCUSSION AND RECOMMENDATIONS

► DISCUSSION

Comments from parties on this topic present no new information that would cause staff/consultants to reconsider the June 4, 2008 Commission-generated amendments.

► RECOMMENDATIONS

No recommended changes to these June 4th Commission-generated amendments.

12

TOTAL NUMBER OF UNITS:
AMENDMENTS TO TOTAL NUMBER OF UNITS

COMMENTING PARTIES

- ► Intervenors and Interested Persons
  - Forest Ecology Network and RESTORE: The North Woods
  - Maine Audubon and Natural Resources Council of Maine
  - Maine Wilderness Guides Organization
  - Native Forest Network

► Forest Ecology Network and RESTORE: The North Woods (pp. 16-19)

FEN-RESTORE also finds some of the methodology used by staff unpersuasive. Staff begins its analysis of the Plan by examining each proposed development zone in isolation. Then, after considering each zone separately, staff jumps to considering whether the entire area can accommodate the "total number of units." Mr. Richert begins his analysis of the "total number of units" by asking "Cumulative impact on what?" DT P 145 L 14. He then concludes that on a spectrum between urban settings and primitive settings, the Concept Plan area is "characterized as sort of in the middle of that spectrum. It is not primitive, it is not wilderness." DT P 147 L 4- 8. He explains that "consultants tended to characterize this overall area as roaded natural, that is, sort of in the middle, not unlike what you would expect for an industrial forest." DT P 146 L 13-16. He then analyzes various impacts, such as wildlife, scenery, recreation, etc. and ultimately concludes,

> The impression I wanted to leave you with is that we carefully looked at the record in each of these functional areas of wildlife, forestry, recreation, visual impacts measured against the existing character of this area and what people appear to value about this area. And we could not find evidence that a cumulative impact of the proposed units would exceed the carrying capacity of this area *as a whole*. DT P 151 L 3-10. (emphasis added).

First, we disagree with the spectrum staff has used because it trivializes the North Woods and the Concept Plan area. If one uses a world-wide spectrum that includes places like Papua New Guinea and the upper reaches of the Amazon, Maine's North Woods would fall into a middle ground as roaded natural. However, a world-wide spectrum is not the proper comparison to use here. The spectrum from urban settings to primitive settings should be limited to settings in the State of Maine. Viewed from the perspective of the State of Maine, the North Woods are at the primitive end of the spectrum and the "gateway" areas contained in the Concept Plan are near the primitive end of the Maine spectrum. When compared to what is available in the State of Maine – or even in the whole eastern half of the United States – Maine's North Woods stand out as a unique – but threatened – treasure. FEN-RESTORE implores the Commission to see this area in its proper context as the treasure it is and to reject its trivialization as only being in the "middle" of the spectrum.

Second, besides starting with the wrong perspective, the methodology used by the staff to analyze the Plan also missed an essential step. Missing in the analysis are the cumulative impacts of the development as actually laid out on the face of the earth. For example, in considering whether 300 vehicle trips per day is excessive, Mr. Richert says, "there simply seems to be an awful lot of capacity in this 400,000-acre region to absorb that kind of -- that kind of activity." DT P 150 L 8-10. This is not the same thing as considering the cumulative impact of where those trips are actually going to take place within the overall landscape. Development is not spread evenly over the full 400,000 acres or even in the less important parts of the 400,000 acre area. As is typical of all development, the developers want to "cherry pick" locations by putting development in the best areas because that is where the greatest economic value is. Just as it is insufficient to consider as an abstraction whether 2,000 units could fit into the 400,000 acres, it is insufficient to only consider whether any specific development on its own exceeds the carrying capacity in its area. Staff should have considered the cumulative impact of all the developments as a whole as actually laid out. In other words, even if the full 400,000 acres could absorb 2,000 units, it does not follow that placing the resorts and units at Lily Bay, Big Moose Mountain, Moose Bay, Long Pond and Brassua would not create undue cumulative impacts when analyzed together. Even with the staff's amendments, we are left with a massive development that sprawls on both sides of Moosehead Lake up past Rockwood to Long Pond on the west and into Lily Bay and Upper Wilson Pond on the east.

FEN-RESTORE also objects to using areas beyond the Concept Plan to offset the impact of development that takes place in the Concept Plan area. For example, when considering the loss of recreational areas, Mr. Richert used the Katahdin Ironworks outside the Concept Plan area to mitigate the loss of recreation:

So there is a place, there is ample area, in our view, for some of the recreational opportunity that we lost in a place like the Big Moose Mountain area to shift elsewhere. Some of those would be close in, like Prong Pond. Some of them will be areas just beyond the concept plan area like KI. Some of them will be within the concept plan area, like the Roaches and Spencer Bay. But there appear to be ample areas. DT P 149 L 10-17. (emphasis added)

The Concept Plan as revised by staff must stand or fall on its own merits without having to rely upon assets beyond the Concept Plan area. We are also troubled by the way staff turned the testimony of Mr. Christ on its head. Mr. Christ testified for NRCM against the Concept Plan. After discussing Mr. Christ's data and projections, which Mr. Richert seems to accept, he dismisses Mr. Christ's conclusion with the simple statement, "That does not strike us as a cumulative impact that will overwhelm this area." DT P 150 L 5-6. The Commission should take great care in accepting the factual basis of an expert opinion but rejecting the expert's conclusion based on those data.

► Maine Audubon and Natural Resources Council of Maine

(p. 1)

There is one aspect of the proceedings so far upon which the Commissioners and most participants all appear to agree – Plum Creek's Rezoning Petition ZP 707, as written and without any amendments, would have to be denied under governing statutory and regulatory standards. The Commission's recommended amendments seek to cure deficiencies of the Rezoning Petition and Concept Plan, but fail to redress the two fundamental problems with it: 1) there should be no development on Lily Bay, and 2) the overall development planned for the region is still both too large and unprecedented on a landscape-scale perspective. Our joint comments submitted here provide for the Commission – and for the State of Maine – a viable potential resolution to these current fundamental issues in the Commission's recommended amendments to the rezoning petition.

(pp. 2-3)

There was also no reduction in the amount of overall proposed development throughout the whole plan area – the proposed amendments still allow over 2,300 units (975 total residential units and 1,050 resort accommodation units, as well as 190 employee or caretaker/manager housing units, and compelled 100 affordable housing units). The Amendments even add a third "resort-optional" zone at Moose Bay and would permit even more development after 30 years in the Rockwood/Blue Ridge and Brassua Lake zones. There was no discussion at the deliberations of the essential element of "demonstrated need" in considering this level of intensity of development. The record does not rationally support this intensity. It is expressly acknowledged – by both LURC staff/consultants as well as Commissioners – that the development rights being "granted" to Plum Creek in the form of these Amendments are "extraordinary" development rights. See Footnote 75 of LURC Staff/Consultants' Recommendations ("These public rights and protections [of the conservation easements] are being granted by the landowner in exchange for **LURC granting certain extraordinary development rights to the landowner**.") (bold emphasis added).[3] See also Transcript of Deliberations, 216 & 218, lines 18-20 ("It's just that this easement is different, in my view, in that it is being offered in return for extraordinary development rights.") (Laverty); Transcript of Deliberations, 258, lines 19-20 ("the applicant is requesting extraordinary development opportunities . . .") (Laverty). Plum Creek is not entitled, by statute or otherwise,

[3] Although this quotation is used here to show LURC staff/consultants' concurrence that this matter Indeed involves LURC's granting of "extraordinary development rights" to the landowner, we take separate issue with the way in which LURC staff-consultants characterize the paid-for conservation easements as "a grant" by the landowner of public rights and protection. In this case, as explained in Part V herein, it is wrong to characterize the conservation package as a "grant" from the landowner. It is *a sale* by the landowner, not a donative "grant." The distinction is monumental in terms of public policy and legal significance. See Part V herein.

to "extraordinary" development rights, and has failed to present a record– by "substantial evidence" under the law[4] – that would entitle it to such a determination.
(p. 10)

Overview of the Resolution Avoiding All Development at Lily Bay

During its deliberations, several Commissioners expressed discomfort with the amount of development proposed both for the entire project (over 2000 units) and for Lily Bay (404 units). Collectively, these statements evince the view that any ability to approve this amount of development, including development at Lily Bay, is dependent on the entire staff-recommended conservation package – a package including not only the "Balance Easement" but also the 266,000 "Legacy Easement" and the 27,000 acre Roach Pond acquisition, all of which must be secured within 45 days of Plan approval and prior to acting on any Plan subdivision permits. These comments from Commissioners ran throughout the deliberations.[9]

(p. 11)

We continue to believe that the total amount of development proposed by Plum Creek will have undue adverse impacts on the natural character of the region, on wildlife, and recreational opportunities as detailed in testimony and briefs filed earlier in this case and in further comments below.

(pp. 25-31)

The Total Number of Development Units Contained in the Commission's Amendments Remains Too High Under Statutory and Regulatory Criteria.

As noted above, throughout deliberations the essential element of "demonstrated need" was never mentioned. In what has amounted to a prospective zoning exercise, and a rule-making proceeding now designed to afford the public the right and opportunity to voice opinion on the propriety of rezoning and re-drawing district boundaries in the region under Title 12 (12 M.R.S.A. § 685-A), the Commission has lost sight of the core values of the jurisdiction – those values cited

[4] 12 M.R.S.A. § 685-A(8-A).

[9] A general overview of many of the comments is as follows:

- "without those easements, those 2,000 units certainly become a much different number" (Harvey, 206)
- "I think the previous discussion about how many units are appropriate all has to be seen in light of the easements, and so it's essential." (Laverty, 206)
- "it's the essential piece of the whole package. If you're going to say that 2,000 units is o.k., there's got to be – that's a lot to swallow. So there's got to be something on the other side of the equation, for me anyway. I don't know if any others want to weigh in. (Harvey, 206)
- "Yeah, I totally agree." (Schaeffer, 206)
- "I think the 404 is acceptable but it's only when taken within the context of this whole… If there was a piece missing, you know, if the easements didn't go into effect within 45 days.. I think my heartburn over 404 would be much greater. But it's sort of tempered by all these other pieces when taken as a whole." (Kurtz, 412)
- "Rebecca, I think you stated that very well and that --- that reasoning, I guess, is what gives me some comfort in the total number of units that are being proposed here. This is a package and we've – there's a potential for getting a lot of conservation land out of this, particularly when you combine both the offset or balance conservation easement with the framework and all the recommendations that go along with that and what's being proposed here." (Hilton, 414)
- "my mind is only set at ease when I look at the fact that what this
- "I want to make that absolutely clear that whether it's Lily Bay and 404 units or 975 for the entire project that it's a package deal." (Kurtz, 415) • "Okay. I think we've all said that basically." (Harvey, 416)

above which define the jurisdiction, which make it unique – and has applied planning principles more appropriate to what would be expected in southern Maine where development and subdivision sprawl has already taken place. Put simply, within LURC jurisdiction it is not appropriate to create another town of Troy (or Perry or St. Agatha) north of Greenville – and certainly not given the existence of land for development within Greenville, including land owned by the applicant. Without a clearly demonstrated need for more houses, spread around the lake, any rezoning in order to build the equivalent of new towns and commercial amenities north of Greenville is poor planning, and inconsistent with the CLUP.

LURC staff/consultants consistently cry out for the need for "metrics" to help the Commission know "what is too much." The quasi-legislative or rule-making task of prospective planning and rezoning is not often an objective science that allows regulators to find cover behind statistics or measurements in making a decision – rezoning embodies policy decisions, seeking always to maintain harmony with the existing vision for the jurisdiction that this Commission has already placed in writing (after public input) in the form of its Comprehensive Land Use Plan. As stated above in the discussion on Lily Bay, one "metric" that is inescapable now – and an overwhelming one – is the metric of public input. The public, on a 25-to-1 ratio, does not want this rezoning to take place because it is out of harmony with the jurisdiction's comprehensive land use plan. On a 251-to-1 basis, the metric of public opinion tells us that development on Lily Bay should be eliminated. Ultimately, that may be the best "measure" of "how much is too much" when one searches for that answer in the context of a rezoning decision with regional, prospective planning reach. If it were otherwise, there would be no need for the public to have any say at all.

Many of the other standards and criteria for determining whether the scope of development proposed for rezoning here is out of harmony with the vision set forth in the CLUP, are standards and criteria that simply do not lend themselves to hard data – to the "metrics" that would allow numbers and data to do the work of prospective planning for a region. LURC staff/consultants are adept at working with and analyzing the details of data and of "metrics" (the staff/consultants' appreciation for the issues generated by the traffic engineers' testimony is an example), but this Commission must not get lost in the details of metrics, and cannot ignore those criteria which do not lend themselves to metrics, such as the concepts of remoteness and natural character under the CLUP, at page 114. Indeed, these criteria are the most important of LURC's characteristics. "Remoteness and the relative absence of development are perhaps the most distinctive of the jurisdiction's principal values, due mainly to their increasing rarity in the Eastern United States. . . . " CLUP, p. 114. One "measures" these standards – the most important standards – through the exercise of judgment, based upon public input, the gathering of public consensus on rezoning, and in combination with those objective criteria which do happen to lend themselves to metric analysis.

Yet the CLUP does provide guidance, still, on the questions of remoteness and natural character. This Commission's most fundamental policy for guiding growth on a regional level (in the absence of prospective zoning) is to "encourage orderly growth within and proximate [emphasis added] to existing development of a similar type, use, occupancy, scale, and intensity."[24] (Hereafter, the adjacency principle or policy.) The reason for this policy is to protect the jurisdiction's four principal values, to "protect and conserve forest, recreational, plant or animal habitat and other natural resources, to ensure the compatibility of land uses with one another and to allow for a reasonable range of development opportunities important to the people of Maine."[25]

While application of the adjacency principle may be relaxed in the context of a concept plan, it should not be relaxed when it would adversely affect the principal values of the jurisdiction or the reasons for the adjacency policy, particularly when alternative development locations are available which would protect the jurisdiction's principal values and reasons for the policy. Plum Creek owns 8000 acres within the Town of Greenville, much of it highly desirable, which could be developed in a fashion that reinforces the strength of the local economy and potentially attracts year-round residents who would pay taxes to Greenville. However, instead of proposing development for this land which is consistent with

[24] CLUP, p. 141

[25] CLUP, p. 140

LURC's adjacency principle, Plum Creek is proposing intensive development on land up to 24 miles away from Greenville (measured in a straight line; 40 miles by road), including over 14,000 acres of non-adjacent undeveloped, or very sparsely developed, land.[26] Plum Creek should be required to pursue its development goals in Greenville before leapfrogging out into undeveloped or sparsely developed areas distant from Greenville.

Plum Creek's Plan proposes a total of 2,315 accommodation and resort units, and envisions an additional 390 "induced" units.[27] This level of development would be entirely out of scale with what currently exists in the region. Greenville has fewer than 1,300 occupied homes; Rockwood has an estimated 380. With two or three large "resorts" – however elusively defined the "resorts" are at this stage – and hundreds of new house lots likely to be sited west and south of Rockwood, Plum Creek's proposal should be thought of as being equivalent to the creation of 2-3 new towns overall. There is no demonstrated need for building what amounts to 2-3 new towns north of Greenville. These are the objective points which inform the analysis on whether the proposed development in terms of overall numbers is truly "extraordinary" – as it has been described by LURC on the record. There is no compelling basis at all to approve extraordinary development plans.

On this point, it is important for the Commission to acknowledge that it is, indeed, engaged in a large scale regional prospective planning task with this proceeding. Most adjoining landowners have received constructive notice of the proceedings, and participated (many local landowners in the region oppose the rezoning – the intensive and valuable participation of the Moosehead Region Futures Committee is testament to that observation). But the scale of development contained in Plum Creek's concept plan is so large that it may functionally prevent other landowners from ever meeting demonstrated need criteria.

Reserving a significant portion of the land in the Rockwood/Blue Ridge Corridor zone for more development after 30 years appears to be the Commission's recognition of that fact – but it is a concept that the public in Rockwood has not had full opportunity to consider because it is a new concept raised for the first time formally on May 27-28, 2008 (or the few days prior to deliberations when the staff/consultant recommendations were released). It is a concept that literally contemplates Rockwood's future intention of incorporating – divorcing itself from LURC jurisdiction – based in part upon the level of development contemplated in this very plan. It is a legitimate question for the Commission to determine whether in fact there has been enough input from the public on these new concepts.

The applicant's primary testimony on the record seems to be nothing more than the applicant's own acknowledgement that it is indeed planning for the construction of the equivalent of new towns, and the commercial activity that come with them, all around the lake (such as on Brassua peninsula, or on Lily Bay). The assertion is made with no valid showing of "need" or how these new towns will impact the existing Town of Greenville or inhabitants of Rockwood. To the extent the rezoning decision requires the "metrics" economic analysis, it is irresponsible for LURC to proceed on the record with a set of recommended Amendments that by their very "resort-optional" nature have not even been analyzed by any economist. Instead of leaving the question "how much is too much?" entirely unanswered (and then proceeding with the development despite that unanswered question), this Commission should be asking whether it has enough information, given the changing nature of the Plan and the new concepts contained in the Amendments, to even recommend any Amendments that have not been put to test of the rezoning criteria in issue. Is there a demonstrated need for a "resort-optional" zone at Lily Bay? Or is there demonstrated need for a third zone at Moose Bay, assuming the viability of at least one other at Moose Mountain and existing space for development in Greenville – some of which is land owned by Plum Creek? Will there be an undue adverse impact from rezoning in the Rockwood/Blue Ridge or Brassua zones by leaving room for more build-out after 30 years? Questions like these were not addressed at the hearing, nor could they have been, because they are raised here for the first time through Commission-generated Amendments. Regional

[26] See LURC staff and consultants' "A Comparison of Development Elements of Plum Creek's Moosehead Lake Region Concept Plan Proposal to the Commission's Adjacency Principle" (November 5, 2007).

[27] 975 house lots, 800 resort accommodations at Moose Mountain, 250 resort accommodations at Lily Bay, 190 employee housing units and 100 affordable house lots.

prospective zoning demands fuller analysis, and a fuller and fairer opportunity for the Commission to gather informed and timely input from the public. As it stands, the Commission is best left with existing public opinion, based on communications received during official public comment periods – 1508 to 6 opposing the development at Lily Bay (as of mid-day July, 11, 2008), and 2500 to 100 opposing the plan that was on the table before the LURC-generated Amendments (LURC staff estimate, as of May, 5, 2008). Ultimately, that may be the only real "metric" that matters at this juncture.

Finally, tied to this issue is the concern raised by the Amendments on "minimum land reservation requirements" in the Rockwood/Blue Ridge and Brassua Lake development areas. Setting aside 50% of "net developable land in contiguous blocks" in the Rockwood/Blue Ridge zone, and 25% in the Brassua Lake zone, would allow for additional development after the 30year life of an approved concept plan. This was a concept that was never before the public in the hearings. It is entirely unclear why this Commission is approving more development and growth on the applicant's land than the applicant itself has applied for. It is also entirely unclear what "deficiency" in Zoning Petition ZP 707 this "future build-out" amendment could possibly be aimed at addressing. There is no substantial evidence on this record that there is a demonstrated need to reserve land for greater future development, potentially allowing Rockwood to grow to the size of Greenville or greater. There is no substantial evidence on the record that doing so has no undue adverse impact on existing uses and resources, including the critical wildlife travel corridor in the Rockwood/Blue Ridge area that was so much a part of the testimony of wildlife biologists and comments from USF&W and DIF&W during the hearing. See, e.g., Map of Exclusion Zones Identified in Testimony of IFW, USFWS, & MA-NRCM (attached to Opening Brief of MA-NRCM); Joint Comments of MNAP and MDIFW of 8/31/07 (discussing the Rockwood/Blue Ridge wildlife travel corridor: "At full build-out development of these proposed envelopes could significantly alter, restrict and possibly eliminate movement of various wildlife species along and over this ridge.") The Commission made no explicit findings at the deliberations that more development than what was currently proposed by the applicant met, by substantial evidence, the statutory and regulatory rezoning criteria. And indeed, this "minimum land" reservation or "set aside" concept does not meet either the demonstrated need or the no undue adverse impact standards.

► Maine Wilderness Guides Organization (p. 1)

While we are pleased with the modest recommended changes to the Plum Creek Concept Plan, we feel it does not achieve a fair balance for all vested interest groups. There seems to be an underlying assumption that the total number of residential and resort units is a non-negotiable item.

► Native Forest Network

(p. 2)

To begin, we find that the [LURC staff/consultant recommendation] solely addresses specific details within the plan and does not question the plan as a whole. It fails to recommend actual substantive changes within the plan and does not question the total amount of development or its overall impacts. It does not evaluate whether the proposed zoning is more appropriate for existing uses than current zoning. It does not take into account the fact that Plum Creek has repeatedly violated land-use laws in Maine and other places where it has operated. Although language clarifications have been recommended by LURC, it fails to address the concern raised at Party Hearings that unless an agreement is in legally-binding writing, Plum Creek can not be relied upon to act on basic recommendations or agreements sealed with a handshake (NFN PHB, pg 51). Also, the [LURC staff/consultant recommendation] does not address the threat to the remote character of the region. For these reasons and the more detailed criticisms below, NFN will continue to oppose Plum Creek's proposal, even with the addition of the LURC staff and consultant recommendations.

2.) ON IMPACTS:

Nowhere does the [LURC staff/consultant recommendation] address or consider adverse social or economic impacts.

The [LURC staff/consultant recommendation] has failed to consider or test the adverse ecological, economic and social impacts of the overall plan at the rezoning stage. The cumulative impacts of the proposed developments are not addressed. LURC's own language suggests that the proposed CP will have adverse impacts, even with the recommendations in place (pg 107, rt column, end of 1st pgh).

Nor does it evaluate the specifications within the existing CLUP that require adequate protection of the following resources: cultural, air, archaeological, geological, historical, recreational, water and wetland, wildlife, or fisheries.

(p. 8)

[Regarding specific concept plan cons:]

- Makes no reduction to the 2,025 allowed housing units and in fact, allows up to 2,000 of these to be individual house lots …

- Unlimited # of employee, caretaker, manager and so-called "affordable" housing units in certain development areas. This could mean an addition of over 1,000 more residents than what the development itself would bring!

STAFF/CONSULTANT DISCUSSION AND RECOMMENDATIONS

► DISCUSSION

Based on comments received, staff/consultants offer the following analysis:

Total number of units

The total number of residential and resort accommodation units proposed by Plum Creek is unchanged at 2,025 (plus caretaker/manager housing, as well as required employee housing units and affordable housing units, which may or may not be located within the Concept Plan area). However, the distribution of potential units between "residential units" and "resort accommodation units" changed as a result of combining certain zones and providing options for residential and resort units at Lily Bay and Moose Bay. The Concept Plan, if it were to be changed based upon the June 4th Commission-generated amendments, would include the following restrictions regarding the total number of units that could be built within the plan area during the 30-year term of the Concept Plan:

- Beaver Cove 32 residential units (estimated, potential receiving area)
- Upper Wilson Pond 32 residential units (capped)
- Lily Bay 404 residential or resort accommodation units (capped)
- Big Moose Mountain 800 resort accommodation units (capped, but potential receiving area for residential units)
- Moose Bay 112 residential units (estimated, potential receiving area for residential units, also potential receiving area for some of the 800 resort accommodation units from Big Moose Mountain)
- D-CI Zone 0 units (capped)
- Route 6/15 Corridor 125 residential units (estimated, potential receiving area)
- Rockwood/Blue Ridge 160 residential units (estimated, potential receiving area)
- Brassua Lake 250 residential units (capped)
- Long Pond 55 residential units (capped)

Based on comments received, staff/consultants conclude that Lily Bay should revert from a residential/resort optional zone to a resort zone, in which the 404 units (capped) would be considered resort accommodation units. *See* Tab 5.

Based on comments received, staff/consultants also conclude that allowing Brassua Lake's south peninsula to serve up to 300 residential units is acceptable. *See* Tab 10.

Cumulative impacts

Several parties have asserted throughout the proceedings and continue to assert in their comments that 2,025 units will exceed the capacity of the Concept Plan area or Moosehead Lake region when considering their cumulative impact on the Commission's principal values, including the region's natural character and remoteness, its wildlife, and its recreational opportunities Cumulative impacts, as these parties suggest, need to be judged against the Commission's four principal values. These values (CLUP, p. 114), and staff/consultants' summary view of the record addressing them, are as follows:

The economic value of the jurisdiction for fiber and food production, particularly the tradition of a working forest, on private lands

Staff/consultants conclude that the Concept Plan, if amended based on the staff/consultant recommendations set forth in this document, will be an effective means of protecting the economic value of the Moosehead Lake region for fiber production.

The Concept Plan would include enforceable, permanent conservation easements covering more than 360,000 acres of working forest, with strict limits on subdivision/parcelization of these lands. Conversely, in the absence of the Concept Plan, the record indicates potential for incremental, relatively unplanned erosion of the forest through development and parcelization. Staff/consultants conclude that the protection afforded the working forest is significantly greater with the Concept Plan, as proposed to be amended herein, and the potential for adverse cumulative impacts is significantly greater without it. (See, *e.g.*, Bley et al, Aug. 31, pp. 5-9; Wagner, Aug. 31, 2007, pp. 2-7; Lumbert, Aug. 31, 2007, p. 2, Brochu, Aug. 31, 2007, p. 1, Somerset Economic Development Corporation, March 7, 2008, pp. 13-14, Piscataquis County Economic Development Council, March 7, 2008, pp. 9-12)

Diverse and abundant recreational opportunities, particularly for primitive pursuits

The record contains competing arguments on the impact of the Concept Plan on primitive recreational uses. At the level of the Concept Plan area as a whole, some parties assert that the more than 360,000 acres of permanent, enforceable conservation easements with guaranteed public access and the fee transfer and subsequent protection of the 29,500-acre Roaches property will be a boon to traditional outdoor recreational pursuits, and will remove their greatest fear of the future, namely parcelization of the landscape and future denial of access to these lands for recreational activities.[10] (See, *e.g.*, Rust, Aug. 31, p. 6, Kleiner, Aug. 31, pp. 3-4, Legere, Aug. 31, p. 2) Other parties assert that the proposed development in the Concept Plan will have an undue adverse impact on existing primitive recreational uses and settings, both as a result of direct impacts on specific resources and as a result of the cumulative impacts of increased use of "wilderness destinations." For example, MA/NRCM witness Costas Christ projected that at build-out, on an average summer day, there would be 287 vehicles carrying 576 people to "wilderness destinations" throughout the region as a result of the Concept Plan's development (Christ, Aug. 31, p. 7) and MRFC contends that the proposed development would cause undue adverse impacts to nature-based tourism opportunities in the Moosehead Lake region. (*See, e.g.,* Neily, Aug. 31, *Plan adverse impacts to the Moosehead brand of nature tourism: site specific and easement*)

The record also makes clear that, while the Concept Plan's development will potentially compromise primitive recreational activities in some locations in and adjacent to development areas as a result of increased use (such as Big Moose Mountain, Indian Pond and East Outlet) (Daigle, Aug. 31, p. 22), the Plan will simultaneously protect or enhance primitive pursuits as a result of: (1) permanent conservation easements covering large backcountry areas providing, *inter alia*, pedestrian public access and camping rights and including protection around remote ponds and shorelines of lakes and rivers important to canoeing and kayaking; (2) grants of guaranteed public access to trails; and (3) grants of vehicular access on 57 miles of private roads leading to important primitive recreational destinations. According to LURC consultant Mark Anderson, the tipping point between whether the Concept Plan would enhance or degrade primitive recreational opportunities overall rests primarily on whether:

- Both the Balance and Legacy conservation easements are consummated;
- Hiking trails are constructed;
- If 800 residential units are constructed at Big Moose Mountain and 404 at Lily Bay, these residential units are part of a resort complex that provides recreational amenities to both attract and hold visitors within resort boundaries;

[10] *Cf.* earlier versions of Plum Creek's Concept Plan proposal, which provided an enforceable conservation easement on a single block of 61,000 acres and on 11,000 additional acres of trails, river corridor, and lake shorelines (April 2006 Concept Plan).

- Additional recreational resources, such as signage and appropriate capital investments, are provided to service additional recreational demand as it develops; and
- Public access to lands under conservation easement is guaranteed, versus subject to limitation at Plum Creek's discretion.

(Anderson, Aug. 31, pp. 2-26)

Staff/consultants conclude that a Concept Plan, as amended by the staff/consultant recommendations set forth herein, satisfies the above contingencies. Specifically:

- Along with the approximately 95,000-acre Balance easement, the 266,000-acre Legacy conservation easement and the 29,500-acre Roaches property fee transfer with subsequent protective conservation easement have now become certain, enforceable elements of the Concept Plan. (*See* Tabs 23, 54, 57)
- Trail easements (with an area equivalent to 67 miles x 15 feet) will be provided to BPL , along with donated trailhead parking areas and an upfront $1 million grant to BPL for construction and maintenance of hiking trails, all as a certain, enforceable element of the Concept Plan. (*See* Tab 61)
- A diverse board will be in charge of a Moosehead Recreation Fund that should have significant monies flowing into it. (*See* Tabs 63, 64)
- Although resort development is not guaranteed, the 800 residential units proposed for Big Moose Mountain and the 404 for Lily Bay can only occur if resort cores are part of the development plans from the beginning, to provide the management structure and the recreational amenities that both attract and hold visitors within resort boundaries.
- Public access to approximately 390,000 acres is guaranteed via the execution of the Balance, Legacy and Roaches conservation easements. Further, as development areas receive their permits, guaranteed vehicular access to 57 miles of roads leading to primitive recreational destinations would be established (*see* Tab 62).

In addition to meeting these parameters laid out by consultant Anderson, the Concept Plan requires that subdivisions within development areas provide recreational amenities designed to help satisfy a share of new residents' recreational demands on site, without overburdening destinations elsewhere in the region.

With these elements part of the Concept Plan, staff/consultants conclude that the cumulative impact on this principal value of diverse and abundant recreational opportunities, particularly for primitive pursuits, will not be unduly adversely affected.

<u>Diverse, abundant and unique high-value natural resources and features</u>

Parties have raised concerns throughout the proceeding that the numerous unique high-value natural resources present within the Concept Plan area (e.g., wildlife and plant resources, water and wetland resources, and scenic resources) would be adversely affected as a result of the cumulative impacts of the intensity and/or location of development proposed. With each of these identified resources and features, staff/consultants evaluated whether adverse impacts would occur and, if so, whether such impacts could be avoided and/or minimized or whether appropriate mitigation measures were in place for those adverse impacts that were unavoidable.

Staff/consultants conclude that the intensity of development contemplated by the Concept Plan in the locations proposed will result in no cumulative adverse impacts on natural resources and features *so long as* the avoidance, minimization and mitigation approaches included in the June 4th Commission-generated amendments, as amended herein are implemented. These approaches, among others, include:

- Excluding from development certain areas with known high-value natural resources (e.g., north shore of Long Pond, and portions of the south shore of Long Pond, Moose Bay, Moose Mountain, Brassua Lake south peninsula, and Lily Bay development areas);
- Applying enhanced "no disturbance" buffers to certain natural resources (e.g., Burgess Brook at Lily Bay);
- Limiting shoreland structures and requiring common water access points to serve certain development areas;

- Applying adaptive management techniques to address potential traffic and other fragmentation impacts on wildlife (e.g., *see* Tab 5);
- Easement terms that will ensure that critical wildlife and other conservation values, such as providing wildlife refugia within large blocks of habitat are achieved; and
- Establishing rigorous review processes at the area-specific level (via long-term plan review) and/or the site-specific level (via subdivision/development permit review), which will require natural resource inventory submissions and compliance with customized land use standards.[11]

These provisions, combined with well understood performance standards applied at project permitting stages and the hard-boundary containment of development within areas surrounded by landscape-level conservation easements, lead staff/consultants to conclude that cumulative impacts on high value natural resources and features will not be unduly adverse.

Natural character, which includes the uniqueness of a vast forested area that is largely undeveloped and remote from population centers: Location of development impacts

The Moosehead Lake region is one of the jurisdiction's four areas where roads, services and jobs are available but that also have high natural resource values, qualifying them as "areas with special planning needs."[12] (CLUP, pp. 110, 115) At this broadest jurisdiction-scale level, the region overall is accessible and under development pressure; consequently "[t]he challenge for the Commission is to allow growth to be accommodated in these areas without compromising the resources that make them so special." (CLUP, p. 113)

Considering the Moosehead Lake region itself, the region has a varied profile: a combination of organized municipalities, fringe communities (townships contiguous with municipalities that have local land use control), communities with established patterns of settlement, typically near public roads, and townships that are part of the jurisdiction's interior. The interior townships are distant from population centers, established settlements, and roads and other public services, and are remote. At this level of consideration, the Concept Plan area contains extensive remote territory, all of which will be subject to permanent conservation easements. Most of the Concept Plan's proposed development areas are confined to townships or communities that either are fringe communities, contain an established pattern of development, and/or have a major public road within their boundaries; the exception is the westernmost part of the proposed Big Moose Mountain development area.[13]

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[11] Resource protection laws and rules applied at the site-specific level -- long-term plan and subdivision/development review phases -- are specifically designed to minimize impacts on resources such as water quality, specific types of habitat, and ground water. For resources vulnerable to cumulative impacts, projects are required to avoid them though the application of best management practices at the source of impact – for example, stormwater runoff and sedimentation controls to protect water quality and buffers, and corridors to protect specific wildlife habitats and movements. Where staff/consultants have determined that existing site-specific LURC rules and review processes would not sufficiently address certain impacts, new standards and processes have been recommended. For example, the June 4th Commission-generated amendments direct staff/consultants to prepare scenic standards that will screen the appearance of hillside development, both individually and cumulatively, from areas with public values while allowing for filtered views from development (*see* Tab 15*).* The record testimony conclusively shows that Concept Plan approval and rezoning is not understood by Plum Creek or anyone else as approval of any particular development project, and that each development area and project must ultimately submit detailed information at the time of permit applications and be judged against, *inter alia,* the Commission's "harmonious fit" criterion (Section 10.24 of the Commission's Land Use Districts and Standards).

[12] The other three areas are Rangeley, Millinocket, and Carrabassett Valley.

[13] *Cf.* earlier versions of the Concept Plan, which proposed development in at least six townships in the interior of the jurisdiction.

One indicator of the presence of natural character and remoteness is whether an area meets the Commission's "adjacency" criterion (i.e., proximate to existing, compatibly developed areas).[14] At this level of consideration, land that is not part of the jurisdiction's large remote interior but is non-adjacent may have qualities of remoteness that contribute to the natural character of the jurisdiction. Analysis by staff/consultants determined that approximately 435 of the proposed 2,025 units in the Concept Plan would meet the standard of adjacency, while 1,590 would not (of these, 180 are in the shoreland area of a management class 3 lake where adjacency is waived).[15] Based on the record developed in the public and party hearings, staff/consultants have concluded that, with two exceptions, a waiver of the adjacency criterion is appropriate for these non-adjacent units because these units are: (1) appropriately located near management class 3 lakes; (2) proximate to the region's public road system and within reasonable distance of public services (e.g., public electricity, solid waste disposal facilities); or (3) resort accommodation units that are part of appropriately located resort zones. The exceptions were lots on the northeast shore of Long Pond and lots in the highlands of the Lily Bay peninsula. The June 4th Commission-generated amendments eliminated the Long Pond north shore development area and reduced the size of the Lily Bay development area by about 60%, moving it out of the ridgeland area.[16]

Staff/consultants note that, for any development granted a waiver of adjacency as allowed under a concept plan, the Commission must compensate the for this waiver by requiring comparable conservation measures, which staff/consultants conclude would occur with implementation of the June 4th Commission-generated amendments.

Natural character, which includes the uniqueness of a vast forested area that is largely undeveloped and remote from population centers: Intensity of development impacts

While staff/consultants conclude that the locations of development areas, as revised, do not unduly compromise the principal value of natural character and remoteness, the question remains as to whether the activity that emanates from 2,025 residential and resort units will cumulatively have off-site effects that threaten the remote character of the larger region. Staff/consultants' view is that the answer rests in conclusions concerning impacts to the other principal values that depend on and are enhanced by the natural character of remoteness. Staff/consultants previously concluded that the Concept Plan will, *inter alia,*:

- reasonably protect a large, intact forest and will conserve its value for fiber production;
- with all of the elements of the Concept Plan in place, reasonably promote a diversity of recreational opportunity and protect primitive recreational opportunities and settings; and
- through both landscape-level conservation and protective measures within development areas, reasonably protect high value natural resources and features of the region.

The record indicates that the sum of these assets (a large, intact forest, protected primitive recreational opportunities, and landscape-level conservation that protects high value features of the region, ranging from close-in resources like Prong Pond to remote resources like the Roaches property) constitutes a very large carrying capacity for human

[14] The shorelines of management class 3 lakes – including Brassua, Long Pond, and Indian Pond in the Concept Plan area – are generally not subject to the policy of adjacency. (CLUP, p. C-7) And in Concept Plans, the Commission may waive adjacency if the plan includes comparable conservation measures. (Ch. 10, sec. 10.23,H, 6,d)

[15] *See* staff/consultant report, "A Comparison of Development Elements of Plum Creek's Moosehead Region Concept Plan Proposal to the Commission's Adjacency Principle" (November 5, 2007)

[16] Previous revisions to the Concept Plan, occurring prior to the current Concept Plan before the Commission, moved development from a number of locations that staff/consultants believed compromised remote qualities of the jurisdiction, including lots at (1) Big W Township; (2) the north shores of the western and middle "rooms" of Long Pond; (3) the north shore of Brassua Lake; (4) the shores of pristine ponds in four remote townships; (5) the Moose River; (6) Prong Pond; and (7) the non-adjacent, east side of Upper Wilson Pond.

activity compared with the number of visitors the record indicates will be traveling to different parts of the region at any one time. (Daigle, Sept. 24, 2007, p. 2; see Christ, Aug. 31, 2007, p. 7 for one projection of visitor travel to remote areas) There is a likelihood that some resources such as the north end of Indian Pond, which may not be literally "remote" but possess remote qualities (valued for primitive recreation, limited probability of interacting with others, etc.) will shift in character (see, e.g., Cochrane, Aug. 31, 2007, p. 2). However, the larger region offers suitable alternative locations for recreationists in search of such remote qualities. Many of these alternative locations will be permanently protected, and consequently overall impacts will be mitigated. (see, e.g., Daigle, Sept. 24, p. 3; Cole, Aug. 31, 2007, p. 3) In addition, landscape and resource level protections that offer refugia for primitive and traditional recreationists will offer refugia for wildlife, minimizing the impacts of this level of development if the conservation lands are managed properly (Elowe, July 11, 2008, pp. 2-3).

In sum, off-site impacts caused by activity emanating from the proposed development areas will be dispersed across a conserved landscape that is large enough and diverse enough in its offerings to absorb such activity. Thus, staff/consultants conclude that, for the Concept Plan area as a whole, cumulative impacts from the proposed intensity of development can be absorbed without undue adverse impact on the natural character of the region.

Demonstrated need

A number of parties have stated in their comments that Plum Creek has not demonstrated a need for this scale of development. Staff/consultants offer the following in response:

Staff/consultants believe that the proposed Resource Plan Protection (P-RP) subdistrict must be considered both for its development and conservation components in evaluating whether the rezoning meets a demonstrated need in the area.[17] These development and conservation components have a strong nexus to each other, not merely in the regulatory sense that conservation may provide "comparable conservation," a particular public benefit, or mitigation, but rather in meeting the most basic need of the Moosehead Lake region, as identified in the CLUP: long-term, orderly growth that balances resource protection and appropriate development. (CLUP, pp. 113, 119, 126, 140-141) This need is acute in "areas of special planning needs" such as the Moosehead Lake region.

Some of the individual factors that are used as guidelines to measure demonstrated need – *e.g.*, economic benefit, impact on community services, support for forestry, and support for natural resource-based economic development [18] – are components of the balance between resource protection and appropriate development. In these regards, the record leads staff/consultants to conclude that:

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[17] Staff/consultants note that, in previous Commission decisions to rezone lands to a P-RP subdistrict for purposes of implementing a concept plan, the Commission's interpretation of the demonstrated need criterion has varied and, in some cases, has not been applied as a regulatory test. To the extent the Commission finds this statutory criterion relevant to this rezoning petition, staff/consultants believe that the uniqueness of this concept plan proposal justifies deviation from certain of the Commission's past applications of this criterion. In the context of this unprecedented landscape-scale concept plan (and other such long-term, prospective zoning schemes), the criterion of "demonstrated need" cannot reasonably be understood as referring to each individual development area standing or falling on its own, nor only to economic needs, but also to the need for rezoning that will ensure the protection of resources and sound management of the uses of those resources. The Rangeley region prospective zoning plan recognized this. It sought to anticipate long-term (20-year) need for development, but thought about "demonstrated need" in different terms than under the usual "reactive" zoning process, in which the Commission is responding to case-by-case requests to rezone particular parcels of land for development. "The challenge of planning is to shape the course of development toward a desired outcome rather than merely to respond to demand and development pressures." (Rangeley plan at p. 20)

[18] See the Commission's guidance document on demonstrated need, "Clarifying the Rezoning Criterion Demonstrated Need" (April 2004)

- The rezoning will provide strong, long-term support for forestry, relieving fears of gradual fragmentation (from piecemeal development, creation of kingdom lots, etc.) and the resulting loss of reliable sources of raw material for the local wood products industries;

- The rezoning will produce some level of long-term jobs, but the economic benefits are considerably less certain than Plum Creek has presented in its application, primarily because of uncertainty around the proposed resorts;

- The rezoning will not unduly stress community services, because (1) implementation of the Concept Plan will be over a number of years; (2) as development is put into place, it will produce tax revenues that will exceed the costs of the services demanded; (3) capacity to provide services exists in the region or, with tax revenues derived, can enhance those services that today would be insufficient at build-out (as appears to be the case with fire protection service in the Rockwood area, for example); (4) subdivision roads will be private and self-maintained; and (5) the development will be required, in the case of the resorts, to self-provide or directly pay for the services it needs, including fire, solid waste management, water supply, road maintenance and wastewater disposal; and

- The rezoning, as discussed under cumulative impacts, above, and at Tab 5, will support a natural resource-based, tourist economy through its conservation and trail easements and guaranteed public access to resources upon which this economy depends. At the same time, it will displace some primitive recreational opportunities. However, the weight of the evidence indicates that the Concept Plan, as amended by the staff/consultant recommendations herein, will provide a net benefit to this sector and will not preempt other opportunities for nature-based tourism.

In addition to these showings of demonstrated need, staff/consultants believe that this Concept Plan meets the demonstrated long-term community need for orderly growth and further meets the demonstrated need of striking a balance between appropriate development and protection of natural resources, based on, *inter alia,:*

(1) staff/consultants' conclusions regarding the appropriateness of locations of development (see above discussion on cumulative impacts);

(2) the hard, permanent boundaries of conservation lands that envelop the development areas;

(3) long-term growth trends that have led the Commission to identify the Moosehead Lake region as an area of special planning needs; and

(4) the predictability that the Concept Plan will yield both for growth and conservation, staff/consultants conclude that it will.

► RECOMMENDATIONS

Based on the discussion above, staff/consultants offer the following recommendations:

Total number of units (residential and resort accommodation units) capped at 2,025 and distributed as follows:

- Beaver Cove 32 residential units (estimated, potential receiving area)
- Upper Wilson Pond 32 residential units (capped)
- Lily Bay 404 resort accommodation units (capped)
- Big Moose Mountain 800 resort accommodation units (capped, but potential receiving area for residential units)
- Moose Bay 112 residential units (estimated, potential receiving area for residential units, also potential receiving area for some of the 800 resort accommodation units from Big Moose Mountain)
- D-CI Zone 0 units (capped)
- Route 6/15 Corridor 125 residential units (estimated, potential receiving area)
- Rockwood/Blue Ridge 160 residential units (estimated, potential receiving area)
- Brassua Lake 300 residential units (capped)
- Long Pond 55 residential units (capped)

13

LAND USE ZONING (PERMITTED USES)

COMMENTING PARTIES

- ► Petitioner Plum Creek
- ► Intervenors and Interested Persons
  - GrowSmart Maine
  - Moosehead Region Futures Committee
  - Native Forest Network

(pp. 18-19)

Plum Creek's intent is to allow reasonable commercial development located in the residential development zones consistent with the residential development use. Plum Creek understands this to be the Commission's intent, as well.

Plum Creek agrees with LURC's intent of combining zones into one and applying it to those development areas referenced. There are important issues that require clarification and potentially modification to LURC's approach. For example, the language pertaining to residential-scale commercial facilities and uses (footnote 54, page 47) lacks specifics and requires clarification. Additional language will need to be agreed upon, probably including an enumeration of allowed uses and a clear distinction between commercial uses and subdivision amenities. Some important uses previously found in the D-GN3M zone are not mentioned, such as on-site caretaker or manager housing servicing residential subdivision community needs or amenities could be classified as" other uses compatible with residential development" but it is not clear that this use is allowed or not. Previously, structures and uses that serve community or residential subdivision needs such as clubhouses or gathering places for recreational or social functions less than 5,000 square feet and community swimming pools, were allowed. The size of commercial uses has been reduced from 2,500 square feet to 1,500 square feet. Plum Creek believes this may be too limiting for future needs in certain locations. It is unclear what it means for all commercial uses to be allowed only by special exception, rather than some with or without a permit, and others by special exception.

At the Brassua Lake South Peninsula and Rockwood/Blue Ridge development areas, some of the uses previously listed in the previous D-GN3M zone need to be listed as allowed used here, such as on-site caretaker or manager housing servicing residential subdivisions. Structures and uses larger than 1,500 square feet are potentially needed to serve community or residential subdivision needs such as a previously enumerated use of clubhouses or gathering places for recreational or social functions provided such structures do not contain more than 5,000 square feet of floor space per structure and community swimming pools.

Requiring a special exception permit for any residential scale commercial development does not provide the certainty that is needed to properly plan for these areas. In addition to these specific concerns it is important for Plum Creek to have a clear understanding of the range of the uses that would be allowed, or not allowed in these new zones

Plum Creek agrees with LURC's intent of combining and creating these 3 new resort related zones and applying it to the development areas referenced in the above paragraph. However there are important issues that require modification to LURC's approach. It is not clear what LURC means by saying that nature-based resort related commercial facilities and uses must be compatible – in terms of type, scale and design – with the character, natural and cultural values of the surrounding area. Specific to the D-MH-RT zone Plum Creek believes that the language pertaining to Nature-based resort related commercial facilities (as stated in footnote 55 on page 48) does not provide ample flexibility or certainty.

► GrowSmart Maine (p. 3)

[Regarding improved smart growth adherence with Principle #1. Location of Development: Proximity to Existing/Future Development and Infrastructure & Services:]

- [Commission-generated amendments] remove some incompatible commercial uses from Residential zones and eliminate some Commercial zones altogether that are distant from established centers.

[Regarding improved smart growth adherence with Principle #3. Create Economic and Land Use Diversity: Mix and Balance of Uses:]

- [Commission-generated amendments] retain mixed use residential and compatibly-scaled commercial/retail in appropriate development zones.

► Moosehead Region Futures Committee (pp. 5-6)

The LURC-generated amendments replace three types of residential/commercial zones proposed by Plum Creek (D-GN3M, D-RS2M, D-RS3M) with a single broadly-defined zone (D-MHRS1). The MRFC Steering Committee believes that uses allowed without a permit, uses requiring a permit, and uses allowed by special exception must be explicitly defined in the final language describing this zone. In particular:

1) Allowable public/civic structures and uses must be explicitly defined and a maximum aggregate acreage for such structures and uses must be specified for each development area. We are concerned that facilities such as banks and nursing homes might be interpreted as falling under "public/civic structures and uses". Unless further definition is provided, this category could serve as a loophole leading to expansion of commercial development beyond established limits.
2) Other uses compatible with residential development must be explicitly defined.

In a rezoning application, it is important that language describing new zones be as explicit as possible. Plum Creek is proposing development of an unprecedented scale that will have considerable impacts on the Moosehead region. In each development area, allowable uses must be clearly and unambiguously defined prior to concept plan approval. Otherwise, interpretation of vague, ambiguous language by future LURC staff, Commissioners, or developers may lead to adverse impacts that are not intended by the current Commission.

Submission of natural resources inventory maps at the time of site-specific development application:

The LURC-generated amendments would require that, at the time of subdivision or other site-specific development application, the applicant submit natural resources inventory maps of the proposed development area (LURC-generated amendments, June 4, 2008, page 52). The MRFC Steering Committee believes that MDIFW/MNAP should approve the natural resource professional who will prepare these maps, and should review and approve the completed maps prior to development application approval.

► Native Forest Network (p. 8)

[Regarding specific concept plan cons:]

- Eliminates ability to rezone development areas to protection subdistricts for the 30 year life of plan.

STAFF/CONSULTANT DISCUSSION AND RECOMMENDATIONS

► DISCUSSION

Based on comments received, staff/consultants offer the following analysis:

- Regarding permitted uses in the residential development zone (D-MH-RS1):

  The intent of the June 4th Commission-generated amendments concerning allowable uses in the simplified single residential development zone set forth in those amendments was to allow, in certain development areas, a level of mixed use to serve some of the everyday needs of residents and to allow opportunities for work space close to homes, while maintaining a residential scale and an environment compatible with the primary residential uses. Both Plum Creek and other parties seek more clarity on uses that were included as part of general language in the June 4th Commission-generated amendments. While staff/consultants recommended, and continue to recommend, that the exact language of these provisions should be regarded as a second tier issue (as explained in the Commission-generated amendments at p. 130), it is reasonable to provide greater explanation of intent in the recommendations below.

  Even with the development of implementing language, however, it is never possible to capture in a single list all of the permutations of uses and activities that arise over time. Therefore, in this zone staff/consultants continue to favor employing special exceptions for permitting uses that are acceptable, but whose scale or design might be potentially incompatible with residences. Allowing uses by special exception is not a device to thwart the permitting of a given use or category of uses that is part of the zoning scheme, but is a mechanism to assure the compatibility of the use; special exception means the Commission can require buffers and impose other conditions that the Commission may consider necessary to minimize impacts on surrounding residences and other uses.

  The June 4th Commission-generated amendments established the maximum size of a major home occupation (1,500 square feet, as defined in Chapter 10 of the Commission's rules), as the benchmark for "residential scale commercial facilities and uses," but staff/consultants agree that a somewhat larger, freestanding structure (e.g., 2,500 square feet) can be of residential scale as well.

- Regarding nature-based resort-related commercial facilities and uses within the Residential/Resort-optional Development (D-MH-RS2) and Resort Development (D-MH-RT) zones:

  In addition to resort accommodation units, it is the intent of the June 4th Commission-generated amendments to allow within a resort core, as part of a long-term development plan:

  (1) the essential services and infrastructure necessary to support the resort and allow it to be operated safely, conveniently, and efficiently;
  (2) recreational uses and facilities, both commercial and non-commercial and both natural and developed, provided they are compatible in type, scale and design with a nature-based destination; and
  (3) hospitality amenities commonly associated with nature-based resorts and tourist facilities, including those that are commercially operated, provided they are compatible in type, scale and design with a nature-based destination.

  While staff/consultants anticipate that the style of the resort cores, based on the record, will be nature-based – that is, involving experiences that are directly or indirectly dependent on the natural environment and require a land or water base, such as Nordic skiing, boating, and nature watching, but not experiences that are independent of the natural environment, such as amusement parks – staff/consultants also understand the resorts will include commercial recreation facilities that substantially alter the natural environment, such as golf courses, although

always within a context that protects scenic quality and always complying with environmental and other subdivision and development standards of the Commission. Staff/consultants anticipate that the resorts will have the physical, environmental, and managerial characteristics that would place them in the "rural" part of the Recreation Opportunity Spectrum, as explained on the record by consultants Mark Anderson, John Daigle, and Jim Palmer.

In the judgment of staff/consultants, for land use zones that will likely be quite customized, it is not possible to arrive at a comprehensive, *a priori* list of specific uses that does not either needlessly restrict the types of uses that may be appropriate for a resort or open the door too widely to uses that may be inappropriate to the character of the area. Therefore, staff/consultants continue to favor developing, as part of the Second Tier process, a relatively short list of permitted use categories and allowing an applicant to present the full set of uses that will be proposed for the resort zones as part of a long-term development plan (akin to the Commission's Planned Development (D-PD) subdistrict approach) for review and approval by the Commission. All uses approved in the long-term development plan would then become the full list of permitted uses.

► RECOMMENDATIONS

Based on the discussion above, staff/consultants offer the following recommendations:

- Regarding the Residential Development (D-MH-RS1) zone:

  In the context of the June 4th Commission-generated amendment (p. 47) that creates one zone to accommodate residential development and residential-scale commercial development by special exception in certain development areas, this zone:

  - Allows residential development (including single-family dwellings, duplexes, and multi-family dwellings) and affordable housing, as well as public/institutional uses[1], home occupations and other uses compatible with residential development[2].

  - In certain development areas, allows residential-scale commercial facilities and uses[3] by special exception[4], imposes gross floor area restrictions on such facilities and uses, and limits land devoted to commercial uses in each development area to a maximum aggregate acreage.

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[1] "Public/institutional uses" refers to uses such as places of worship and other religious institutions, day schools, non-profit day care and adult day service facilities, libraries, fire stations and public safety buildings, post offices, community centers, parks, playgrounds, and essential public services.

[2] "Other uses compatible with residential development" refers to uses that support or are amenities for residential development, such as on-site caretaker or manager housing, clubhouses or gathering places for recreational or social functions (in structures of no more than 5,000 square feet of floor space per structure), and community swimming pools, equestrian facilities, and similar recreational facilities.

[3] "Residential-scale commercial facilities and uses" means businesses of limited size that sell everyday goods and services primarily to residents or visitors of the immediate area or that are small-scale businesses, located in structures with a residential appearance. Examples include freestanding retail stores of up to 2,500 square feet of gross floor area that sell convenience goods and services (such as a general store, coffee shop, beauty salon, day spa or Laundromat); business space for artisans, tradespeople or professional occupations with no more than 2,500 square feet of gross floor area; and nature-based recreational service businesses of limited size (such as a commercial guide service, small-scale commercial marina, or canoe/kayak rental office).

Development areas affected by this zone would be:

- Beaver Cove
- Upper Wilson Pond
- Long Pond – Southeast Shore
- Long Pond – Southwest Shore
- Brassua Lake Northeast Shore
- Brassua Lake South Peninsula*
  (land for commercial uses limited to max. aggregate size of 50 acres)
- Route 6/15 Corridor*
  (land for commercial uses limited to max. aggregate size of 50 acres)
- Rockwood/Blue Ridge*
  (land for commercial uses unlimited within 1000 feet of Route 6/15 near Rockwood Village, and land limited to max. aggregate size of 25 acres elsewhere)

** Residential-scale commercial structures and uses would be allowed uses by special exception in these development areas.*

- Regarding nature-based resort-related commercial facilities and uses within the Residential/Resort-optional Development (D-MH-RS2) and Resort Development (D-MH-RT) zones

  With the clarification included in the discussion above, staff/consultants recommend no changes to these June 4th Commission-generated amendments.

[4] In a special exception application, the applicant would show that the use can be appropriately buffered from other uses in the zone and can meet such other conditions that the Commission may reasonably impose in accordance with its policies and standards.

14

PLANNING AND DESIGN COMPONENTS WITHIN DEVELOPMENT AREAS

COMMENTING PARTIES

- Petitioner Plum Creek
- Intervenors and Interested Persons
  - GrowSmart Maine
  - Native Forest Network
- Governmental Review Agencies
  - Maine Department of Inland Fisheries and Wildlife and Maine Natural Areas Program
  - Maine State Housing Authority

COMMENTS FILED BY THE PETITIONER

(p. 16)

[Regarding the long-term development plan:]

These requirements[1] should only apply to the Brassua Development Area and the Rockwood / Blue Ridge Development Area (see Reservation of Excess Lands on pages 34, 39, 57).

COMMENTS FILED BY INTERVENORS AND INTERESTED PERSONS

► GrowSmart Maine

(p. 2)

Second, we remain concerned that the Commission could miss the opportunity to insert into the Concept Plan planning mechanisms that provide enough design flexibility but also provide strong guidance as to necessary expectations for the configuration/form and quality of development that should result. Even with the enhancements suggested in the Commission-generated amendments, the Sub-Chapter III, Land Use Standards portion of Chapter 10 and the provisions for the newly prescribed Long-Term Development Plan process remain inadequate to address the Site Context and Design aspects as they would apply to the Concept Plan. Good, quality development outcomes are still left more to chance than design. We reiterate our prior testimony and comments concerning the form of development, particularly with respect to setting maximum lot sizes, the use of conservation and/or cluster subdivisions and setting guidance on the relationship of proposed new development to existing development. The four objectives prescribed in the Long-Term Development Plan process do not provide enough substantive guidance to ensure those results.

(pp. 3-5)

[Regarding improved smart growth adherence with Principle #1. Location of Development: Proximity to Existing/Future Development and Infrastructure & Services:]

- [Commission-generated amendments] require employee housing to meet the demand created by a resort core, if developed, within the development zone. (p. 3)

[Regarding improved smart growth adherence with Principle #2. Build Community: Site Context and Design:}

- [Commission-generated amendments] require long-term development plans for certain areas which address some internal design aspects within and between subdivisions in development zones (connectivity of circulation and open space, for instance). (p. 3)

[1] Promotes efficient use of land by demonstrating that … (b) where the size of the development area warrants, sufficient land remains both undeveloped and legally available for development in the development area to meet community needs that may exist following the termination of the Concept Plan; (Objective 1b on page 55) Identification and quantification of developable land within the development area that will be located outside of proposed subdivisions and other proposed development project boundaries and that will be available to meet needs beyond the 30-year Concept Plan period, as may be determined by the Commission, consistent with the minimum land reservation requirements (Item #6 on Page 57)

[Regarding remaining smart growth weaknesses with Principle #2. Build Community: Site Context and Design:}

- The Long-term Development Plan process, as described in the [Commission-generated amendments], does not adequately address site design and context issues with adequate detail nor address proposed development's external context. (p. 3)

- Through reliance on albeit enhanced Chapter 10 standards and regulations, [Commission-generated amendments] fail to adequately address context of new development adjacent to existing development. (p. 3)

- [Commission-generated amendments] do not ensure reduced/minimum footprint of land consumption/ fragmentation occurs and instead fail to make provision for maximum lot sizes for residential development. (p. 3)

[Regarding improved smart growth adherence with Principle #3. Create Economic and Land Use Diversity: Mix and Balance of Uses:}

- [Commission-generated amendments] require employee housing to meet the demand created by a resort core, if developed, within the development zone, furthering a mix and balance of uses. (p. 3)

- [Commission-generated amendments] strengthen the provisions related to creation and funding of trails and other recreational opportunities outside of development zones as well as within subdivisions through the Long-term Development Plan process objectives. (p. 4)

[Regarding remaining smart growth weaknesses with Principle #3. Create Economic and Land Use Diversity: Mix and Balance of Uses:}

- [Commission-generated amendments] fail to address the issue of housing diversity (housing types, lot sizes, etc) within residential subdivisions. (p. 4)

[Regarding improved smart growth adherence with Principle #5. Collaborative Process and Predictable Decision-making:]

- [Commission-generated amendments] introduce the concept of a two-step Long-term Development Plan process for the six specified development zones that allow for mixed use which has the potential to provide a more predictable, quality outcome for these zones (see associated 'Remaining Weakness' below). (p. 4)

[Regarding remaining smart growth weaknesses with Principle #5. Collaborative Process and Predictable Decision-making:]

- The four objectives described as part of the Long-term Development Plan process are inadequate to predictably ensure quality development applications as well as quality development outcomes. (p. 4)

- Existing Chapter 10 LURC development standards and regulations and the suggested [Commission-generated amendments] enhancements remain inadequate on the quality of resulting development desired (relationship of new development to existing development, for example). (p. 4)

[Regarding improved smart growth adherence with Principle #6. Provide Accessibility and Mobility Choices: Reducing Auto Dependency:]

- [Commission-generated amendments] require meeting created demand for employee housing by resort cores, if they are developed. (p. 5)

[Regarding remaining smart growth weaknesses with Principle #6. Provide Accessibility and Mobility Choices: Reducing Auto Dependency:]

- [Commission-generated amendments] do not adequately address the aggregate form of development within development zones that could positively contribute to the future viability of transit alternatives (such as a Moosehead Explorer bus system). (p. 5)

► Native Forest Network

(pp. 2-3)

[On mitigation of impacts:]

Instead of deciding that the adverse impacts from the plan as a whole would outweigh mitigation efforts, LURC has chosen to …[i]ncrementally assess impacts vs. mitigation in a fractured scenario during the site-specific subdivision stages. (First, this places too much faith that proposed mitigation efforts will in fact work. We feel that when looking at the overall scenario, proper mitigation could never be attained and this should be addressed at the rezoning stage while rejection of the entire plan is still possible. Second, these mitigation efforts would take place in the future, not now when the assessment of overall impact is critical to approval. Finally, Public Hearings are not guaranteed. It would be at LURC's discretion whether or not to hold a Public Hearing during the subdivision stage, LSCR pg 59, pgh 1.)

(p. 7, 8)

[Regarding specific concept plan cons:]

- Eliminates proposed expansion of the "balance" conservation easement into development zones upon buildout, and instead continues to make that land (and potentially more) available for future development after the 30 year life of the plan (p. 7)

- Allows additional land within certain areas of the CP to be subject to rezoning at end of 30 year term (ex: Big Moose Mtn., Moose Bay, Brassua, Rockwood/Blueridge, Route 16 corridor, Beaver Cove), allowing more development than what is being proposed (p. 8)

COMMENTS FILED BY GOVERNMENTAL REVIEW AGENCIES

► Maine Department of Inland Fish and Wildlife and Maine Natural Areas Program (p. 4)

In our August 31, 2007 comments we outlined a series of additional field surveys that would be required at the time of development design planning. These recommendations serve as a good starting point for developing a future scope of work associated with long-term development plan requirements to document "*existing site conditions*". Minimum surveys recommended included: plant surveys based upon MNAP's list of rare, Threatened, and Endangered Plants List; rare and exemplary natural community and ecosystem surveys based on MNAP's Natural Community Classification, amphibian, reptile, bird, mammal, and invertebrate surveys based on MDIF&W list of Species of Greatest Conservation Need; significant vernal pools; late successional (100-150 years of age and older) forest stands; and nearshore emergent and aquatic bed habitats (critical for appropriate siting of common and temporary dock structures). MDIF&W and MNAP look forward to working with Plum Creek and future project developers in developing survey methodology for each resource type and in the final review of survey findings.

As recommended by LURC, long-term development plans would require that the applicant demonstrate how the project design "avoids where possible and otherwise minimizes impacts to natural resources" (Objective 3). We recommend that this analysis not only take into consideration findings from survey work conducted to document existing site conditions, but also demonstrate:

- efforts taken to minimize habitat fragmentation from road and structure placement;
- efforts taken to maintain stream and riparian zone connectivity through proper buffer vegetation management, crossing structure sizing and installation, and;
- proposed approaches to long-term management of open space areas designated to maintain habitat functions and values.

We strongly recommend that the applicant, or plan preparer, meet with MDIF&W and MNAP concurrently early in the process to cooperatively identify which elements within the development area should receive particular attention and to determine appropriate approaches to avoid and minimize habitat loss.

► Maine State Housing Authority (p. 1)

As we understand the amendments, Plum Creek would be: required to meet the employee housing needs generated by the resort developments; allowed to move forward with the second phase of the CEI plan; required to meet the demand for employee housing in the long term development plan; and required to create an Affordable Housing Fund administered by MaineHousing.

We appreciate the interest the Commissioners and staff have shown in the issue of affordable housing and your consideration of our analysis and views. We think that the Commissioners have been particularly bold in attempting to address the needs of the many varied interests involved while always insisting that the best interests of the people of Maine be the highest priority. We also would reiterate our appreciation to Plum Creek for making their consultants available to us to discuss their work as we analyzed it.

We endorse the staff amendments. They effectively and practically address the concerns that we have raised about the need for affordable housing resulting from the proposed development. We are willing to accept and undertake the responsibilities of the proposed Affordable Housing Fund.

STAFF/CONSULTANT DISCUSSION AND RECOMMENDATIONS

► DISCUSSION

Based on comments received, staff/consultants offer the following analysis:

- Regarding the long-term development plan and subdivision layout and design

  Staff/consultants agree that the form of development – how buildings, circulation, and open spaces are laid out and how they relate to each other and their larger setting – helps to determine how the development will function in terms of efficiency (including energy efficiency and amount of infrastructure to be built and maintained), available transportation options (including walking and shared trips), environmental quality (protection of wildlife habitat, stormwater runoff, etc.), and access to services in nearby centers. In LURC jurisdiction, the degree to which there is consensus about the appropriate form of development at the site level is best reflected in standards set forth in Section 10.25,Q,3, of the Commission's Land Use Districts and Standards, which the June 4th Commission-generated amendments reinstated in full. In combination with the stated objectives for long-term development plans – efficient use of land (including interconnected circulation and open space systems), recreational opportunities within development areas, and habitat preservation (see June 4th Commission-generated amendments, p. 55) – there is an expectation that the developer must present a well-functioning form of site-level development. Required reservations of excess lands in the Brassua Lake south peninsula and Rockwood/Blue Ridge development areas, in combination with the Commission's existing policy statement discouraging large lots[2], should reduce some of the concern that overly large lots will produce a sprawling form of development. Finally, the June 4th Commission-generated amendments (p. 59) direct staff/consultants to develop additional detailed Concept Plan amendment language during the "second tier" process if the Commission determines that final implementation language should be prepared to carry out the purposes of efficient subdivision design, and design that creates a "sense of place." During the second tier process, staff/consultants would also expect to detail the types of field surveys and analysis recommended by MDIFW/MNAP.

- Regarding treatment of undeveloped land in certain development areas:

  Concerning the June 4th Commission-generated amendment to enable the Commission to determine future zoning of land in certain development areas if it remains undeveloped after 30 years (rather than automatically placing it into the Balance Easement), comments from parties present no new information that would cause staff/consultants to reconsider the amendment.

  See also Tab 9 (Rockwood/Blue Ridge Development Area) and Tab 10 (Brassua Lake Development Area) for analysis of reservation of excess lands for future community needs.

[2] *See* CLUP, p.142 (Site Review policy #3: "…discourage unnecessarily large lot sizes.")

► RECOMMENDATIONS

Based on the discussion above, staff/consultants offer only one recommended change, consistent with the earlier recommendation of returning Lily Bay to resort-required zoning (see Tab 5).

- Regarding the long-term development plan:

  Where, in the June 4th Commission-generated amendments, the long-term development plan specifications include requirements for resort areas, include Lily Bay as such an area.[3]

[3] At p. 55 of Commission-generated amendments, the recommendation would read as follows: "For development areas in which resort accommodation units are proposed (i.e., Big Moose Mountain, Lily Bay, and potentially Moose Bay development areas): a. Promotes nature-based resort development that is compatible – in terms of type, scale and design – with the character, natural and cultural values of the region, and b. Meets the created demand for employee housing for temporary and seasonal workers.

At p. 57 of Commission-generated amendments, the recommendation would read as follows: "10. Additional submission requirements for long-term development plans within development areas where resort development is proposed (*mandatory for Big Moose Mountain and Lily Bay development areas; mandatory for Moose Bay Village only if resort core is proposed):…."

15

PROPOSED LAND USE ZONES AND STANDARDS:
SCENIC STANDARDS FOR BACK LOTS

COMMENTING PARTIES

- Petitioner Plum Creek
- Intervenors and Interested Persons
  - Native Forest Network

(pp. 22-24)

Plum Creek agrees with, and is committed to, the dual objectives of the Commission: (I) to appropriately screen the appearance of, but not block from view, development as seen from areas with public values, and, (II) to provide views from development. Plum Creek also is in agreement with the goal of the Commission to find an appropriate balance between the effectiveness, ease of administration and enforcement of scenic and vegetation clearing standards, while providing confidence that necessary views can be obtained. Plum Creek understands and agrees with the need for appropriate visual mitigation, but emphasizes that, especially due to the large quantity of shorefront lots that have been removed from the Plan, the quality of views from development is critical to making the Plan workable.

A version of the Commission's existing shoreland vegetation buffer point system (Section 10.27,B,2) customized to back lot conditions (e.g., a 16-point threshold) has been suggested as a basis for a set of back lot vegetation clearing prescriptions. However, Plum Creek is uncertain that a single, objectively quantifiable standard for vegetation clearing for back lots can be found or developed. Even if one could be found, Plum Creek is equally uncertain that it could be applied and achieve consistent, reliable, results (Section 10.27,B of the Commission's Land Use Districts and Standards -- Vegetation Clearing). Some modification of this concept, and/or, alternate methods may need to be considered and tested as described in footnote 66 on page 64. Nevertheless, Plum Creek is committed to working with the Commission, Staff and Consultants to develop a standard that achieves the Commission's and Plum Creek's intent.

Plum Creek disagrees that these standards should apply in all Concept Plan development areas. The basis for these standards is to provide for fitting the development harmoniously into the natural existing environment. If development cannot be seen, there is no purpose served by imposing these standards which only exist as a result of the visibility of development by the public, from public places. In fact, the majority of land within the Concept Plan is not within the viewshed of an area of public values.

Plum Creek disagrees with the expansion of the locations of "areas with public values" proposed to include "any water bodies, public roads, roads over which public access easements are granted, public lands, and portions of conservation easement lands identified in baseline analyses as important scenic vantage points." We are especially concerned with the addition of "any water bodies", "roads over which public access easements are granted', and "portions of conservation easement lands identified in baseline analyses as important scenic vantage points".

These expand on the viewshed analysis conducted by Saratoga Associates. (See Pre-Filed Direct Testimony, Matthew W. Allen, RLA, Saratoga Associates, August 28, 2007; 1.1 Regulatory Standard for Visual Effect on Existing Scenic Character, and 4.0 Visual Impact Assessment). This analysis is consistent with Maine Department of Environmental Protection Chapter 315: Assessing and Mitigating Impacts to Existing Scenic and Aesthetic Uses., H. Scenic Resources: "Public natural resources or public lands visited by the general public , in part for the use, observation, enjoyment, and appreciation of natural or cultural visual qualities." Further, it specifically followed the guidance for visual impact assessments for a proposed activity that "has the potential to have an unreasonable adverse impact in a scenic resource listed in Section 10."

In addition to visibility from Scenic Resources described by DEP as "public" natural resources and "public" lands usually visited by the "general public", the analysis included within the assessment of view from "areas of public values", visibility from water bodies, and visibility from public roads including roadside visibility and roadside vistas. The phrases "any water bodies"," roads over which public access easements are granted", and "portions of conservation easement lands identified in baseline analyses as important scenic vantage points" should be deleted. Plum Creek, however, recognizes that water bodies greater than 10 acres have public values, and does not seek to change that definition.

Plum Creek believes it understands the intent of the Commission for scenic standards at the Lily Bay Mountain Primitive Resort Development Zone from both the proposed Commission generated amendments and the Staff and Commission

discussion during the May, 27, 2008 Commission Deliberation, Plum Creek is committed to work with staff on appropriate standards for this location.

COMMENTS FILED BY INTERVENORS AND INTERESTED PERSONS

► Native Forest Network

(p. 3)

[On mitigation of impacts:]

In the [LURC staff/consultant recommendations], the only type of impact that was addressed in any detail was scenic impacts. LURC gave this a pretty thorough review and offered some substantive recommendations regarding the mitigation of this issue.

It appears that, rather than question the overall amount/size/nature of development and its appropriateness, LURC has put its priority in limiting visibility. In fact, the scenic values seem to be worth more to LURC than all of the Native Brook Trout streams combined, considering the word "scenic" appears throughout the entire [LURC staff/consultant recommendations]. The recommendations for scenic impacts are referenced as an example at least 12 times in various sections within the document.

There are a few concerns with this:

- If LURC can address this issue with thoroughness and detail at the rezoning stage, why are they putting off mitigation recommendations of other, more critical ecological impacts until the subdivision stage?
- Does LURC feel that limiting visibility of the development is more important than the mitigation of ecological impacts, therefore placing visual values over ecological values?
- Is there language within the regulations that supports the inequality of values, in particular with scenic values having more of an importance in the criteria than ecological values?
- Why is the scenic impact issue such a priority to LURC? Does the study entitled "Charting Maine's Future" have any influence in making this a priority?
- This effort doesn't change the increase of humans and human activity within the region and it certainly doesn't mitigate any substantive adverse impacts from the plan.

To NFN, this reads as: "go ahead and build it, as long as it's not completely visible it will be fine." The problem with this approach is that, no matter how much of a vegetative buffer LURC is suggesting, whatever the vegetation is attempting to hide is still there. It may be less visible, but it is still adversely impacting the planet. It may be camouflaged, but it still exists. Behind the vegetative curtain will be converted forest, replaced by condos, mansions, golf courses, Starbucks, and what-have-you.

Between the "Offset Conservation", mitigation of scenic impacts, and an enormous reliance on future mitigation efforts, it sounds like LURC is sold.

(p. 7)

[Regarding general concept plan pros:]

- Attempts to protect scenic values by recommending tighter visibility standards than what PC is proposing: enforcing max bldg height provisions and standards on materials used for structures and docks throughout the plan area (attempt to make these “blend” into the landscape) (p 66) and adding vegetative buffer requirements (p 67) (Why not protect scenic values by rejecting the plan?) …

- Deletes PC language to allow opening of view corridors

(p. 8)

[Regarding specific concept plan cons:]

- No guarantee that PC will comply with the view corridor recommendations

STAFF/CONSULTANT DISCUSSION AND RECOMMENDATIONS

► DISCUSSION

Based on comments received, staff/consultants offer the following analysis:

- Clarification of Commission's dual objective

  Comments filed by Plum Creek on this topic have led staff/consultants to question whether differences exist between the Commission's and Plum Creek's understanding of the dual objective of "screening the appearance of development from areas with public values, while allowing for filtered views." In staff/consultants' view, the degree to which back lot development must be screened from view is a core issue presented by Plum Creek's proposal. Therefore, staff/consultants seek clarification from the Commission regarding its understanding of this dual objective in order to establish the parameters for developing specific back lot vegetation clearing standards. To aid in this effort, staff/consultants have assembled from information in the record a set of governing principles, which clarify and further refine staff/consultants' understanding of the dual objective (*see* recommendations on vegetation clearing, below).

- Prescriptive or performance standards?

  In May 2008, staff/consultants recommended to the Commission that a prescriptive set of vegetation clearing standards be incorporated into the Concept Plan addendum, based on a version of the Commission's existing shoreland vegetation buffer point system, on the presumption that that such a prescriptive approach would be more familiar to the agency and therefore less administratively burdensome and more easily enforceable. It was not staff/consultants' intent in recommending this to preclude consideration of other approaches. Consequently, staff/consultants recommend removing reference to "prescriptive" back lot vegetation clearing standards from the Commission-generated amendments in order to allow for the evaluation of both prescriptive and performance-based approaches to meeting the Commission's dual objective of "screening the appearance of development from areas with public values, while allowing for filtered views."

- Applicability of back lot vegetation clearing standards

  In developing its recommendations regarding the applicability of back lot vegetation clearing standards, staff/consultants concluded that back lot vegetation clearing standards should apply to development that is within short- or middle-distances (i.e., within 5 miles) of areas with public values. Staff/consultants agree with Plum Creek that such standards should not apply to development that cannot be seen from areas with public values. However, staff/consultants do not agree that such standards should only apply to those areas identified in the viewshed analysis conducted by Plum Creek's witnesses, Saratoga Associates. Such narrow applicability would potentially accommodate otherwise avoidable visual impacts on certain resources identified in the record as having high recreational values, particularly for primitive pursuits (e.g., Moose River, East and West Outlets), as well as high value scenic resources that may be present in the conservation easement areas.

  The governing principles recommended by staff/consultants (*see* recommendations on vegetation clearing, below) set forth staff/consultants' views on where vegetation clearing standards should apply and where they should not apply.

- Perceived emphasis by staff/consultants on scenic resources impacts

  Staff/consultants have not taken the position that efforts to address certain natural resources impacts (e.g., impacts on water quality) are unnecessary so long as scenic impacts of development are avoided or minimized. In fact, in developing its May 2008 recommendations as well as these September 2008 recommendations, staff/consultants have continuously recognized the need to assess all natural and cultural resources impacts of proposed development, including *but certainly not limited to* scenic resources impacts[1]. The level of attention given to scenic standards is largely because standards for hillside development currently exist for LURC only at a general level of principle, whereas specific, detailed standards to protect many other resources, such as protecting water quality from nonpoint source pollution, do currently exist.

  Staff/consultant recommendations include both changes of substance (e.g., developing back lot vegetation clearing standards, removing known high-value natural resource areas from development zoning) and changes to process (e.g., requiring tree inventories and site-specific natural resources inventories at the subdivision phase to ensure a rigorous evaluation of development against, *inter alia*, the Commission's 'harmonious fit' criterion) as a means to avoid or minimize both scenic and other natural resources impacts.

► RECOMMENDATIONS

Based on the discussion above, staff/consultants offer the following recommendations:

- Regarding view corridors:

  No change recommended by staff/consultants.

- Regarding view corridors in Resort Development (D-GN3RM) zone:

  No change recommended by staff/consultants.

- Regarding visual standards in Resort Development (D-GN3RM) zone:

  No change recommended by staff/consultants.

- Regarding maximum height of structures:

  See Tab 16.

- Regarding construction materials and building design:

  No change recommended by staff/consultants.

- Regarding vegetation clearing, change the June 4, 2008 Commission-generated amendment to state:

  Incorporate into the Concept Plan addendum to Chapter 10 back lot vegetation clearing standards, to be applied at the subdivision and/or development review stage, that meet the dual objective of screening the appearance of development from areas with public values, while allowing for filtered views. These vegetation clearing standards shall be based on and consistent with the following governing principles:
  What does "screening the appearance of development" mean?

[1] E.g., *see* Tabs 5 and 6 for a discussion of undue adverse impacts regarding the Lily Bay development area.

- In the case of the Lily Bay Mountain Primitive Resort Development zone, development would not be *visually evident*, meaning it would be completely or nearly completely blocked from view.

- In the case of all other development areas, development would be *visually subordinate* to the surrounding landscape, meaning that, although development could be partially visible, it would not be what is seen first or remembered about the landscape.

What role must non-vegetation techniques play in screening the appearance of development?

- Construction materials (including color, reflectance, and texture), development design (including structure height, location, building mass and form, and density of development) and lighting design can all be used to significantly minimize the appearance of development. Consequently, these governing principles assume that the June 4, 2008, Commission-generated amendments to the scenic standards for back lots related to (1) maximum height of structures; (2) construction materials and building design; (3) ridgeline protection; and (4) placement of roads, driveways and utility corridors, as well as the Commission-generated amendments to the lighting standards, would apply to all development areas.

What role must vegetation play in screening the appearance of development?

- Given the forested character of the development areas and the surrounding landscape, use of vegetation in screening the appearance of development is essential. In order for development to satisfy the Commission's "harmonious fit" criterion[2], vegetation must be used in combination with non-vegetation techniques to minimize the visual impacts of development that is located in those places where screening the appearance of development is required (*see* "Where would VCSs apply" and "Where might VCSs not apply").

Where would VCSs apply?

- The VCSs would apply to any residential or non-residential development that is located, in whole or in part, within five miles of an area with public values and in the line of sight of an area with public values. However, the Commission would provide for potential modification of the standards under certain circumstances documented as part of a long-term development plan (*see* "Where might VCSs not apply").

Where might VCSs not apply?

- The VCSs would not apply to shorefront development. Vegetation clearing for shorefront development would need to comply with the Commission's existing standards for vegetation clearing in shoreland areas (Section 10.27,B of the Commission's Land Use Districts and Standards).

- The VCSs would not apply if it can be demonstrated to the Commission's satisfaction that:

  (1) Development will be visually obstructed by topographic features (e.g., a knoll); OR

[2] This is one of the Commission's six general criteria for approval of permit applications and states that the Commission shall approve no application unless "[a]dequate provision has been made for fitting the proposal harmoniously into the existing natural environment in order to assure there will be no undue adverse effect on existing uses, scenic character, and natural and historical resources in the area likely to be affected by the proposal" (12 M.R.S.A. §685-B(4) and Section 10.24 of the Commission's Land Use Districts and Standards).

(2) Development is visible from areas with public value that are located at substantially higher elevations than the development itself (e.g., downward views of development from Eagle Rock) and vegetation conditions cannot effectively screen such aerial views[3]; OR

(3) For either residential or non-residential structures that are part of a long-term development plan, other natural conditions (e.g., slope, existing vegetation outside the boundaries of the development area[4]) and/or the layout of the development create visually obstructing conditions at least as effective as the VCSs; OR

(4) For non-residential structures that are part of a long-term development plan:

(a) the VCSs are not practicable[5] when applied to non-residential uses, and

(b) the location, design, landscaping and other measures proposed, which must include both vegetation and non-vegetation visual impact minimization techniques, satisfy the Commission's general scenic impact standards (Section 10.25,E).

How would areas with public values be defined?

- Areas with public values would comprise:

(1) Bodies of standing water 10 acres or greater (e.g., Upper Wilson Pond, Prong Pond, Moosehead Lake, Indian Pond, Burnham Pond, Brassua Lake, and Long Pond);

(2) Flowing waters draining 50 square miles or more (e.g., Moose River, East and West Outlets, Roach River);

(3) Public roads (i.e., Route 6/15 and Lily Bay Road); and

(4) High value scenic resources identified in the baseline analyses of the conservation easements.[6]

What would the specific standards of the VCSs achieve?

- The VCSs would establish standards to ensure that vegetation is used to (1) interrupt the façade and perimeter of structures and (2) provide a forested backdrop to structures by:

(1) Requiring that most of the façade(s) and perimeter of each structure in places where screening the appearance of development is required would be obscured by vegetation during the leaf-on season (i.e., in

[3] In such scenarios, greater emphasis would be placed on non-vegetation screening techniques (e.g., roof colors, architectural design) to minimize scenic impacts.

[4] If vegetation located outside the development area is relied on to satisfy this provision, the Commission would need to be satisfied that the visually obstructive characteristics of such vegetation would not be diluted by any permitted activities (e.g., timber harvesting) in those areas.

[5] "Practicable" is defined in the Commission's Land Use Districts and Standards as, "Available and feasible considering cost, existing technology and logistics based on the overall purpose of the project." [Section 10.02(142)]

[6] A baseline documentation report would be completed prior to conveyance of the conservation easement and would include identification of high value scenic resources. It would be updated periodically as new information is discovered.

no case where a structure is located in places where screening the appearance of development is required would the entirety of that structure's façade or perimeter be visible from an area with public values);

(2) Limiting the area that is cleared of vegetation between a structure and its screening vegetation ("setback space") to the minimum necessary for construction and fire safety; and

(3) Allowing for the reduction or elimination of the "setback space" if the development utilizes other appropriate fire safety measures, such as residential sprinkler systems.

- The VCSs would accommodate views of areas with public values (i.e., filtered views through and between trees), but would not allow for the creation of large cleared openings to achieve panoramic views of an area of public value.

- The VCSs would encourage the preservation of coniferous vegetation.

- The VCSs would allow for planting of only native species to avoid creating contrasting visual elements and to increase chances of survival of planted vegetation.

- The VCSs would require a detailed tree inventory conducted and certified by a licensed professional prior to authorizing development in order to help assess the appropriateness of tree removal and monitor unauthorized tree removal.

What happens if the VCSs cannot be met due to lack of existing vegetation?

- No development would be permitted unless the VCSs can be met at the time of filing of a subdivision or development permit application. However, if the applicant can show that, due to either natural causes or removal of vegetation that occurred prior to approval of the Concept Plan, it is not possible to meet the VCSs at the time of subdivision/development application [7], an application may be filed at such time that: (a) the area proposed for development contains a minimum of 300 well distributed trees greater than 2 inches DBH per acre, with softwood trees at least 10 feet in height and hardwood trees at least 20 feet in height; and (b) there is a reasonable expectation based on regeneration and growth rates that the VCSs will be met within 10 years. In such cases, no further vegetation shall be removed from the buffer area, except to encourage regeneration, until the vegetation standards can be met and maintained.

- Regarding the Lily Bay Mountain and Indian Pond Shore Low Impact Zones:

  No change recommended by staff/consultants.

- Regarding ridgeline protection:

  No change recommended by staff/consultants.

- Regarding placement of roads, driveways, and utility corridors:

  No change recommended by staff/consultants.

[7] At the time of subdivision/development application, the applicant would need to demonstrate to the Commission's satisfaction that subdivision lots are laid out and development is designed so as to comply with the VCSs to the greatest extent practicable.

16

PROPOSED LAND USE ZONES AND STANDARDS:
SCENIC STANDARDS FOR BACK LOTS: MAXIMUM HEIGHT OF STRUCTURES

COMMENTING PARTIES

- Petitioner Plum Creek

(p. 21)

Building height limitations below the current LURC regulations should only be applied when there is a potential for a structure to be seen from an area of public values as analyzed by Saratoga Associates. If a structure cannot be seen by anyone without the person being on private land, then it does not create an impact. There are many areas where backlots have NO view potential, or potential to be seen. If someone desires this type of lot they should not be subject to the same conditions as lot/structure that is within a viewshed.

In areas of potential visibility of development, Plum Creek suggests that the Commission retain the authority to review and grant exceptions to the 35 foot residential limit, and the 60 foot commercial limit. Measuring building height from the uphill side of a structure, when many structures will be on slopes, will yield a wide range of result, depending on many variables such as the slope of the ground, the width of the structure, and the slope/height of the roof. The intent was not to try to increase height through a trick of measuring, but to provide the flexibility to have reasonably sized two story structures with sloped roofs that will fit harmoniously with the environment. Retaining authority by the Commission to make exceptions, consistent with evidence of conformance with scenic standards and harmonious fit, would allow potential unforeseen conditions to be appropriately regulated.

STAFF/CONSULTANT DISCUSSION AND RECOMMENDATIONS

► DISCUSSION

Based on comments received, staff/consultants offer the following analysis:

- Regarding building height on lots that cannot be seen from any area of public values:

  Scenic impact is not the only consideration in establishing maximum building height. Another consideration is the ability of firefighters to reach the upper level of homes with ladders carried on a typical fire engine (pumper or tanker truck). Second story windows in homes with heights in the 30 to 35 foot range typically are reachable.

- Regarding flexibility in building height for homes on slopes:

  Staff/consultants understand that as slopes increase, it becomes difficult or impossible to build a two-story home within a height limit of 35 feet, as measured from the original grade of the downhill side. Staff/consultants agree that some limited flexibility is warranted on slopes greater than, *e.g.*,10%, where it may be that even a modestly-sized two-story home with a roof slope steep enough to shed snow and a typical floor-to-floor height could not meet the 35-foot standard.

► RECOMMENDATIONS

Based on the discussion above, staff/consultants offer the following recommendations:

- Regarding building height on lots that cannot be seen from any area of public values:

  The same building height standard should apply throughout the Concept Plan area.

- Regarding flexibility in building height for homes on slope:

  Retain the maximum height of 35 feet for residential structures, measured from the original grade of the downhill side, but direct staff/consultants during the second tier process to establish a formula for limited flexibility on sites with natural average slopes greater than 10%[1] if a request for a building height greater than 35 feet on a given proposed lot is made, and the maximum height is established at the time of subdivision approval. Approval of the greater height should be conditioned on the ability of the lot to meet vegetation clearing standards if the lot is visible from an area of public values.

[1] For example, the formula might allow an increase of X feet for each percent increase in natural average slope over 10%, up to a maximum of Y feet. Staff/consultants should consider factors such as typical home width and typical roof slope in arriving at the formula.

17

PROPOSED LAND USE ZONES AND STANDARDS:
NOISE STANDARDS

COMMENTING PARTIES

- Petitioner Plum Creek

(p. 16)

[Regarding deleting Plum Creek's proposed changes to LURC's existing noise standards:]

Plum Creek agrees, however, since there are zoning designations in the Concept Plan that differ from those in the table found in existing 10.25, F.1.a., this is subject to Plum Creek's agreement of the assignment of new zoning designations to the existing table.

STAFF/CONSULTANT DISCUSSION AND RECOMMENDATIONS

► DISCUSSION

Based on comments received, staff/consultants offer the following analysis:

Staff/consultants have not recommended modification to the sound pressure level limits, as proposed by the petitioner -- i.e., D-CI zone = 70 dB(A) from 7:00 AM to 7:00 PM, then 65 dB(A); resort zone = 65 dB(A) from 7:00 AM to 7:00 PM, then 55 dB(A); all other zones = 55 dB(A) from 7:00 AM to 7:00 PM, then 45 dB(A). Staff/consultants view the assignment of new zoning designations to the table found in Section 10.25,F.1.a as a second tier drafting issue.

► RECOMMENDATIONS

No recommended changes to this June 4th Commission-generated amendment.

18

PROPOSED LAND USE ZONES AND STANDARDS:
MAINE DEPARTMENT OF TRANSPORTATION TRAFFIC MOVEMENT PERMIT

COMMENTING PARTIES

- Intervenors and Interested Persons
  - GrowSmart Maine
  - Moosehead Region Futures Committee

► GrowSmart Maine (p. 5)

[Regarding improved smart growth adherence with Principle #6. Provide Accessibility and Mobility Choices: Reducing Auto Dependency:]

- [Commission-generated amendments] acknowledge the importance of the Maine DOT Traffic Permit requirement for infrastructure to serve bicycle and pedestrian circulation internal to subdivision and resort developments and external connections to important destinations (Rockwood, Greenville, Lily Bay State Park, etc).

► Moosehead Region Futures Committee (p. 6)

During the May 27-28 deliberations, discussion of the Maine Department of Transportation (MDOT) Traffic Movement Permit was extremely brief (transcript pages 185-186), primarily consisting of an acknowledgment by Chair Harvey "that we have to look at a lot of other things with respect to traffic that DOT doesn't" (page 185). However, no discussion of these additional issues ensued. At other times during the deliberations, there was some limited discussion of potential adverse impacts of increased traffic on wildlife. However, there was no discussion whatsoever of the following issues relevant to increased traffic, which were raised in comments submitted by the MRFC on May 8, 2008: overall quality of life for residents of local communities (both during and after the construction phase); air and noise pollution (both during and after the construction phase). LURC should consider these issues and generate amendments to address them. [See page 8 of the MRFC post-hearing opening brief submitted March 7, 2008 for specific recommendations regarding traffic mitigation measures.]

Furthermore, the MRFC Steering Committee questions LURC's decision to consider the MDOT Traffic Movement Permit dispositive with regard to traffic safety (LURC-generated amendments, June 4, 2008, page 68). In our comments submitted May 8, 2008, we pointed out that "the MDOT traffic permit does not appear to adequately address concerns regarding the impracticality of enforcing traffic laws in remote areas."

STAFF/CONSULTANT DISCUSSION AND RECOMMENDATIONS

► DISCUSSION

Conditions relating to construction of subdivision roads, such as a construction management plan to control noise and dust, road design, and measures to reduce speed are appropriate for consideration at the subdivision application stage rather than this rezoning stage.

► RECOMMENDATIONS

No recommended changes to this June 4th Commission-generated amendment.

19

OFFSET CONSERVATION: BALANCE CONSERVATION EASEMENT
LOCATION, SIZE OF EASEMENT

COMMENTING PARTIES

- ► Petitioner Plum Creek
- ► Intervenors and Interested Persons
  - Forest Ecology Network and RESTORE: The North Woods
  - Forest Society of Maine
  - GrowSmart Maine
  - Maine Audubon and Natural Resources Council of Maine
  - Maine Wilderness Guides Organization
  - Moosehead Region Futures Committee
  - Native Forest Network
- ► Governmental Review Agencies
  -- Maine Department of Inland Fisheries and Wildlife and Maine Natural Areas Program

(pp. 33-35)

The Management Plan attached to the easements currently addresses lands that are particularly ecologically valuable:

Wildlife, Fisheries, and Habitat Diversity

Implementation Examples that would be reviewed with the Management Advisory Team:

- Biodiversity
- Habitats of management concern identified by the Maine Natural Areas Program (MNAP) and Maine Department of Inland Fisheries and Wildlife (MDIFW) including, but not limited to, rare plants and animals and rare and exemplary natural communities, will be included in Plum Creek's Geographic System (GIS) as known sites are located. Where active management of these sites is planned, the MNAP and/or MDIFW are consulted. . . .["Multi-Resource Management Plan Addressing Forestry Standards of The Plum Creek/The Natural Conservancy of the Pine Tree State, Inc Conservation Easement"]
- The Management Plan also provides: Special SitesPlum Creek identifies sites that contain unique biological, ecological, historical or cultural attributes. These sites are managed to conserve their local or regional importance and to protect their unique attributes. Plum Creek works cooperatively with government agencies and conservation groups to achieve this policy.

Implementation Examples that would be discussed with the Management Advisory Team:

- Plum Creek involves and consults with the Maine Natural Areas Program to identify and manage special sites. ["Multi-Resource Management Plan Addressing Forestry Standards of The Plum Creek/The Natural Conservancy of the Pine Tree State, Inc Conservation Easement"]

With respect to the first recommendation, identified sites will be added to the baseline documentation. With respect to the second recommendation, the language in the Management Plan cited above makes clear that special sites get special treatment. Thus, the Commission's intent and Plum Creek's intent appear to be consistent. With respect to the third recommendation and the specific land located in Big Moose and Lily Bay Townships that have been identified by MNAP, Plum Creek believes the intent of the Commission can be addressed by adding the following specific provisions to the Management Plan: "Plum Creek will involve and consult with Manomet (or other similar ecological consulting group approved by Holder, such consent not to be unreasonably withheld) to confirm that these areas have significant ecological value, and if they do have such value, Plum Creek will work with Manomet (or other similar ecological consulting group approved by Holder, such consent not to be unreasonably withheld) and MNAP to develop appropriate science based site specific management plans for these sites. Plum Creek will manage these sites in accordance with this site specific management plans to conserve their importance and protect the unique ecological values within this working forest. Technologies and best science change and any such plan must adapt over time. Plum Creek will work in good faith with these organizations to complete field work and site specific plans at the earliest practical date.

► Forest Ecology Network and RESTORE: The North Woods

(p. 18)

FEN-RESTORE also objects to using areas beyond the Concept Plan to offset the impact of development that takes place in the Concept Plan area. For example, when considering the loss of recreational areas, Mr. Richert used the Katahdin Ironworks outside the Concept Plan area to mitigate the loss of recreation:

> So there is a place, there is ample area, in our view, for some of the recreational opportunity that we lost in a place like the Big Moose Mountain area to shift elsewhere. Some of those would be close in, like Prong Pond. *Some of them will be areas just beyond the concept plan area like KI*. Some of them will be within the concept plan area, like the Roaches and Spencer Bay. But there appear to be ample areas. DT P 149 L 10-17. (emphasis added)

The Concept Plan as revised by staff must stand or fall on its own merits without having to rely upon assets beyond the Concept Plan area.

(pp. 22-25)

The way staff uses the Conservation Framework creates problems that go much deeper than simply justifying the sacrifice of Lily Bay. As the Commission will recall, Plum Creek proposed a "Balance Easement" to offset its development. Plum Creek did not propose the "Legacy Easement" and the rest of the Conservation Framework as balance to offset undue impacts on wildlife and other natural resources, nor as comparable conservation for waiving adjacency. Plum Creek submitted the Conservation Framework only as another "public benefit" of its Concept Plan. See, for example, Plum Creek's March 7, 2008 "Opening Brief" pages 22- 25 arguing that the Legacy Easement must be considered as a public benefit ("... the Legacy Easement must be included in the publicly beneficial balance determination ..." PC's March 7, 2008 Opening Brief at page 25).

Staff rejected Plum Creek's approach to the Conservation Framework and, with the sole exception of Number 5 Bog (the million dollar bog), decided that the Conservation Framework is essential to both balance the undue impacts on wildlife and resources, and to provide comparable conservation for the waiver of adjacency. See footnote #91 in the May 20, 2008, Recommendations. Accordingly, staff recommends requiring that the sales of the Legacy Easement and the Roaches be consummated within 45 days of the approval of the Concept Plan and before any development permits are issued. See May 20, 2008, Recommendations pages 97- 99. Staff stated its position clearly: "... staff/consultants believe that securing the protections provided by the Legacy easement as amended is a critical component of an approvable Concept Plan." Recommendations Footnote #91, *supra*. Yet, strangely, staff does not recommend making the needed parts of the Legacy Easement become part of the Balance Easement. Staff does not even clarify what parts of the Legacy Easement are required to balance the development:

> The specific acreage required for recreation and wildlife mitigation may be less than the total acreage proposed by Plum Creek and TNC for Legacy easement coverage; it is not clear from the record what lesser portion of the Legacy easement, if any, is required for this mitigation. However, staff/consultants believe that what is clear is that, with the Legacy easement (as amended by staff/consultant recommendations) in place, in combination with other mitigation measures recommended by staff/consultants, Plum Creek will have provided adequate recreation and wildlife mitigation. Recommendations, footnote 91, *supra*

Staff makes no attempt to analyze – or even place a value on – the donative part of the Legacy Easement, *e.g.* the difference between the fair market value of the easement and the amount The Nature Conservancy ("TNC") is paying Plum Creek for the easement. Staff simply ignores the novel, self-serving economic arrangements Plum Creek has

presented to the Commission and focuses only on the Conservation Framework as "a critical component of an approvable Concept Plan." *Id.*

Staff may not have felt comfortable adding the Legacy Easement to the Balance Easement because Plum Creek is being paid for the Legacy Easement but not the Balance Easement. Even Plum Creek has not suggested that it should be paid for balancing its development. Yet that is precisely the result that staff is proposing. If the staff are correct that the Balance Easement ***by itself*** is inadequate to balance the development and that at least parts of the Legacy Easement are required to mitigate undue impacts as well as provide comparable conservation for the waiver of adjacency, then it follows that staff is proposing that Plum Creek be partially compensated for providing the required balance since TNC is going to pay Plum Creek for the Legacy Easement. This would set a devastating precedent that will limit LURC's ability to insist in future concept plans ***that developers, not the public*** balance the full impact of their developments.

Implicitly recognizing the insufficiency of the Balance Easement, Plum Creek – over FEN-RESTORE'S objection – dangled the Conservation Framework in front of LURC in the hope that the Commission would find the bait too attractive to ignore. The Legacy Easement will cost much more than $35,000,000 because the analytic confusion that allows its use as compensated balance will taint the very essence of what future Commissioners are supposed to do. All these problems could be avoided if this Commission simply denied Plum Creek's petition. Plum Creek could then decide if it wants to submit a new plan that does propose *appropriate development* with *adequate conservation*. This would avoid making the Commission wade into the never-never land of the Conservation Framework as private sale cum regulatory required balance ... or, is it regulatory required balance cum private sale?

For the Commission's convenience, attached to these comments is a concise summary of our objections to the New Plan.

► Forest Society of Maine (p. 19)

Commission Recommendation (page 88): Redraft language so that baseline documentation must (a) include cataloguing of high public value scenic resources; and (b) include and identify, following consultation with IFW/MNAP, all areas identified by IFW/MNAP in the record as requiring special forest management protection due to their high ecological importance.

FSM Comment: FSM concurs with the goals of this recommendation. If FSM is determined to be the Holder, FSM would be pleased to offer its expertise in these matters to work with LURC staff and consultants, the Third Party backup holder and Plum Creek in consultation with IFW/MNAP to help develop the baseline documentation required by the easement in a manner that provides appropriate recognition to high value scenic resources and areas requiring special forest management protection.

► GrowSmart Maine (p. 4)

[Regarding improved smart growth adherence with Principle #4. Protection and Preservation of Environmental Quality:]

- [Commission-generated amendments] remove high value plant and animal habitat areas from development zones in some areas and use other less stringent measures where appropriate as well (use of "no disturbance areas" for stream buffers, for example).

► Maine Audubon and Natural Resources Council of Maine

(p. 3)

These comments also address the new and fundamental public policy problem raised by the current set of proposed amendments: It is contrary to law, bad public policy, and bad precedent to allow a landowner to procure the granting of extraordinary development rights through the landowner's *sale* of conservation easements (whether the sale is to a non-profit entity, or – directly or indirectly – to the State). The impact of that proposal would be, in essence, one that allows the developer to be paid twice by the public – not only does the developer get "extraordinary" development rights, the developer also profits from the sale of conservation easements in a working forest. This is neither within the plain meaning of what is intended by "publicly beneficial" balance of conservation required under LURC Chapter 10.23, H ¶ 6f, nor sound public policy. The regulatory scheme does not contemplate double compensation to the landowner – once by the zoning change, and then again in a cash sale transaction.

(pp. 31-36)

State Mandated Conservation Measures Must Be Donated by the Developer, Not Bought From the Developer by the State or by an NGO (Non-profit) on Behalf of the State.

The Amendments raise a new issue that has not been part of this proceeding to date. Earlier in these proceedings, when the Conservation Framework was not offered by the applicant as a contingency for approval of its development, and only a donated Balance Easement was offered, NRCM and Maine Audubon objected to any mention or consideration of the Conservation Framework because the Commission's consideration of it was not relevant to the rezoning decision. One of the primary arguments was that the Conservation Framework was in essence nothing more than a private land transaction between Plum Creek and TNC, and since it was not offered as regulatory conservation offset it was irrelevant and prejudicial to the Commission's rezoning decisions on whether Plum Creek's development was appropriate and met existing regulatory criteria. We emphasized that, "While LURC has never faced this issue in its history, integrating private side deals into a public process allows landowners to have their cake and eat it too: allowing them to make money on private deals which benefit their own greater good while gaining significant development rights through LURC. Such a precedent undercuts the very heart of the LURC process."[28]

A developer or applicant should not be allowed to use paid-for conservation sales and easements to fulfill regulatory requirements. The analysis changed when the LURC staff/consultants recommendations, for the first time, recognized that the "extraordinary" development rights granted to Plum Creek would require a greater package of conservation measures than Plum Creek had offered in its proposed balance easement. The Commission ultimately accepted the recommendation for a new conservation package to meet the regulatory requirements of mitigation, waiver of adjacency, and providing publicly beneficial balance between appropriate development and long-term conservation. The conservation package included not only the donated "Balance Easement" but also the 266,000 "Legacy Easement" and the 27,000 acre Roach Pond acquisition, and provided that all conservation must be secured within 45 days of Plan approval and prior to the Commission's acting on any further Plan subdivision permits.

As NRCM and Maine Audubon pointed out in pre-filed testimony (Cathy Johnson, pre- filed testimony of September 14, 2007), Plum Creek had negotiated a private conservation deal with The Nature Conservancy (TNC). In return for the payment of $35,000,000, Plum Creek would sell to TNC two parcels and place a conservation easement on a third area. As outlined above, originally the deal was not considered part of the required conservation balance, and Plum Creek quite clearly did not claim that it should be. See Plum Creek Application, Question 21. It is only now, with respect to the Amendments, that this "paid-for conservation deal" (with the exception of the No. 5 Bog parcel, which is part of

[28] This Letter was filed jointly by NRCM and Maine Audubon on December 14, 2006 in this proceeding. All parties were given the right to comment or respond to it (many exercised that right) and in Part IV of the First Procedural Order of August 10, 2007, the motion to exclude consideration of the private land deal with TNC was denied.

the transaction but not contiguous to or in the concept plan area) becomes an actual requirement of the applicant in order to meet the State's regulatory conservation balance mandates.

Allowing a landowner to use a paid-for conservation package – that is, a conservation package in which the landowner/applicant is receiving financial compensation – in order to meet the regulatory mandate of offsetting development with conservation, contravenes the legal regulations themselves, sets terrible precedent, and represents bad public policy.

i. Paid-For Conservation Contravenes Regulations.

LURC's statutory and regulatory mandates for conservation arise in three areas: (1) as a means of mitigating the adverse impacts of development on wildlife and other ecological features, on scenic resources, remoteness, natural character of the region, and recreation under 12 M.R.S.A. § 685-A(8-A) (B); (2) as a means of securing a waiver of adjacency under LURC Chapter 10.23, H ¶ 6d.[29] ; and (3) in order to strike "a reasonably and publicly beneficial balance between appropriate development and long-term conservation" under LURC Chapter 10.23, H ¶ 6f.

A "paid-for" conservation package in which the landowner receives financial compensation in order to meet the regulatory mandate of providing conservation, contravenes each of these three requirements. In comparable settings, such as under the Natural Resources Protections Act (NRPA), 38 M.R.S.A. § 480-A to BB, there are several conservation/mitigation requirements, such as compensation mandates involving Significant Wildlife Habitat under 38 M.R.S.A. § 480-D(3), or the Wetlands Compensation Program under 38 M.R.S.A. § 480-Z, including the concepts set forth in the Natural Resources Mitigation Fund Fact Sheet, "Mitigating Adverse Environmental Impacts is an Integral Part of Maine's NRPA." Maine law requires developers in LURC jurisdiction and DEP jurisdiction to mitigate for unavoidable undue adverse impacts. The precedent that is being set in this case, by allowing "paid-for" conservation packages to meet such mitigation requirements, and the message being sent to developers even in the organized part of the State subject to DEP jurisdiction, is that this type of transaction could be recognized by the State as appropriate mitigation, instead of the traditional donated or dedicated conservation that is contemplated under these statutory regimes. The concept of conservation in order to mitigate development is turned on its head – developers/landowners will no longer donate land or interest in land as conservation mitigation but will instead expect financial reward. A developer as an applicant to the State seeking development rights will receive financial compensation for selling development rights and the grant of development rights at the same time.

ii. The "Paid-for" Conservation Package is Bad Policy and Sets Dangerous Precedent.

This raises the "double payment" issue inherent in any "paid-for" conservation package, and the terrible public policy which such double payment represents. Because the conservation is part of a State-mandated regulatory process, the public ends up paying twice: the public pays once through the State's granting of a development permit (for "extraordinary development rights"), since in part because of the paid-for conservation deal, the developer receives its rezoning approval. The grant of a rezoning approval or development permit is a grant from the public to the developer for something which the developer is not entitled to under current zoning. The public then pays again with cash. It is most likely that the paid-for conservation deal would be funded by an NGO or nonprofit whose funds derive from private charitable donations or public solicitation of charitable donations.[30] In the final analysis, the developer is paid twice – a

[29] "The Plan, taken as a whole, is at least as protective of the natural environment as the subdistricts which it replaces. In the case of Concept Plans, this means that any development gained through any waiver of the adjacency criteria is matched by comparable conservation measure[s]." 10.23, H ¶ 6d.

[30] There had also been a possibility that direct public dollars, such as funding from the federal Forest Legacy Program, would be sought for this particular paid-for conservation deal. It is likely that the state- funded Land for Maine's Future Program, and the federally funded Forest Legacy Programs, would not provide funds to TNC for this particular paid-for conservation package, precisely because the Commission has made this conservation package a direct regulatory mandate

significant financial profit from the sale of interests in land, which sale then triggers the State's grant of development rights.

As bad public policy, such a paid-for conservation deal also puts pressure on funding for other conservation projects, and takes limited conservation dollars away from those other projects. The recent Downeast Project conserved a similar amount of land in issue in this case, but included no development. The bad policy and precedent that this case sets is that landowners may expect, now, extraordinary development rights in addition to cash when selling land or interests in land for conservation. Scarce conservation dollars, in essence, begin to fund development.

It also sets bad precedent for future land conservation deals, which could be hampered or halted if the entity acquiring the conservation easement were aware that it may thereby be triggering massive development nearby. Entities funding land conservation transactions would find such arrangements – where their conservation value does not stand alone but in fact facilitates the loss of conservation elsewhere –a great disincentive to further investment in conservation values. Similarly, it sets troubling precedent to consider that developers pursuing projects that require regulatory conservation balancing will expect financial compensation for the conservation value they are required to create to off-set their requested zoning changes.

The position that has prevailed throughout these proceedings, and throughout the State in other proceedings to date, is that the landowner must meet State-mandated conservation requirements of LURC (or of DEP) through grants of conservation – donations of land or interests in land, not land sales or sales of easements. That is the only position supported by the statutory and regulatory framework, and the only position supported by good policy and common sense. If the land in the Conservation Framework in this case is truly required for the applicant to meet its mandatory conservation requirements in order to get a rezoning for development, then the land must be donated.

(pp. 41-42)

<u>Ecologically Significant Areas Should be Donated in Fee to the State</u>.

The effectiveness and enforceability of those provisions of the easement and accompanying management plan designed to protect biodiversity and ecologically significant areas continue to be of great concern. For example, the proposed easement lands contain a 220-acre area of high quality late successional stands, including 200-300 year old trees, which Plum Creek plans to cut.[31] Given the merely advisory nature of the Management Advisory Team, Plum Creek could cut these 200-300 year old trees even if the Maine Natural Areas Program staff advised against it.

This is the primary reason why the MNAP requested that the natural community on Moose Mountain be donated to the state as a fee acquisition. Based on past experience, neither they nor we have confidence that the terms of the easement are adequate to ensure that those small but ecologically valuable areas will be adequately protected by the terms of the easement.

Unless those easement terms are substantially strengthened, these areas should be donated to the State.

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that the developer must meet in order to obtain a rezoning approval. These programs do not exist to fund the granting of development rights.

[31] See attached Portland Phoenix article, Plum Creek plans to cut down 200-year-old trees, Bridget Huber, May 28, 2008

► Maine Wilderness Guides Organization (p 1)

We are particularly disappointed in the value of the Balance/Offset easement. As you know, this is the largest development proposal in Maine's history. There seem to be no specific statutory guidelines as to the amount of or value of lands to offset the impact of development. Therefore, the specifics of this balance easement could be precedent setting. We urge you to use a "fair trade" principle for the citizens of Maine.

We would define a fair trade balance easement as the increased value of the land after rezoning being roughly equal to the value of the offset easement. According to Open Space Institute's figures, which we do not remember being contested during the intervener proceedings, the increased value of Plum Creek lands after rezoning is conservatively estimated at 105.4 million. The value placed on the 90,000 acre offset easement is between 17.6 million and 22.4 million. Even taking the higher figure, this leaves an 83.4 million unbalanced offset easement. As the public's stewards of our unorganized territories, you should expect a fairer deal. We recommend reducing the size of the development and increasing the amount and value of balance easement, or a combination of both until a fairer trade-off is reached. Just as Plum Creek is being fairly compensated in the Conservation Framework, the citizens of Maine should be fairly compensated in the Balance Offset Easement.

► Moosehead Region Futures Committee

(p. 5)

The hearing record demonstrates the economic dependence of the Moosehead region on nature tourism. In order to sustain a healthy nature tourism economy, the region must continue to offer an unfragmented and undegraded "north woods" experience. Unfortunately, the locations of proposed easement lands were not selected with the goal of protecting the region's nature tourism infrastructure. The locations of the easement lands were determined in private negotiations and they reflect the agendas of the organizations involved (Plum Creek, The Nature Conservancy, and the Forest Society of Maine) rather than broader goals for the greater good of Maine's citizens.

We believe that no amount of conservation could offset the cumulative adverse impacts of the development proposed for Brassua Lake, Indian Pond, Upper Wilson Pond, and Lily Bay. Degradation of these high-value natural areas will adversely impact both the region's ecology and its nature-based economy. Furthermore, the new, unnecessary commercial centers on the Brassua south peninsula and at Lily Bay will compete with already struggling businesses in the existing service centers of Rockwood and Greenville.

(pp. 7-8)

LURC has determined that the Balance easement alone will *not* provide adequate balance for Plum Creek's proposed development, and has therefore concluded that "securing the protections provided by the Legacy easement as amended is a critical component of an approvable Concept Plan". LURC has noted that Legacy easement lands will be necessary "to partially mitigate for adverse recreation and wildlife impacts...from the development rights granted by the Commission", to provide comparable conservation in exchange for adjacency waivers, and to achieve a publicly beneficial balance between development and conservation (LURC-generated amendments, June 4, 2008, page 97).

If Plum Creek's application is approved, Maine's citizens, represented by LURC, will be granting Plum Creek a huge, windfall increase in the value of the land that is rezoned for development. If The Nature Conservancy pays Plum Creek for the Legacy easement, the public will in essence be paying Plum Creek a second time, by subsidizing the conservation required as balance for the development. The Nature Conservancy will likely seek financial assistance for the easement purchase from federal and/or state programs supported by taxpayers. Even if funds for the purchase are supplied solely by private donors, these donors will receive deductions on their state and federal taxes, thereby reducing the money that goes into public coffers.

The MRFC Steering Committee therefore reiterates our request from our post-hearing opening brief submitted March 7, 2008 (page 6): the Legacy easement lands should be added to the Balance easement. Paying Plum Creek for the Legacy easement would set a dangerous precedent. The public should not be required to pay for legally mandated mitigation of adverse impacts of development.

(pp. 8-9)

Overriding of specific requests by MDIFW/MNAP: The LURC-generated amendments override a number of specific requests made by MDIFW and MNAP, as detailed below. These requests were made by the state's natural resource experts with the goal of protecting resources that belong to the citizens of Maine. Given that LURC lacks professional expertise in this area, it seems inappropriate for LURC to override the MDIFW/MNAP requests, and we believe that the decision to do so sets a very dangerous precedent.

Requests to remove certain wildlife travel corridors and deer wintering habitat from proposed development areas, with addition of these lands to the Balance easement, including: the proposed resort zone at Indian Pond, which could adversely impact a significant wildlife travel corridor; the proposed resort zone on the north shore of Burnham Pond, which could adversely impact a travel corridor between two large deer wintering areas; and the deer wintering area on higher elevations of Moose Mountain. The Commission has chosen not to honor these requests because it believes that development in these areas can be designed to avoid adverse impacts (LURC-generated amendments, June 4, 2008, page 16). The MRFC Steering Committee objects to this decision; we strongly agree with MDIFW/MNAP that these areas "should be removed from re-zoning consideration up-front and added to the Balance Easement to best ensure longterm protection. Doing so will minimize complicated development-by-development negotiations regarding future open space designations during the LURC development review process, and will help avoid future homeowner association conflicts regarding management and protection of these key resource areas" (MDIFW/MNAP testimony, November 20, 2007, page 12). These areas are too important with regard to publicly-owned wildlife resources to rezone them for development with the expectation that adverse impacts will be avoided by a vaguely defined process at a future stage of development plan review. Adding these ecologically important areas to the Balance easement, with BPL as primary holder, will ensure that the state has direct authority to protect valuable publicly-owned wildlife resources dependent upon these areas.

Requests to remove certain riparian and waterfowl/wading bird habitats and associated buffers from proposed development areas, with addition of these lands to the Balance easement, including: in the Lily Bay development area, Burgess Brook; in the Brassua Lake south peninsula development area, two waterfowl and wading bird habitats, as well as Misery Stream as it approaches the lake; and in the Long Pond development area, waterfowl and wading bird habitat on the southeast shore. Instead, the Commission proposes leaving these ecologically important lands within the development areas and applying a "no disturbance" standard (LURCgenerated amendments, June 4, 2008; pages 10, 37, 42). The MRFC Steering Committee objects to this proposal; we agree with MDIFW/MNAP that these lands should be "added to the Balance Easement to best ensure long-term protection" (MDIFW/MNAP testimony, November 20, 2007, page 12). Adding these sensitive natural areas to the Balance easement, with BPL as primary holder, will ensure that the state has direct authority to protect valuable publicly-owned water and wildlife resources dependent upon these areas.

Request that Plum Creek donate in fee to the State of Maine several areas of highest ecological importance: In testimony submitted September 14, 2007 (pages 9-10), MDIFW and MNAP requested that Plum Creek convey lands on Big Moose Mountain and Lily Bay/Number Four/Baker Mountains in fee to the State of Maine. In testimony submitted November 20, 2007 (page 5), MNAP reiterated its earlier request, while MDIFW asked that Plum Creek, "at a minimum, include previously identified areas of high ecological importance as Special Management Areas subject to minimal or no future disturbance per Management Advisory Team recommendations within the Balance Easement Baseline Documentation." The Commission has decided against requiring that Plum Creek donate the specified areas in fee to the state; the Commission is proposing that these areas be identified as special management areas in the baseline documentation, with Commission approval required for language detailing forest management and harvesting in these

areas (LURC-generated amendments, June 4, 2008; pages 72, 95). The MRFC Steering Committee believes that the best way to protect the ecological values of the specified areas would be ownership by the state, as initially requested by both MDIFW and MNAP and as requested again by MNAP in its most recent written testimony. However, if the Commission persists in its decision to offer more limited protection through designation as special management areas, MDIFW and MNAP should approve the language detailing forest management and harvesting, and the Management Advisory Team, under the direction of MDIFW, should be able to amend this language as indicated by future data. LURC does not have the expertise in natural resource management that MDIFW and MNAP can provide; requiring approval of forest management and harvesting plans by these two agencies offers greater assurance that the ecological values of these important areas will be protected.

► Native Forest Network

(pp. 3-4)

FINANCIAL COMPENSATION FOR MITIGATION:

LURC is requiring the turnover of both the Balance and Legacy easements, as well as other areas such as the Roaches and Bog Properties be mandatory before plan approval or further application processing, and deems the so-called "protection" of these areas integral to plan approval. Considering the monetary transactions that will take place with the turnover of the Legacy easement and the Roaches parcel, LURC is essentially recommending that PC be financially compensated to balance their development. If these areas are required for adequate "Offset Conservation" or adequate mitigation of impacts incurred by the development aspect, then why should PC be paid $35 million? It is the landowners own responsibility to effectively balance/mitigate their development. If PC receives money to balance their development, it could set a precedent allowing future corporations/landowners to receive monetary compensation for impact mitigation efforts.

EASEMENT LEVERAGE:

NFN feels that it is completely unacceptable that LURC is using the leverage which PC has provided by offering the Conservation Easements in addition to the Concept Plan as a means for approval. It is our understanding that, by law, LURC cannot approve a proposed Concept Plan based on the addition of Conservation Easements. What the LSCR suggests is that LURC permits for development within the CP area and the processing of other development-related applications is entirely dependent on the sale/solidification of the easements including Balance, Legacy, and Roaches acquisition. This recommendation officially intertwines the approval of the plan with the solidification of the easements (with the agreement to turn over the easements within the suggested timeframe of 45 days after approval). Plum Creek has clearly used the easements as the key selling point of the plan, and it sounds like LURC has bought it.

(p. 8)

[Regarding LURC staff/consultant recommendations cons:]

- Instead of removing environmentally sensitive areas from easements and donating, in fee, to the state, they suggest that these areas receive "special management protection", which merely limits management and harvesting practices

► Bureau of Parks and Lands (p. 11)

Ecologically valuable lands under the Balance/Legacy Easements.
Footnote #83 in the June 2008 LURC amendments to the Concept Plan recommends enhanced protections of certain ecologically valuable lands within the proposed easements, rather than fee ownership ...

Solely in cases where the baseline or existing inventory might locate such lands adjacent to existing conservation lands, we urge the Commission to reflect again on whether fee ownership might be the most cost-effective long term approach. If the landowner is facing increased endowment contributions, decreased harvest expectations, and increased annual interactions with the holders to ensure compliance, then the scales may tip for all parties to prefer fee conservation ownership. Conservation interests are likely to bring money to the table to tip the scales finally toward fee, where there is adjacent conservation ownership.

If the Commission continues with easement protections of these values (as it should where there is no contiguous conservation fee ownership), the Commission should be aware that recent experiences here in Maine with multiple existing working forest easements and forest certification systems have led us to recognize that the standard 'conserve and protect' language is insufficient. This is particularly apparent when there is appreciable timber value at stake. Responses are challenging and costly to all involved. Easement language and baselines must be express and clear to avoid debate in perpetuity about the extent of economic loss the landowner should expect, and the process which must be followed as science evolves on best practices, as state and global inventory of such properties evolve, and as climate change introduces new scientific and management challenges especially regarding unique ecological communities.

► Maine Department of Inland Fisheries and Wildlife and Maine Natural Areas Program

(pp. 5-7)

Location, size of easement (page 72)
In its June 4, 2008 amendments to the core elements of the Plum Creek concept plan, the LURC Commission recommends: 1) requiring that lands identified by MDIF&W / MNAP for conveyance in fee be alternatively identified in the Baseline documentation and then on an ongoing basis; 2) receive special management protection, in terms of limits on forest management and harvesting practices; and 3) set forth in detail in language in the accompanying Management Plan the forest management and harvesting programs and practices allowed in Special Management Areas (SMA) with such language reviewed and approved by the Commission as part of its review of final language.

Our experience with multiple working forest easements and forest certification systems have led us to believe that standard "conserve and protect" language in these easements is insufficient to safeguard natural community and ecosystem level functions and conservation values. If the Commission determines that those ecologically significant areas as identified in our September 14, 2007 comments (or subsequently indentified by MNAP and MDIF&W as discussed below) are best protected through the easement as SMA's, it is crucial that outcome based performance measures for any future forest management in these designated SMA's be developed in close consultation with MNAP ecologists and/or MDIFW biologists. Outcome based performance measures (further defined on pp 9-10) should include goals specific to maintaining publicly valued natural qualities of forest stands such as perpetual representation of old growth/late successional conditions, maintenance of habitat integrity for under-represented species of community types on the landscape, water quality conditions, etc.

For context, it is important to note that Special Management Areas (outside of vernal pools and deer wintering areas), as currently envisioned, would encompass a very small part of the easement landscape. Big Moose Mountain is the

only currently proposed Special Management Area with significant acreage of operable, high value forestland – roughly 2100 acres. As such, the Big Moose Mountain acreage accounts for less than 1% of the overall easement area.

Should the Commission decide to leave these areas within the easement to be treated as Special Management Areas, we strongly recommend that these areas be managed under close guidance by MNAP ecologists and / or MDIFW biologists to best safeguard the vulnerable natural community and ecosystem functions of each respective SMA designated. We strongly recommend that each SMA have a specific management plan drafted as a component of the more general Multi-Resource Management Plan, and that these standalone SMA management plans be crafted around an approved set of outcome based performance measures developed in consultation with MNAP ecologists specific to preserving representative natural community and ecosystem functions.

We are convinced that an outcome based approach to forest management in designated SMA's will better protect the significant public resource values currently provided by these exemplary natural communities and ecosystems, and will better accomplish the intent of the easement as mitigation for proposed conversion of forest land for development than a more traditional prescription based approach to forest management that emphasizes forest product output over less tangible ecological values.

Consequently, if the LURC Commission remains committed to conserving these values through the easement process, it is crucial that more specific, outcome based performance measures be developed in close consultation with MNAP ecologists and / or MDIFW biologists and that sufficient funds are allocated for a rigorous monitoring system for old growth/late successional areas to ensure the public values are adequately protected. Below are recommendations for the LURC Commission to consider regarding the designation of Special Management Areas:

- Special Management Areas should be defined in the easement as areas identified by the Maine Natural Areas Program and Maine Department of Inland Fisheries and Wildlife containing ecological resources of state-wide significance requiring management.
- Oversight and monitoring of Special Management Areas should be entrusted to a qualified, independent third-party monitor at a minimum or to MNAP or MDIFW depending on the feature being managed.
- Special Management Areas should be identified and site-specific outcome based management plans (further defined on pgs 8- 9 of these comments) agreed upon by the landowner, easement holder, MNAP, and MAT prior to the appraisal process to adequately assess the economic value of the relevant management constraints.
- Special Management Areas should be included in the baseline documentation process (as further defined on pg. 8 of these comments) to ensure the landowner, easement holder and third-party monitor are all clear on the size and locations of these resources. The baseline documentation should be signed by all three parties and ultimately approved by the MAT.
- Written notice will be provided at least 90 days prior to initiation of any harvest, road building or other management activities to the easement holder, monitor and members of the MAT.
- Any proposed harvesting or management activities undertaken in Special Management Areas shall require a site visit by the monitor and/or respective resource management agency (MNAP or MDIFW) with the landowner and their contractors prior to execution.
- The third party monitor and/or MNAP and MDIFW will retain the right to conduct periodic site visits while harvesting, road building and management activities are underway.
- The third party monitor and/or MNAP and MDIFW will notify the easement holder of any potential or actual easement violations. Easement holder remains responsible for enforcing the terms of the easement and providing communication with the landowner.
- The third monitor and/or MNAP and MDIFW will provide the landowner, easement holder and MAT members with a written report documenting the outcome of the activities.

Sufficient funds will be provided by the landowner in a dedicated fund for monitoring and enforcement of Special Management Areas

STAFF/CONSULTANT DISCUSSION AND RECOMMENDATIONS

► DISCUSSION

Based on comments received, staff/consultants offer the following analysis:

The comments received by the parties focused on two of the June 4th Commission-generated amendments concerning the location and size of the Balance easement: (1) the requirements for protecting particularly valuable ecological lands addressed in footnote 69, and (2) the decision that no further additions of land to the Balance easement would be required, as long all the Legacy easement and Roaches property are made required parts of the Concept Plan, pursuant to a series of Commission-generated amendments. Each issue is discussed below.

- Regarding footnote 69 of the June 4th Commission-generated amendments, wherein the Commission allowed particularly valuable ecological lands (identified by MDIFW / MNAP) to remain in the easement, but required that (1) they be identified in the baseline document and on an ongoing basis, (2) receive special management protection, and (3) the Management Plan set forth in detail the harvesting programs and practices that would apply to these special management areas:

  Two parties, MA/NRCM and MRFC, opposed leaving these lands in the easements, arguing that as part of the easement it was extremely unlikely that the lands would receive the ecological protections required. BPL's comments asked the Commission to be "aware that recent experiences here in Maine with multiple existing working forest easements and forest certification systems have led us to recognize that the standard 'conserve and protect' language is insufficient" for protecting these special management areas. From their comments, MDIFW/MNAP did not oppose outright the Commission's approach *so long as* special harvesting standards, as detailed in their comments, applied to these areas ("...if the LURC Commission remains committed to conserving these values through the easement process, it is crucial that more specific, outcome based performance measures be developed in close consultation with MNAP ecologists and/or MDIFW biologists and that sufficient funds are allocated for a rigorous monitoring system for old growth/late successional areas to ensure the public values are adequately protected.").

  Plum Creek, FSM, BPL and MDIFW/MNAP all expressed either support for or at least a willingness to work with the three requirements in the Commission's amendment. Specifically, both Plum Creek and MDIFW/MNAP suggested implementing language for the third requirement, each asking that their language be added to the Management Plan. Plum Creek's suggested implementing language is quite different from MDIFW/MNAP's, and their respective comments to the Commission do not demonstrate that these entities attempted to work together to reach mutual agreement on appropriate Management Plan language prior to each submitting these respective July 11th comments. Underscoring the importance of the Commission's third requirement, BPL's comments emphasize that "Easement language and baselines must be <u>express and clear</u> to avoid debate in perpetuity about the extent of economic loss the landowner should expect, and the process which must be followed as science evolves on best practices...". (emphasis in original)

  In staff/consultants' opinion, these comments do not change staff/consultants' recommendation regarding the treatment of special management areas, and in fact underscore the importance of each of the Commission's three conditions in the June amendment. Staff/consultants believe it is critical that final easement terms reflect a true meeting of the minds, expressed in precise and unambiguous language, as to the harvesting programs and practices that will be allowed in these special management areas. It would be a disservice to all interested parties if resolution of this issue were in effect deferred to the future by the adoption of vague or highly subjective terms.

  Against this background and as stated in the amendment, staff/consultants will develop what it believes to be appropriate and responsible special management area language for inclusion in the Management Plan, and will

submit this language to the Commission as part of its review of final language of any proposed amended Concept Plan.

- Regarding the June 4th Commission-generated amendment stating that no further additions of land to Balance easement would be required, as long all the Legacy easement and Roaches property are made required parts of the Concept Plan, pursuant to a series of Commission-generated amendments:

  Five parties (FEN/RESTORE, MA/NRCM, Maine Wilderness Guides Organization, MRFC and Native Forest Network) object to inclusion of the Legacy Easement and the Roaches property as part of the conservation required in return for the development rights granted in the Concept Plan. FEN/RESTORE and MA/NRCM in particular devoted a substantial amount of their comments to this issue. The objecting parties argue that, *e.g.,* "staff is proposing that Plum Creek be partially compensated for providing the required balance since TNC is going to pay Plum Creek for the Legacy Easement " (FEN/RESTORE), "A developer or applicant should not be allowed to use paid-for conservation sales and easements to fulfill regulatory requirements" and that "Allowing a landowner to use a paid-for conservation package ... contravenes the legal regulations themselves, sets terrible precedent, and represents bad public policy" (MA/NRCM), and "If The Nature Conservancy pays Plum Creek for the Legacy easement, the public will in essence be paying Plum Creek a second time, by subsidizing the conservation required as balance for the development" (MRFC).

  Staff/consultants and legal counsel appreciate the importance of the criticisms being raised by these parties, and have carefully examined the merits of these criticisms, and the allegations of a "terrible precedent" that would be set by the Commission's amendment here. For the reasons discussed below, staff/consultants and legal counsel reach a different conclusion than these parties, and recommend no change in the Commission's June 4th amendment on this issue.

  First, it is critical that staff/consultants/counsel correct what appears to be a misunderstanding of what staff/consultants/counsel believe to be the Commission's position (per the June amendments) regarding payment that Plum Creek might receive from TNC for certain land transactions required of Plum Creek by the Commission. The position taken by the Commission in its June amendments is essentially this: *unless certain lands are encumbered by easement terms and conditions acceptable to the Commission within 45 days of finalization of the Concept Plan, and certain other lands are transferred to AMC and also encumbered by easement terms, then LURC will cease processing all Concept Plan development-related applications until these actions have occurred.* Through these amendments the Commission *has taken no position on the existence, nature or extent of any compensation Plum Creek may receive*. Plum Creek's obligations to cause these land transactions to take place before any development applications are approved are entirely unaffected if payment to Plum Creek does not occur.[1]

  It is with this background that staff/consultants/counsel respond to the legal, policy and precedential claims made by the commenters.

  Several commenters assert the existence of a legal prohibition on applicants receiving financial assistance from third parties to assist them in complying with the Commission's required conservation actions. These assertions are accompanied by no citation to, or analysis of the statutory or regulatory language that allegedly compels this legal conclusion. In fact, the concept of a "donation" appears nowhere in LURC's statutes or regulations, and there is nothing intuitive about why the concepts of "mitigation," "comparable conservation," or "publicly beneficial balance" inherently depend on a donation. To the contrary, government generally establishes regulatory standards, but then leaves entities subject to those standards to decide how best to comply with them. Here, LURC does not

[1] To the extent that language in the Commission's June amendments created any other impression (*see* Tabs 53 and 57), staff/consultants/counsel are now recommending a slight change to that language.

have the legal authority to declare that a landowner does not, *per se,* meet these regulatory standards if, as a way to meet them, the landowner is able to arrange financial assistance from a third party.

Even if the statute or regulation could be read as harboring an implied donation requirement, it is difficult to see how LURC could effectively implement it. Would landowners be required to affirm that they received no form of third-party compensation for the conservation land they were delivering? Assuming the terms of such compensation were purely private, how could the Commission ever be assured of knowing about them? What if the landowner received consideration for the conservation land in a form other than cash? How would the Commission evaluate or value it? Would the Commission, even in the absence of any statutory or regulatory guidance on the question, be expected to apply some "discount" based on its understanding of the nature and extent of landowner compensation? To do so, not only would the Commission be inventing a new requirement, but attempting to apply it with no standards or expertise on the issue. If the Commission finds that the landowner is delivering conservation land that is acceptable in both quantity and quality to satisfy regulatory requirements, staff/consultants/counsel can find no statutory mandate or authority under which the Commission may investigate or evaluate the private terms of the underlying transaction.

Finally, the comments included warnings about the "dangerous" precedent that would be set unless the Commission rules that conservation land cannot be used to satisfy regulatory requirements if the landowner is compensated for it. The suggestion is that developers will somehow exploit conservation buyers by making the terms of a conservation sale contingent on regulatory approval for a development proposal, and by implication that TNC was exploited here. This argument fails to account for the fact that conservation buyers -- whether private entities like TNC, or public entities like the Land for Maine's Future -- have control over the terms of purchase and sale, and cannot be forced to agree to such contingencies. To the extent that the Commission's approach to the unique transaction between Plum Creek and TNC sets any "precedent" influencing future land conservation deals, it may well be to encourage conservation buyers to await the outcome of regulatory proceedings that will require significant land conservation from the landowner if significant development is approved, rather than first agreeing to the terms of a transaction that is expressly contingent on that regulatory approval.

► RECOMMENDATIONS

Based on the discussion above, staff/consultants offer the following recommendations:

- Regarding footnote 69 of the Commission's June 4th amendments:

  No change recommended by staff/consultants.

- Regarding that the Commission's June 4th amendments stating that no further additions of land to Balance easement would be required, as long all the Legacy easement and Roaches property are made required parts of the Concept Plan, pursuant to a series of Commission-generated amendments:

  No change recommended by staff/consultants.

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OFFSET CONSERVATION, BALANCE EASEMENT:
LAND USE ZONING

COMMENTING PARTIES

- Petitioner Plum Creek

COMMENTS FILED BY THE PETITIONER

(p. 19)

Plum Creek agrees with these recommendations.[1] However, Plum Creek would like to point out that the 190 acres located on Blue Ridge is surrounded by a development zone. Plum Creek wants to place a deed restriction on this property instead of adding it to the balance easement.

[1] Recommendation, Development Zoning (M-GNM Zone): (various pages noted below)

Eliminate the four proposed M-GNM zones adjoining development areas by either placing such areas into new development zoning or "Balance" conservation easement (page 51), as follows:

1 Near the Beaver Cove town office (two M-GNM zones, 10 acres total): Replace with new D-MH-RS1 zone. (page 3)

2 In the Big Moose Mountain development area, west of Burnham Pond (one M-GNM zone, 107 acres): Add area into "Balance" conservation easement. (page 16)

3 In the Rockwood/Blue Ridge development area, on Blue Ridge (one M-GNM zone, 190 acres): Add area into "Balance" conservation easement. (page 32)

STAFF/CONSULTANT DISCUSSION AND RECOMMENDATIONS

► DISCUSSION

Based on comments received, staff/consultants offer the following analysis:

The outcome suggested by Plum Creek in its comments -- using a deed restriction to eliminate development in the proposed 190 acre M-GNM zone in the Rockwood/Blue Ridge development area that is surrounded on all sides by development area rather than placing this isolated parcel in the Balance easement -- makes sense to staff/consultants. If it is determined that an easement, rather than deed restrictions, is the appropriate legal vehicle to accomplish this purpose, any such easement should be distinct and independent from the Balance easement. Staff/consultants believe resolving the question of which legal vehicle is appropriate is a second-tier issue.

► RECOMMENDATIONS

Based on the discussion above, staff/consultants offer the following recommendations:

- Regarding treatment of the proposed 190 acre M-GNM zone in the Rockwood/Blue Ridge development area, change the Commission's June 4th amendments to state:

  Eliminate the four proposed M-GNM zones adjoining development areas by either placing such areas into new development zoning or "Balance" conservation easement (page 51), or imposing deed restrictions/easements as follows:

  1. Near the Beaver Cove town office (two M-GNM zones, 10 acres total): Replace with new D-MH-RS1 zone. (page 3)

  2. In the Big Moose Mountain development area, west of Burnham Pond (one M-GNM zone, 107 acres): Add area into "Balance" conservation easement. (page 16)

  3. In the Rockwood/Blue Ridge development area, on Blue Ridge (one M-GNM zone, 190 acres): Require a no-development deed restriction or easement be placed on this acreage at the time the long-term plan for the Rockwood/Blue Ridge development area is approved and prior to any subdivision or development activity commencing.

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OFFSET CONSERVATION: BALANCE CONSERVATION EASEMENT HOLDER OF EASEMENT

COMMENTING PARTIES

- ► Petitioner Plum Creek
- ► Intervenors and Interested Persons
  - Forest Society of Maine
  - Maine Audubon and Natural Resources Council of Maine
  - Maine Professional Guides Association
  - Moosehead Region Futures Committee
  - Native Forest Network
  - The Nature Conservancy
- ► Governmental Review Agencies
  - Bureau of Parks and Lands
  - Maine Department of Inland Fisheries and Wildlife and Maine Natural Areas Program

(p. 40)

Plum Creek agrees that streamlining who is holder and who is back up holder makes sense. Plum Creek, however, believes that a private entity like FSM can and should act as holder. Conservation of thousands of acres of the North Woods has been achieved by private entities. Indeed, the vast majority of the conservation efforts in Maine have occurred as a result of private entities such as TNC, FSM and land trusts. To provide for more efficient and cohesive management of these conservation lands, the private conservation entities must continue to fulfill this function. They have the required demonstrated mission, experience and expertise to act as Holder. Perhaps equally important, if the Commission were to find that TNC or FSM are not acceptable Holders, it would undercut the value of the easements currently held by these organizations and potentially undercut their ability to undertake future conservation easements. It is critical to both recognize and support the efforts of private entities which have provided the majority of conserved lands for the people of the State of Maine.

The Balance Easement as presented to the Commission in Plum Creek's October filing had FSM as the Holder with BPL as the back-up holder. The Legacy Easement had TNC as the holder and BPL as a limited third party holder with respect to the public access provisions only.

Plum Creek and, to our knowledge, TNC, are willing to amend the Conservation Framework to provide that Plum Creek would grant the Legacy Easement directly to FSM as Holder at Closing and to have BPL act as the full Third Party holder. It is important that the easement holder be an entity that has a conservation mission focus, expertise, resources, and understanding of the history and intent of the easements necessary to monitor and enforce the easements. FSM meets all of these criteria.

Plum Creek agrees that having BPL act as back-up holder for both easements makes sense and that BPL has an important role to play particularly with respect to recreation management.
It is important to note that the easements make clear that the Back-up holder has all the rights of the holder and can independently enforce the terms of the easements even if the Holder fails to do so. Section 13 of each easement provides: "Grantor grants to the Third Party the same entry, inspection, management and enforcement rights as are granted to Holder under this Conservation Easement, and the Management Plan. However, the parties hereto intend that Holder shall be primarily responsible for the monitoring and enforcement of this Conservation Easement, and that the Third Party intends to assume such responsibility only if Holder fails to properly monitor and enforce. However, the Third Party may at any time exercise, in its own name and for its own account, all the rights of monitoring and enforcement granted Holder under this Conservation Easement." [emphasis added]

Plum Creek is further willing to address LURC's concern by adding language such as the following to the TERMS, COVENANTS AND RESTRICTIONS of the easements: "Throughout this Conservation Easement, it is intended that Third Party shall have the same rights as the Holder, as more specifically described in Section 13 hereof. "

Moreover Plum Creek is willing to add language to both easements that make it clear that the Attorney General can independently enforce the easements in accordance with the recently revised Maine statute as amended or successor provisions. By following this approach, the public benefit of these easements is fully protected without putting undue stress on limited state resources.

Plum Creek is also willing to add language such as the following to section 13 (D) of the easements to address LURC's concern about what happens if FSM were not adequately administering the easements: "D. This Conservation Easement is assignable by Holder, but only after notice to and approval by Third Party and Grantor (which approval shall not be unreasonably withheld), and only to an entity that satisfies the requirements of Section 170(h)(3) of the Internal Revenue Code of 1986, as amended (or successor provisions thereof) and Section 476(2) of Title 33 of the Maine Revised Statutes

Annotated (1989), as amended (or successor provisions thereof), and that agrees, as a condition of transfer, to monitor, enforce, and otherwise uphold the conservation purposes and terms of this grant (together, the "Holder Requirements"); provided that the parties hereto agree that the State of Maine is an approved assignee; and provided further that any such assignment (other than one to the State of Maine) must be approved by LURC. Third Party shall have the right to oversee Holder's management and enforcement of this Conservation Easement and the Management Plan. If Third Party finds, after 90 days written notice and opportunity to cure and after exhaustion of all appeals if any, that Holder is failing in a material and unreasonable way to perform its duties as Holder hereunder, then Third Party may assign this Conservation Easement to a new holder who meets the Holder Requirements, but only after notice to and approval by Grantor (which approval shall not be unreasonably withheld). Such assignment must also be approved by LURC.

COMMENTS FILED BY INTERVENORS AND INTERESTED PERSONS

► Forest Society of Maine (pp 1-8)

Commission Recommendation (page 74): Holder of the Balance easement and the Legacy easement should be the same entity;

FSM Comment: FSM concurs with this recommendation.

Commission Recommendation (page 74): The Commission has tentatively concluded that the holder of the Balance and Legacy easements should be the Department of Conservation, Bureau of Parks and Lands. However, the Commission is particularly interested in public comment on three questions:

Commission question #1 (page 74): 1) whether a non-governmental entity is more appropriate as the Holder, and why;

FSM Comment on Question 1: A non-governmental entity as the Holder for the Balance and Legacy conservation easements, with the Bureau of Parks and Lands (BPL) as the Third Party backup holder, is a more appropriate model to successfully meet the Commission's stated goals for Concept Plans and associated conservation easements for the following reasons:

The non-governmental Holder/State as Third Party model will ensure that the public rights and conservation protections provided by the Balance and Legacy easements are monitored and enforced through a public-private partnership which combines the strengths of a nongovernmental Holder and a public agency without unduly burdening the State's staff and financial resources..

> Maine is fortunate to have strong land trusts with easement holding and enforcement capabilities. Under the non-governmental Holder/State as Third Party model, the State benefits from a public-private partnership that utilizes this strong land trust capacity and expertise. With the private non-profit holder performing its role, the State is able to use its scarce resources for other priorities. The public interest is protected even in the unlikely event of a failure of the non-profit, because the State agency holder of third-party rights can step into the Holder's shoes, or can designate another non-governmental Holder. This public-private partnership is particularly beneficial in the context of landscape-scale working forest easements that require substantial capacity and expertise for monitoring and enforcement.
>
> If the conservation easement were simply held by BPL with no other entity holding third-party rights, the conservation values of the property, and the public interest in preserving them, could under some circumstances, be afforded less protection. BPL is an agency with broad and diverse responsibilities which often has limited resources to meet the many demands placed on it, and the stewardship funds that accompany the easements, while sufficient to augment an entity's existing capacity for monitoring and enforcement, might be insufficient to

expand this capacity and expertise in a public agency that does not already have staff dedicated solely for that purpose. By having an existing non-profit as part of the public-private partnership, the partnership builds on years of accumulated experience and organizational investment in easement monitoring, stewardship and enforcement capacity. Such a private-public partnership further protects the public interest against circumstances under which BPL might fail to monitor or enforce the easements due to other and more immediately pressing public responsibilities or limited resources.

In Maine, the protection of the public interest in easements with a non-governmental Holder is made even more secure by additional statutory protections. Under 33 M.R.S.A. §478(1)(D)(4), in the event of the failure of the private Holder and the agency, if any, holding third-party rights, the Attorney General may initiate court action in its own name to enforce the easements. Furthermore, under the intervention authority granted to political subdivisions by 33 M.R.S.A. §478(2), the county commissioners of any counties, and the assessors of any townships and plantations, which include lands subject to the easements can intervene in any legal proceedings regarding the easements.

The Commission, in footnote 72 on page 74, expresses concern that the Holder has significant autonomy to make "decisions that significantly affect the public rights and protections" contained in the easements such that a public entity might be a more appropriate Holder. To the extent that this concern refers to the right of public access, the Holder's responsibility with regard to those rights is to ensure that the affirmative management of such rights conforms with all the terms of the easements.

FSM recognizes that BPL has extensive expertise and experience relating to public recreational management. Whether Plum Creek or BPL is ultimately made responsible for the affirmative management of permitted public recreation on the properties, an experienced non-governmental Holder with the requisite capacity and expertise is an appropriate entity to monitor and enforce the terms of the conservation easements as they apply to such recreational activities.

The conservation protections referred to by the Commission in that footnote are another significant public benefit provided by these easements. The non-governmental Holder/State as Third Party model ensures that these public benefits are protected by an entity with the mission focus, staff and expertise to perform the necessary monitoring and enforcement, and that a public entity oversees the activities of that non-governmental Holder.

No state agency currently exists with the specific mission to oversee working forest easements and the State should not unnecessarily duplicate the existing capacity and expertise of private non-governmental entities. BPL currently contracts with non-governmental entities on a short-term basis to provide easement monitoring services. This contracting model, however, is not well adapted to the requirements for monitoring large-scale working forest easements, especially these particular easements for the following reasons: (1) the short contract time horizon does not match the long-term management needs associated with the adaptive management approach incorporated into these easements because the contract time horizon is too short to permit effective monitoring of decisions and management actions which need to be based on 10 to 20, or even 50+ year forest management time horizons; (2) the short time horizon, uncertainties and other vagaries of the public contracting process do not encourage a contracting non-profit entity to make the long-term commitments necessary to build the capacity and effectiveness required to monitor, manage, and enforce such multi-faceted large-scale working forest easements; (3) the short contract time horizon does not permit the formation of the long-term relationships and understandings among the landowners/managers, Holder, Third Party backup holder, and Management Advisory Team that are essential to achieving the long-term purposes and goals of these easements, especially with regard to their forward-looking adaptive management approach; and (4) the costs of short-term contracts are often greater than the costs of more stable long-term arrangements.

Private nonprofit land trusts have available to them national oversight programs setting forth preferred standards and practices for land trust operations including monitoring, enforcement and stewardship of easements.

Private nonprofit land trusts that adopt the standards and practices developed by the national Land Trust Alliance (LTA) undergo periodic self assessment to ensure ongoing compliance and continued improvement in their operations. National oversight programs such as the LTA provide a forum and network for land conservation professionals to share and develop best practices for easement monitoring, enforcement and stewardship. Such national oversight programs are not open to or available for public agencies holding conservation easements.

As a matter of public policy, the non-governmental Holder/State as Third Party model encourages necessary investment in Maine's private conservation infrastructure which will facilitate publicly beneficial partnerships for state-wide conservation projects in the future.

In view of the State's wide ranging legal and program obligations and frequent budgetary constraints, sound public policy requires that the Maine woods be protected through a combination of state regulations, public and private partnerships, private donations, public and private land and easement acquisitions, and voluntary LURC inspired large-scale concept plans.

Pursuant to this policy, encouraging the formation of qualified private non-profit conservation easement holders is in the public interest for many reasons including their unique ability to do the following: (1) focus on a clearly defined mission; (2) dedicate expert staff to that mission; (3) attract charitable and foundation funds to develop mission-appropriate capacity and expertise; and (4) encourage landowner acceptance and participation in voluntary conservation initiatives. Such private non-profit conservation easement holders are also relatively insulated from changes in the political climate and from legislative and political pressures (both toward and away from conservation objectives).

If one accepts the need from a public policy perspective to encourage the existence of private non-profit conservation easement holders, it follows that, particularly in a state like Maine with very limited resources, the State should not then use its limited resources to replicate the financial, technical, and staff resources which those private entities develop. To do so would defeat the public policy goals which led to the formation of public-private partnerships in the first place, increase the State's costs to achieve its conservation goals, and deprive the private partners of the revenues needed to build their capacity.

The Commission, in footnote 72 on page 74, expresses concern that over whether a "private organization" is appropriate to ensure that the "public values and protections of the easement are achieved." In this regard, it is important to note that a non-profit land trust is not a "private organization" in the typical sense.

A land trust that meets the requirements to be a qualified holder of a conservation easement must comply with the requirements of section 501(c)(3) of the Internal Revenue Code and the regulations adopted thereunder. Maine's nonprofit corporation laws, and common law doctrines relating to charitable trusts, also apply. Within this context a land trusts must act pursuant to their mission and in the public interest, and cannot act in a way that leads to private benefits. Although 501(c)(3) land trusts are non-governmental in nature, their mission and purpose is to further the public interest in land conservation.

In light of the fact that the Commission's *Guidelines for Selection of Conservation Easement Holders* provides that "the agency head . . . must commit to assume legal responsibility for monitoring and enforcement of the easement," substantial weight should be given to the opinions and concerns expressed by Alan Stearns in his capacity as the Director of the State's Bureau of Parks and Lands.

We understand from conversations with Mr. Stearns that his comments are likely to address the following concerns:

- BPL would prefer Third Party status to the affirmative stewardship, monitoring and enforcement obligations associated with directly holding the easements;

- BPL does not currently have sufficient staff or resources to monitor these additional large-scale working forest easements and BPL supports the use of the expertise and capacity that already exists in the private sector;
- BPL supports the goal of maintaining strong land trusts in Maine with appropriate expertise such that BPL can continue to take advantage of public-private partnerships that allow BPL to concentrate on other critical aspects of its mission; and
- BPL cannot reasonably be asked to assume all of the responsibilities suggested by the Commission in its proposed amendments to the Plum Creek Concept Plan.

These concerns are consistent with FSM's discussions with BPL on this topic over the past several years. In late 2005 when FSM was first approached as a potential Holder, FSM went to BPL to seek its guidance. BPL suggested that FSM be proposed as Holder in the Plum Creek application and that BPL be proposed as Third Party backup holder. The inherent strength of this public-private partnership model was a major part of FSM's decision to commit the time and resources necessary to participate in the Concept Plan process as a potential Holder of the conservation easements.

From a public policy perspective, FSM is an appropriate choice for holding the balance and legacy easements.

FSM's qualifications are discussed more completely in the prefiled testimony of Alan Hutchinson on behalf of the Forest Society of Maine dated August 31, 2007, and are highlighted below:

FSM was formed specifically to meet Maine's need for an appropriate holder of large-scale working forest easements;

FSM's mission is to protect and conserve Maine's forestland, including important natural areas such as lakes, rivers, and mountains, and to sustain the economic, ecological, cultural, and recreational values of the Maine woods. FSM's strategy to achieve this mission includes holding and enforcing precisely the types of easements represented by the Balance and Legacy easements;

FSM's stated niche of "providing a balanced approach to conserving the special nature of Maine's working forestlands," mirrors the Commission's stated goal for Concept Plans of "achieving a publicly beneficial balance between development and protection of resources";

FSM has adopted the standards and practices of the Land Trust Alliance and is an active participant in this national oversight organization;

FSM has the resources, technical capacity and expertise to monitor and enforce these easements, and FSM has significant other easement holdings geographically contiguous to or near the Protected Properties, which when managed and monitored in a coordinated manner will increase the effectiveness of the protections provided by each of the easements; and

FSM has a proven track record of successful acquisition, monitoring and enforcement of similar, large-scale, multi-faceted working forest easements in Maine. FSM currently holds conservation easements on 370,000 acres, for which it is fully responsible, and monitors more than 200,000 additional acres of conservation easements for others. Easements FSM holds and/or oversees include the West Branch, Katahdin Forest, Boundary Headwaters, Attean, Debsconeags, and Nicatous easements.

FSM is committed to preventing easement violations to the maximum extent possible and to pursuing enforcement action whenever easement violations do occur. During FSM's 20+ year history, any violations that have occurred on easements we hold, have been fully addressed and brought to satisfactory resolution. In each instance where legal action was necessary, restitution, and restoration were achieved as part of the resolution. In addressing such violations, we also work to identify their cause and to institute measures to prevent any reoccurrence.

Commission questions #2 and #3 (page 74) as amplified by footnote 72 (page 74): 2) if a non-governmental entity is the Holder and BPL is the third-party backup holder, what specific additional provisions should be placed in the easement or otherwise created that would assure that the public rights and protections contained in the easements are being monitored and enforced on an ongoing basis by the Holder, and what remedies should be put in place if BPL finds that this monitoring and enforcement is not occurring; 3) what legal mechanism and /or language would be used to implement these provisions in the context of an easement. Footnote 72 expresses concern that "The easement terms grant substantial authority and autonomy to the Holder to make decisions that significantly affect the public rights and protections that are granted through the easement … [such that] only a public entity (and not a private organization) should be responsible for ensuring that these public values and protections are achieved."

FSM Comment on questions 2 and 3 and footnote 72: If a non-governmental entity is, determined to be the Holder, the following provisions would respond to the Commissions questions and address the concerns raised in footnote 72:

The Commission, in footnote 72 on page 74, expresses concern that the Holder has significant autonomy to make "decisions that significantly affect the public rights and protections" such that a public entity might be a more appropriate Holder. To the extent that the public rights described in this footnote refer to public recreational rights or rights of public access, the easements and Concept Plan could be clarified to separate the management of such public rights from the monitoring and enforcement of the terms of the conservation easements. This could be accomplished within the easement with a provision that specifically identifies the party responsible for such affirmative management (for example, a provision modeled on paragraph 6(E) of the Drafting Guidelines for Working Forest Easements Funded by the Land for Maine's Future Program, page 6-27), or it could be accomplished perhaps more effectively within the framework of the Concept Plan through specific agreements negotiated between Plum Creek and an entity such as BPL with extensive expertise is such affirmative recreation management. Choice of the Holder is not the appropriate mechanism by which to accomplish the goal of assigning affirmative management rights on the Protected Properties because the Holder is responsible for determining whether such affirmative management complies with the terms of the conservation easements, and the Holder is therefore not the appropriate entity to be assigned responsibility for any such affirmative management of public recreation on the Protected Properties.

To the extent that the concerns expressed in footnote 72 refer to decisions on Permitted Uses that might more appropriately be made in the public forum provided by a governmental agency, the easement could be modified to ensure that such deliberations do occur in a public forum. As a condition of approval of the Concept Plan, the easements could be modified to provide that the Commission retain approval rights over improvements and infrastructure which involve issues that are closely related to the Commission's zoning and planning mission. For example, the Commission could retain approval rights over wind power and related infrastructure on the lands subject to the easements. This would allow the Commission to make the determination of whether particular locations proposed for such uses were consistent with Commission requirements and the purposes of the easements. The public comment portion of the approval process would allow for input from the Holder and BPL.

To the extent that Holder autonomy to make "decisions that significantly affect the public rights and protections" mentioned in footnote 72 refer to a Commission determination that certain permitted activities, such as Construction Material Removal, Septic Spreading and Water Extraction, should be limited to the "needs" of surrounding communities located outside of the Protected Property, the Commission should retain the authority to evaluate the need of those local communities. This analysis of need would not be necessary if the Commission were to determine instead that such activities should be limited to servicing those specific surrounding communities and that the activities be subject to clearly outlined restrictions on the short-term and long-term impact on the Protected Properties. While a Holder can be expected to evaluate appropriate extraction limitations within the Protected Properties (such as maximum size or amount per extraction site; maximum aggregate acreage actively disturbed at any time; and maximum total acreage in perpetuity), an evaluation of the "need" of those local communities for construction material, water or areas for septic disposal is outside of the mission and expertise of an easement Holder, and fits more squarely within the zoning and

planning mission of the Commission. FSM's position on these issues is further outlined in response to individual Commission recommendations on pages 79 and 80.

The Commission's concerns expressed within these questions 2 and 3 also relate to adequate oversight of a non-governmental Holder. Under the current easement provisions, the Holder is required to file annual written monitoring reports with BPL. Language could be added to the easement which provides that these annual monitoring reports include, at a minimum, a description of the following: (1) any easement violations on the Protected Properties; (2) any resulting action by the Holder; (3) any potential violations or emerging issues identified by the Holder or brought to the Holder's attention by any other entity; (4) any significant changes to the property or its ownership; and (5) a summary of the activities and recommendations of the MAT. In addition to the written reports, BPL also has access to any and all records of the Holder relevant to the Protected Property, and BPL has all of the same entry and inspection rights as the Holder regarding the Protected Property and Plum Creek's management thereof. These provisions provide significant mechanisms by which BPL, as Third Party, can ensure that the public rights and conservation protections contained in the easement are being monitored and enforced on an ongoing basis, without burdening BPL with the cost of actively performing all such monitoring and enforcement.

If a non-governmental Holder is selected, the easement could be modified to clarify the circumstances and procedures under which BPL could exercise the following three remedies if BPL finds that adequate monitoring and enforcement is not occurring: (1) BPL could replace the Holder with another entity (2) BPL could itself step into the shoes of the Holder, and/or (3) BPL could independently undertake a particular enforcement action as Third Party. While BPL as Third Party would always have the ability to initiate enforcement proceedings independently, prudent practice would suggest that BPL first give notice to Holder of any intent to do so, and give Holder the option of initiating the proceedings. The process by which BPL could replace the Holder, whether with itself or with another entity, should include notice to the Holder and a right for the Holder to cure any deficiency, and should outline the procedures by which such a replacement would be implemented. Because the process of approval of a Concept Plan includes Commission approval of the initial Holder, which approval is subject to specific LURC guidelines for conservation easement Holders, Commission approval of any replacement Holder should be required as part of this process. Requiring Commission approval of a change in Holder would be consistent with other conservation easements approved by the Commission in the context of other Concept Plans. Further, the public nature of the LURC approval process would provide an appropriate forum with sufficient public input for making a decision on a change of Holder.

The stewardship and enforcement fund should be structured to ensure automatic transfer of the fund to any replacement Holder. For this reason, FSM has recommended that the stewardship and enforcement fund be held by a third-party entity such as the Maine Community Foundation for the benefit of the Holder of the easements. Structuring the fund in this way will ensure that, in the event that a change of Holder occurs, no further action is required to effectuate the transfer of rights to the new Holder as the beneficiary of the fund.

► Maine Audubon and Natural Resources Council of Maine (pp. 36-38)

<u>The Primary Holder of the Easement Must Be A State Entity.</u>

A public holder of the easement should be mandatory. NRCM and Maine Audubon have been consistent with this assertion since the beginning of these proceedings. The issue was flagged in the Detailed List of Issues submitted by NRCM and Maine Audubon, roughly one year ago on July 31, 2007. For the reasons stated in the pre-filed testimony of Catherine Johnson on 8/31/07, the Holder should be a public entity.

Because the current conservation easements are State-mandated, because they have become mandatory components of a LURC regulatory development rezoning process, the State of Maine (or a State entity) should be the Holder of the conservation easement. The conservation easement is required in the context of a state administrative proceeding as part of the required statutory balance between proposed new development and conservation. Throughout the easement on several critical terms, the Holder is provided significant rights of approval, and assumes the right and responsibility

for monitoring compliance with easement terms and pursuing enforcement of any breach. Given the size of the easement, these Holder responsibilities become even more important. If the Holder is a private entity, the regulatory power and authority of the State is divested or functionally pre-empted by the discretion or decision-making of a private entity. The private entity may exercise its discretion or decision- making authority in accordance with the private entity's resources or its own interests, and carries no accountability to the public, and provides no actual assurance that the public interest (rather than the interests of the private entity) will be the guiding principal in the decision- making.

It may be that the State could hire an NGO or non-profit to perform the easement monitoring on behalf of the State – and it could even be that the State may decide that either the Forest Society of Maine or The Nature Conservancy is a suitable entity to perform those tasks under government contract, on behalf of the State. But it is best for the State to retain ultimate control and to retain the rights of Holder. In private land deals – in other words, in private conservation easement sales or transfers of land for conservation, which are not connected to any regulatory process or development rights – it may be appropriate for the State to be simply "backup" Holder or third party Holder. In such pure conservation transactions, involving state or federal funding, unconnected to a regulatory development application or compensation in the form of development rights, it is appropriate for the conservation project to go forward without the necessity that the State become the primary Holder of the conservation easement (or of the fee, in a fee acquisition). But in this case, the conservation package is not a pure conservation deal that is unconnected to a regulatory process – indeed, the conservation package is an essential element, or state mandate, as part of the developer's procurement of development rights. A public Holder of the easement should therefore be mandatory.

There is another, practical, reason why the State should be the primary Holder of the easement, and not simply the third party Holder. The Holder will have access to a substantial, presumably sufficient, fund to monitor the easement (although it is unclear that the proposed stewardship fund is sufficient to allow the Holder to pursue potentially necessary enforcement actions or review potentially permitted large scale commercial activities, such as large new gravel pits, wind farms, etc. in the future – provision should be made for access to additional funds for these purposes). No such fund is provided for the third party Holder, and thus, any meaningful oversight by the State as a third party Holder is an illusion. For the State to exercise meaningful third party rights, it would also need access to a similar sized stewardship fund, in which case, it makes more sense for the State to simply be the primary Holder.

► Maine Professional Guides Association (pp. 1-2)

For both the Balance and Legacy Easements, we do not see the need to replace the original plan's proposed primary easement holders (Forest Society of Maine and the Nature Conservancy) with the State of Maine. This is unnecessary and seems to be unprecedented. We support the original proposal having the Forest Society of Maine (FSM) act as holder for the Balance Easement. FSM currently holds easements on 282,000 acres to the immediate north of the Moosehead Lake Concept Plan area, ie., the "West Branch" easement. Recreation and forestry activities within this area have continued to serve public and private needs while protecting ecological values. The success of this arrangement demonstrates that the FSM is not only very capable of holding the Balance Easement, it also shows that the FSM is quite capable of doing so with little controversy or problems.

The FSM has clearly worked with the underlying "West Branch" land owners to provide for a broad range of public recreational opportunities, in a manner similar to that which is being proposed for the Balance and Legacy Easement areas. Specifically, day to day recreational management and facilities is provided through the North Maine Woods organization, while the "Community Stewardship Fund" would oversee and contract for the day to day recreational management and facilities within the Moosehead easement areas on Plum Creek lands. The success of this approach is very well documented.

► Moosehead Region Futures Committee (pp. 6-7)

In the MRFC post-hearing opening brief (submitted March 7, 2008), we stated that the Legacy easement lands should be added to the Balance easement and that the State of Maine should be the easement holder (page 6). We therefore

agree with the Commission's tentative conclusion that the Balance and Legacy easements should be held by the Bureau of Parks and Lands (BPL) (LURC-generated amendments, June 4, 2008, page 74). Under the terms of a concept plan, LURC grants certain extraordinary development rights to a landowner in exchange for conservation that will mitigate the adverse impacts of the development and result in a net public benefit. It logically follows that an easement created as part of this regulatory process should be publicly held. State agencies are directly accountable to the public and therefore are more likely than non-governmental organizations to protect the best interests of Maine's citizens. If BPL lacks adequate staff for monitoring and enforcement, we believe that it would be acceptable for BPL, as easement holder, to contract routine easement management to a non-governmental organization such as the Forest Society of Maine.

Funding should not be an impediment to BPL's serving as easement holder. If BPL believes that the currently proposed easement stewardship funding is inadequate, then the funding agreement should be revised accordingly. Without adequate funding for rigorous monitoring and enforcement of the easements, there is no guarantee that the benefits promised to Maine's citizens will ever be realized.

If the Commission reverses its initial decision, and ultimately concludes that a non-governmental organization should be the primary easement holder, with BPL as third-party backup holder, multiple safeguards would be required to protect the public interest. BPL should be required to closely monitor the primary holder's performance; BPL should have the right to demand that the holder meet high standards with regard to monitoring and enforcement of the easements and should be able to take control of the easements from the holder if BPL determines that the public's interest is not being served. Because close monitoring of the primary holder would place heavy demands on BPL staff time, stewardship funding would be required for BPL as backup holder in addition to the funding provided to the primary holder.

► Native Forest Network

(p 4)

While it is a pro for LURC to be recommending that a Public entity like the BPL be the 3rd party easement holder, there is still an issue with allowing a private non-profit entity like Forest Society of Maine, The Nature Conservancy, or the Western Mountains Foundation to be the primary easement holder. This is not acceptable since there are problems of conflict of interest with these easement holders that were raised in the NFN PHB. The ability for the Public to have effective oversight is much stronger if the easement is held by a Public entity instead of a Private Non-Profit. Even if the BPL becomes the chosen easement holder, there still needs to be a stronger mechanism in place to ensure that there is effective oversight and enforcement of the terms of the easement.

(p 7)

[Regarding conservation easement pros:]

- BPL has 3rd party oversight of easement activities/Holder performance and ensuring they have rights consistent with those of the Holder (p 77, footnote 76)

► The Nature Conservancy (p. 2)

TNC supports the Commission's recommendation to ensure that the Balance and Legacy Easements are held by the same qualified conservation entity. TNC believes that The Forest Society of Maine has the requisite experience, qualifications, and resources to serve as Holder. TNC defers to the Commission to determine the appropriate Holder for the easements, and will work with the Commission to ensure that the appropriate Holder is put in place at closing on the Legacy Easement.

► Bureau of Parks and Lands

(pp. 1-3)

BPL ROLES AND INTRODUCTORY CONCERNS:

BPL has multiple roles with respect to the pending petition/concept plan. These roles were laid out in earlier testimony, but are amended here to reflect recent shifts/amendments to the Concept Plan:

- Requested expert/agency comments to LURC on recreation in Plum Creek concept plan proposal;
- Owner/operator of current major recreational assets surrounded by or adjacent to the Plum Creek concept plan area: Lily Bay State Park; Seboomook Unit; West Branch Easement; Days Academy; Kineo; Moosehead Shoreline: KIW Easement; Nahmakanta Unit; Little Moose Unit; and more;
- Major service provider to meet demands/provide future recreational infrastructure/operations in LURC territories; default service provider (by expectation rather than by funded authorization) for recreation management where recreation management voids exist.
- Proposed primary holder of snowmobile trail easements;
- Proposed primary holder of road easements;
- Proposed primary holder of hiking trail easements;
- Proposed administrator of Moosehead Recreation Fund;
- Proposed recipient of Moosehead Recreation Fund awards and loans;
- Proposed recipient of donated (future unspecified defined acreage) fee lands;
- Proposed beneficiary of unique easement permissions (campgrounds, eg);
- Proposed role in holding of Plum Creek "Balance" and "Legacy" conservation easements;
- Possible holder of AMC Roaches backcountry easement;
- Current holder or designated monitor for USFS of conservation easements over various Plum Creek lands separate from proposed concept plan easements;
- Expected expert/agency comments to LURC on various expected subsequent subdivision, resort, and other applications, with exciting (enhanced) new recreational review standards;
- Expected agency coordination with MDOT pedestrian and bicycle trail development pursuant to concept plan.
- Strong interest in statewide policy implications of LURC's approach to concept plan approval;
- Interest in constructive relationship with Plum Creek due to landowner relations/open lands in other areas of the state;
- Abutter to Plum Creek – various economically significant bilateral forest products access agreements and routine abutter issues;
- More.

BPL is both intrigued and frankly overwhelmed by the prospect of the new proposed/possible/ expected roles, above. Each role individually might be manageable and sensible, but the magnitude of roles considered cumulatively presents questions of our small bureau's ability to analyze pending proposals, execute proposed documents, or implement apparently imminent new responsibilities while retaining our reputation and record of success delivering conservation and recreation for all Maine people. We respect that LURC has now turned to BPL for resolution of difficult issues inadequately addressed by various earlier Concept Plan submissions yet not squarely proposed for BPL's shoulders until June 2008 (hiking trail easements, backcountry Roaches easements, recreation fund, more). We respect that LURC has apparent confidence in BPL's ability to be a competent steward as primary easement holder. We are cautiously intrigued by and eager to embrace the prospect of unparalleled conservation and recreation opportunities linked to economic development and possibilities of prosperity for Maine people in the Moosehead region. The Concept Plan creates precedent-setting tools and security for snowmobile trails. The Concept Plan creates a monumental step

forward for world class backcountry recreation areas in Maine's 100 mile wilderness. Yet we ask for pause and reflection – and then renewed attention --- on the daunting expectations being placed on BPL.

The comments below frame some of the cost/resource implications for BPL, with some suggested avenues for adequate funding. And some suggested avenues for reducing expectations or requirements, thus reducing the need for funding. BPL has never sought to be a "breaking point" or "decider" for the Concept Plan as a whole. Rather we have sought to accommodate LURC's direction, to respond to LURC's vision for the region, within parameters of balance set by LURC. At the same time, BPL must make sure that the Concept Plan does not become the "breaking point" for BPL – a small agency with growing responsibilities and declining resources. This can also framed regulatorily by saying that underfunded or unrealistic recreational or conservation expectations will create unacceptable recreational or conservation impacts under regulatory standards. Without a strong BPL and strong local and non-profit partnerships, the world class recreation potential and conservation goals of the Moosehead region risk being squandered by poor stewardship.

In a nutshell, BPL aims to be stronger rather than weaker following Concept Plan approval, so that the recreation potential of the Moosehead region will be strong rather than weaker as residents and tourists are invited to move to the region for sustainable economic growth. Recreation institutions must be strong enough to respond to a wide variety of scenarios of future demand and future preferences. With many Concept Plan variables still playing out (as discussed below), we can not yet make conclusions regarding our future strength, and thus still can not affirmatively make conclusive comments in support of the amended Concept Plan. We believe that the Concept Plan is approaching regulatory thresholds for conservation and recreation; yet as the proposed holder of various easements and properties, we cannot finally sign off on any of the various easement documents as holder or backup (irrespective of LURC actions or decisions) until BPL knows that BPL will be stronger, rather than weaker, at the end of the day.

I must stress that this opening essay is not merely a request for money for BPL. As much, it is a request for other institutions (counties and needed new local land trusts, eg) to step to the plate. As much, it is a call for LURC and other parties to be realistic in expectations of BPL, easement holders, and others. To the extent that BPL is worried about becoming a piñata (holder approvals regarding ambiguous easement terms, eg), we will not be comforted if we become a well-funded piñata.

This is a watershed moment for BPL. (It's obvious that this is also a watershed moment for the nature-based tourism and year round Quality of Place economic potential of the Moosehead Region.) BPL is facing multiple expected leadership roles in one of the largest conservation deals in the country in recent history, with expected extraordinary recreational attractions and usage. For BPL, our General Fund budget and Congressional appropriations (LWCF, eg) that support facilities such as Lily Bay State Park and municipal recreation have suffered annual budget cuts or limits for many consecutive years, more acute when adjusted to real dollars. Our dedicated accounts are stretched by market fluctuations and new commitments (including welcome commitments) to steward reserves and easements that generate inadequate revenue for the bureau.

While BPL aspires to support the economic development visions of Piscataquis and Somerset County, we are unable to do so to our full potential without affirmative management capacity and affirmative budgetary support (including new approaches to revenue options or new leadership and management tools) not only through this Concept Plan but also in the next round of predicted budget cuts in Augusta and Washington. Concept Plan advocates along with Concept Plan opponents who are asking BPL to take an active role to support this Concept Plan have little or no history of effectively supporting BPL's fiscal resource base at crunch time. Some have rallied aggressively (or funded those who rally aggressively) against general support for government, with direct measurable impacts on BPL.

And thus we approach our watershed moment with a profoundly conflicted mix of sincere willingness to step to the plate, and seasoned knowledge that even if LURC and Plum Creek arrive at a solid Concept Plan that works for BPL, we will still face wrenching battles to retain even existing levels of resources for recreation and conservation stewardship in the Moosehead region.

(pp. 13-14)

FSM as primary holder

BPL deliberately left this comment as our last comment. We have been amazed in recent weeks by the focus on BPL as primary holder, and amazed in recent Commission dialog how this issue has captured the focus of the Commission as well. We leave this comment to last, to de-emphasize its significance, or rather to make significant comments in unexpected directions in support of FSM. There are much more important, much more neglected issues that we raise above that deserve leadership and attention of all parties before turning to this issue.

We trust that Plum Creek or their usual surrogates will state for the record today that they have no opinion as to what entity should be holder. If not their signals will be curious to interpret. Plum Creek's interests will be protected by clear terms irrespective of (or braced for) the fluctuations of non-profit boards, non-profit staffs, or shifting political regimes in Augusta. The holder should enforce clear easement terms agreed to by the grantor, with few options for ambiguity or politicization.

We wish that advocates of northern forest conservation would argue in strong support of FSM. FSM was created as a mechanism to advance conservation goals in the northern forest, to fill a void which state government has been unable to fill in recent history. FSM's conflicts of interest in complex transactions with Plum Creek or other landowners are identical to BPL's. If advocates of northern forest conservation seek to emphasize the weaknesses of FSM, then they themselves will be moving broad conservation momentum in a direction contrary to collective goals. I urge Maine's conservation community to join BPL in a strategy of strengthening institutions and project partners, rather than actively campaigning for them to be sidelined. Some advocates are too good, too seasoned, at pointing out weaknesses. We should collectively learn to build instead.

Both BPL and FSM are new to the conservation easement era. The entire country is new to the conservation easement era. FSM is a pioneer. BPL is learning, perhaps behind FSM. FSM must be strengthened. So must BPL. FSM must become more accountable. So must BPL. FSM's early apparent support of sloppy easement drafting was a mistake. So was BPL's. FSM's board must engage personally to ensure accountability for resource risks. So must the Legislature for BPL. If FSM goes sour or the resources are not protected, BPL as third party will step in.

In conclusion, there is no strong argument that compels BPL to be the primary holder of these easements. Rather BPL recommends that FSM be the primary holder, with BPL in a relatively passive back-up role, so that BPL may focus on its many other challenges as outlined above. FSM weakened as a result of FSM's Concept Plan risk-taking would be a tragic outcome for the northern forest conservation movement.

► Maine Department of Inland Fisheries and Wildlife and Maine Natural Areas Program (p. 7)

To minimize potential conflicts of interest and ensure long-term stability, we believe the responsibility for monitoring and enforcing the easement should be the State of Maine. The State may choose to contract some of the monitoring responsibilities (e.g., remote sensing or change detection) to an independent, non-aligned third party, but the State should maintain final authority on both easement monitoring and enforcement. The proposed easement is resulting from a regulatory process for the express purpose of offsetting impacts to public resources. We agree with the Commission that only a public entity should be responsible for ensuring that the intended public values and protections are achieved.

STAFF/CONSULTANT DISCUSSION AND RECOMMENDATIONS

► DISCUSSION

Based on comments received, staff/consultants offer the following analysis:

- Regarding the Commission's June 4th amendment stating that the Holder of the Balance easement and the Legacy easement should be the same entity:

  Comments from parties on this topic present no new information that would cause staff/consultants to reconsider the June 4th Commission-generated amendments. In fact, all comments received on this issue strongly endorsed this amendment.

- Regarding the Commission's June 4th amendment stating that it "has tentatively concluded that the holder of the Balance and Legacy easements should be the Department of Conservation, Bureau of Parks and Lands...."

  The Commission's request for public comment on this issue elicited detailed and conflicting statements from a number of parties on who should be the holder of the easement, including disagreements among state agencies and bureaus within the same agency. Based on a combination of three factors -- BPL's strongly-worded refusal to be the holder, staff/consultants' conclusion that the Forest Society of Maine is currently qualified to be the holder pursuant to the Commission's *Guidelines for Selection of Conservation Easement Holders* (2004), and, finally, the understanding that there will be included in the easement of a number of new or enhanced terms (see below) that will help ensure that the public rights and protections are granted through the easement are protected, staff/consultants recommend that the holder of both easements should be the Forest Society of Maine (FSM).

  Staff/consultants are making this recommendation contingent on the inclusion of language containing certain new or enhanced terms in the easements[1] (see recommendations, below).

► RECOMMENDATIONS

Based on the discussion above, staff/consultants offer the following recommendations:

- Regarding the Commission's June 4th amendment stating that the Holder of the Balance easement and the Legacy easement should be the same entity:

  No change recommended by staff/consultants.

- Regarding the Commission's June 4th amendment on the Holder of the easement, change the amendment to state:

  Make the Forest Society of Maine the Holder of both the Balance and Legacy easements, provided that language containing the following requirements is added to each easement, or a single combined easement:

  - Naming the Bureau of Parks and Lands or its successor as the Third Party holder ;

[1] Most of these recommended enhanced or new terms, or versions thereof, were suggested in comments filed by one or more of the parties.

- Ensuring that the Third Party holder has all rights of the Holder, and has access to all information in the possession of the Holder;

- Making it clear that the Attorney General can independently enforce the easements;

- Allowing the Third Party holder to: (a) either replace the Holder if the Third Party holder finds, after written notice and opportunity, that the existing Holder is failing in material ways to perform its duties, or step into the shoes of the Holder for a significant period of time as interim holder, in order to assess whether replacement of the Holder is required; and (b) independently undertake an enforcement action, with or without the approval of the Holder.

- Adding significant new annual reporting requirements to the Third Party holder by the Holder including reporting on: monitoring undertaken during the year; any easement violations found and actions taken as a result; potential violations or emerging issues identified by the Holder or brought to the attention of Holder by any other entity;

- Requiring the Third Party holder to conduct an independent audit of the performance of the Holder every three years, and publicly releasing the results of this audit; and

- Ensuring certain provisions and funding are part of the stewardship and enforcement fund so that the Third Party holder can meaningfully fulfill the roles stated above, including the fund is held by an independent third-party, and that monies for the every-three-year audit are provided specifically to BPL from the fund.

The Commission directs staff/consultants and legal counsel to draft this language.

22

OFFSET CONSERVATION: BALANCE EASEMENT
THIRD PARTY BACKUP HOLDER

COMMENTING PARTIES

- Petitioner Plum Creek
- Intervenors and Interested Persons
  - Forest Society of Maine
- Governmental Review Agencies
  - Bureau of Parks and Lands

COMMENTS FILED BY THE PETITIONER

(pp. 40-41)

Plum Creek and, to our knowledge, TNC, are willing to amend the Conservation Framework to provide that Plum Creek would grant the Legacy Easement directly to FSM as Holder at Closing and to have BPL act as the full Third Party holder. It is important that the easement holder be an entity that has a conservation mission focus, expertise, resources, and understanding of the history and intent of the easements necessary to monitor and enforce the easements. FSM meets all of these criteria.

Plum Creek agrees that having BPL act as back-up holder for both easements makes sense and that BPL has an important role to play particularly with respect to recreation management.

It is important to note that the easements make clear that the Back-up holder has all the rights of the holder and can independently enforce the terms of the easements even if the Holder fails to do so. Section 13 of each easement provides: "Grantor grants to the Third Party the same entry, inspection, management and enforcement rights as are granted to Holder under this Conservation Easement, and the Management Plan. However, the parties hereto intend that Holder shall be primarily responsible for the monitoring and enforcement of this Conservation Easement, and that the Third Party intends to assume such responsibility only if Holder fails to properly monitor and enforce. However, the Third Party may at any time exercise, in its own name and for its own account, all the rights of monitoring and enforcement granted Holder under this Conservation Easement." [emphasis added]

Plum Creek is further willing to address LURC's concern by adding language such as the following to the TERMS, COVENANTS AND RESTRICTIONS of the easements: "Throughout this Conservation Easement, it is intended that Third Party shall have the same rights as the Holder, as more specifically described in Section 13 hereof. "

Moreover Plum Creek is willing to add language to both easements that make it clear that the Attorney General can independently enforce the easements in accordance with the recently revised Maine statute as amended or successor provisions. By following this approach, the public benefit of these easements is fully protected without putting undue stress on limited state resources.

COMMENTS FILED BY INTERVENORS AND INTERESTED PERSONS

- Forest Society of Maine (p. 9)

  Commission Recommendation (page 75): Third Party backup holder of the Balance easement and Legacy easement should be the same entity. A third-party backup holder may not be required if the Commission ultimately concludes that BPL is to be the Holder of the Balance and Conservation easements.

  FSM Comment: FSM concurs with the recommendation for one entity to be named as Third Party backup holder for both the Balance and Legacy easements. FSM further concurs that BPL should be that Third Party backup holder. Having BPL named Third Party backup holder provides a strong and appropriate structure for assuring the public rights and protections granted through the easements are adequately monitored and enforced.

  Commission Recommendation (page 75): Ensure third-party backup holder has rights consistent with those granted to the Holder.

  FSM Comment: FSM concurs with this recommendation.

► Bureau of Parks and Lands (p. 12)

All known precedent is that Third Party Holders are in fact back-up holders. We urge no new precedent in that regard. We urge Third Party expectations to be relatively passive, poised to step in conclusively upon a defined trigger, for all of the marbles. Regular obligations or regular expectations of a third party are doubly expensive, require double endowment, and decrease accountability rather than the expected opposite result.

BPL feels strongly that dual responsibility allows pointing of fingers or missed signals or passing of the buck. We believe that one entity can best respond to any controversy, any incident, any proverbial need to stand in front of a firing line of inquiry or protest.

There is no better way to strengthen an organization than to make it solely accountable. Weak holders will either rise or fall to a challenge, and we believe it will become obvious which direction a holder is moving. For a government holder, the electoral and legislative process are accountability points. For a major non-profit holder in a small state like Maine, members of the Board of Directors of the non-profit should be personally responsive to accountability, making an active third-party less necessarily.

Statements by some in recent weeks that they will turn to BPL as third-party regularly to seek most effective leverage are received by BPL with frustration. In a small state like Maine, advocacy groups should invest in a mature process of problem solving and accountability, rather than anticipating politicization of incidents for a short term rush of power and perceived efficacy.

STAFF/CONSULTANT DISCUSSION AND RECOMMENDATIONS

► DISCUSSION

Based on comments received, staff/consultants offer the following analysis:

Because staff/consultants have recommended that the Forest Society of Maine should be the Holder for both easements (or a single combined easement) contingent upon the inclusion of certain additional terms set forth in Tab 21 (*see* Tab 21), staff/consultants recommend that BPL be the Third Party backup holder for both easements.

► RECOMMENDATIONS

Based on the discussion above and in Tab 21, staff/consultants offer the following recommendations:

- Regarding the Commission's June 4th amendments on the Third Party holder:

  BPL must be the Third Party holder for both the Balance and the Legacy easements (or for a single, combined easement).

23

OFFSET CONSERVATION: BALANCE EASEMENT

TIMING OF CONVEYANCE OF BALANCE EASEMENT, RELATIONSHIP TO DEVELOPMENT: WHEN IS BALANCE EASEMENT CONVEYED TO HOLDER?

COMMENTING PARTIES

- Petitioner Plum Creek

COMMENTS FILED BY THE PETITIONER

(p. 26)

Generally agreed. The Balance and Legacy Easements will be conveyed 30 days after the final resolution of all appeals. Plum Creek believes that LURC can and should process applications during the pendency of any appeal. Plum Creek agrees that permits should not be granted in connection with those applications, however, until closing has occurred and the easements have been conveyed and recorded.

STAFF/CONSULTANT DISCUSSION AND RECOMMENDATIONS

► DISCUSSION

Comments from Plum Creek on this topic present no new information that would cause staff/consultants to reconsider the June 4, 2008 Commission-generated amendments. Plum Creek's statement that "LURC can and should process applications during the pendency of any appeal" is not a matter to be decided on by Commission as part of its review of Zoning Petition ZP 707.

► RECOMMENDATIONS

No recommended changes to this June 4th Commission-generated amendment.

24

OFFSET CONSERVATION: BALANCE EASEMENT

CONSISTENCY OF BALANCE EASEMENT TERMS WITH LEGACY EASEMENT TERMS

COMMENTING PARTIES

- ► Petitioner Plum Creek
- ► Intervenors and Interested Persons
  - The Nature Conservancy
- ► Governmental Review Agencies
  - Bureau of Parks and Lands

COMMENTS FILED BY THE PETITIONER

(pp. 26, 54)

Generally agreed. The Legacy Easement will be conformed to the Balance Easement except that the Legacy Easement will permit Wind Power Activities as a potential use; the Balance Easement will prohibit such activity (other than transmission lines and access roads).

COMMENTS FILED BY INTERVENORS AND INTERESTED PERSONS

► The Nature Conservancy (pp. 1-2)

TNC is generally supportive of the proposed amendments to the Balance Easement and Conservation Framework. TNC is happy to work with the applicant and Commission staff to address the recommended amendments. TNC is prepared to work with the applicant to revise the Purchase and Sale Agreement consistent with the proposed amendments, including closing on the entire Conservation Framework no later than 45 days after a Commission-approved Concept Plan becomes final, after all appeals, if any, have been exhausted.

COMMENTS FILED BY GOVERNMENTAL REVIEW AGENCIES

► Bureau of Parks and Lands (pp. 9-10)

Following consultation with TNC, BPL has informed various parties that the "Legacy" easement as currently constructed is no longer a candidate for USDA/USFS Forest Legacy Program funds. Previous testimony on easement holder requirements of the Legacy program should thus be ignored. Forest Legacy Program language in the draft easements should thus be struck. With this finding, BPL knows of no reason why the Balance & Legacy easements should be thought of as separate easements for reasons of holders, endowments, or terms --- once short term options and funding and expected hand-offs have executed.

STAFF/CONSULTANT DISCUSSION AND RECOMMENDATIONS

► DISCUSSION

Based on comments received, staff/consultants offer the following analysis:

Comments from the parties on this amendment as well as on related amendments show unanimous agreement that the Balance and Legacy easements should have the same Holder, Third Party, monitoring and enforcement fund, substantive forestry and other land use standards, date on which they come into effect, etc. -- and therefore, in actuality, be managed as a single, unified easement. Staff/consultants therefore recommend that Plum Creek deliver a single, unified *Moosehead Lake Region Easement* that combines into one easement the land areas and easement terms proposed by Plum Creek for the heretofore separate Balance and Legacy easements.

► RECOMMENDATIONS

Based on the discussion above, staff/consultants offer the following recommendations:

- Regarding the Commission's June 4th amendments concerning the consistency of the Balance easement terms with the Legacy easement terms, change the language of the amendment to state:

  The Commission directs staff/consultants to report back to the Commission with specific amendment language which, if staff/consultants and legal counsel determine it to be possible, requires as part of the Concept Plan the delivery by Plum Creek of a single, unified *Moosehead Lake Region Easement* that combines into one easement the land areas and easement terms proposed by Plum Creek for the heretofore separate Balance and Legacy Easements.

25

OFFSET CONSERVATION: BALANCE EASEMENT
FUNDING FOR EASEMENT MONITORING, "STEWARDSHIP" AND ENFORCEMENT OF TERMS

AND

TIMING OF CREATING, ENDOWING THE FUND

COMMENTING PARTIES

- ► Petitioner Plum Creek
- ► Intervenors and Interested Persons
  - Forest Society of Maine
  - Native Forest Network
  - The Nature Conservancy
- ► Governmental Review Agencies
  - Bureau of Parks and Lands
  - Maine Department of Inland Fisheries and Wildlife and Maine Natural Areas Program

COMMENTS FILED BY THE PETITIONER

(p. 27)

Agreed: A separate filing will be made.

COMMENTS FILED BY INTERVENORS AND INTERESTED PERSONS

- Forest Society of Maine

  (p. 9)
  Commission Recommendation (page 77): A single monitoring stewardship and enforcement fund should be created for both the Balance and Legacy easements consistent with a single Holder for both easements.

  FSM Comment: FSM concurs with this recommendation.

  Commission Recommendation (page 77): Plum Creek, the Holder of each easement (as determined by the Commission), and third-party backup holder of each easement (as determined by the Commission) should propose to the Commission (either through separate filings or, if possible, through mutual agreement) the financial, fiduciary, and administrative terms and conditions that would govern creation, endowment, and administration of a single monitoring, stewardship, and enforcement fund (hereinafter "fund") for both the Balance and Legacy easements. These proposed terms and conditions must be sufficient to ensure that, in perpetuity, proper monitoring, enforcement and stewardship can be fully accomplished on an ongoing basis.

  FSM Comment: FSM concurs with this recommendation. If FSM is determined by the Commission to be the Holder, it will use its expertise in these matters in working with the third-party backup holder and Plum Creek to develop a mutually agreeable proposal to the Commission that addresses all points listed in the recommendation.

  (p. 10)
  Commission Recommendation (page 78): Plum Creek must demonstrate that this approved fund has been established, endowed, and is in operation simultaneous to Plum Creek's demonstration that the Balance and Legacy easements are in effect and have been duly recorded.

  FSM Comment: FSM concurs with this recommendation.

- Maine Audubon and Natural Resources Council of Maine (p. 38)

  There is another, practical, reason why the State should be the primary Holder of the easement, and not simply the third party Holder. The Holder will have access to a substantial, presumably sufficient, fund to monitor the easement (although it is unclear that the proposed stewardship fund is sufficient to allow the Holder to pursue potentially necessary enforcement actions or review potentially permitted large scale commercial activities, such as large new gravel pits, wind farms, etc. in the future – provision should be made for access to additional funds for these purposes). No such fund is provided for the third party Holder, and thus, any meaningful oversight by the State as a third party Holder is an illusion. For the State to exercise meaningful third party rights, it would also need access to a similar sized stewardship fund, in which case, it makes more sense for the State to simply be the primary Holder.

► The Nature Conservancy (p. 3)

TNC strongly agrees with the Commission's recommendation for a single monitoring, stewardship and enforcement fund for both easements. This fund should be held and managed by a credible independent fund manager, such as the Maine Community Foundation. It is TNC's understanding that Plum Creek is prepared to fully pay for this fund.

► Native Forest Network

(p. 7)

[Regarding conservation easement pros:]

- Establishment of community/stewardship funds before CP approval and solidification of said funds dependant [stet] on further processing of CP development-related applications

(p. 8)

[Regarding LURC staff/consultant recommendations cons:]

- $5,000 per year to stewardship fund is not adequate

COMMENTS FILED BY GOVERNMENTAL REVIEW AGENCIES

► Bureau of Parks and Lands (pp. 11-12)

Size of endowment, endowment methodology.

It is axiomatic but regardless must be said that the amount of available resources for the holder will predict the quality of easement compliance. Private corporate expectations of maximized return on investment (fiduciaries duties) will prevail against a weak holder.

The methodology for estimating holder compliance costs is rapidly evolving, or better said, remains largely undeveloped. BPL has only the most cursory ability to predict actual costs, and our experience evolves each month due to the radical change curve BPL faces regarding acreage of easement and experience monitoring, contracting, enforcing, and amending. Market forces are also reducing our expected return from endowments.

BPL places in the record the simple statement that BPL concludes that LURC has inadequate information to sufficiently estimate the required resources. Thus LURC should direct staff to investigate options further. Especially noting that the easement acreage, terms, back-ups, expectations, holder approvals, and other matters remain in flux. LURC Commissioners should also step back and consider personally what level of monitoring/compliance they have in mind. You'll get what you pay for. $30,000 for start-up costs gets you 1/3 of one staff person. Adequate for some easements, but inadequate for the holder if advisory committee members want meaningful engagement on year one, or if activists are camped out in the ecologically sensitive areas, or if wind proposals come out of the gates early. $30,000 is decimal dust for Plum Creek.

BPL also notes that the economic relationship between holder and grantor need not be established solely through a static endowment. If the Commission didn't recommend a significant boost in the endowment to account for each subdivision or sale at the time of subdivision or sale (if any), it should. Recent BPL experience (the last few months) illustrates the costs that are involved with grantor transfer of fee to new owners.

Importantly, LURC should direct staff to consider financing vehicles upon grantor exploitation of remaining economic value. Plum Creek likes to pretend that this will remain a simple working forest. Yet economic forces through perpetuity will compel future owners to maximize return on investment by maximizing retained rights for gravel, wind, sludge, tolls, utilities, water, fire stations, more. The magnitude of retained rights at this scale is unprecedented, thus new tools for stewardship should be explored. As stated above, it would be disappointing if County Government were to receive new tax revenues from wind turbines, while the grantor might see a surge in profits due to wise investments in emerging markets, while a non-profit or governmental holder were left with modest endowments suffering from a market downturn. A marriage of holder and grantor for perpetuity might best involve a shared economic future.

Finally, BPL has a significant economic relationship with Plum Creek due to forest management road rights. LURC should direct LURC staff to explore additional Plum Creek concessions on road rights to allow BPL to bring offset resources to the table for monitoring or recreation stewardship. This would have the added benefit of reducing conflicts/tensions between BPL and Plum Creek. BPL should not be at risk of retaliatory commercial timber fees or permissions based on BPL action to ensure compliance with conservation easement terms. (Note the connection between this recommendation and earlier notes on the retained commercial economic value of roads such as the 20 Mile Road or Sias Hill Road or the Road to Nahmakanta. If those roads were purely public roads (County Roads), BPL would have reduced costs for timber removal. The regional economy would have increased and more rational transportation routes. Liability issues would be resolved traditionally. Etc.)

► Maine Department of Inland Fisheries and Wildlife and Maine Natural Areas Program (p. 8)

Based on the Commission's recommendation that lands identified by MDIF&W / MNAP for conveyance in fee should be treated as Special Management Areas in the Balance Easement, we strongly recommend that additional funds be specifically allocated for monitoring and enforcement activities in these areas to ensure the public values are adequately protected. These funds should not be taken away from the stewardship endowment proposed by the applicant for the remainder of the property.

There is limited precedent set for stewardship endowments covering this level and intensity of monitoring activities. Further research and analysis by MDIFW, MNAP, and LURC would need to be conducted to arrive at an adequate amount.

STAFF/CONSULTANT DISCUSSION AND RECOMMENDATIONS

► DISCUSSION

Based on comments received, staff/consultants offer the following analysis:

No commenters disagreed with the Commission's June 4th amendments regarding the creation of a single monitoring, stewardship and enforcement fund for both the Balance and Legacy easements. While commenters stated their views of various funding needs and approaches in their comments, no party disagreed with the approach set forth by the Commission in the June 4th amendments, in which Plum Creek, the Holder of each easement, and the third-party backup holder of each easement would propose to the Commission the financial, fiduciary and administrative terms and conditions that would govern the fund. Plum Creek stated its willingness to provide the monies necessary for stewardship, monitoring and enforcement for *both* the Balance and Legacy easement areas, whereas its previous position in testimony before the Commission had been that it would provide the monies for those functions only in the Balance easement area. No commenter expressed objection to the timing of when this fund must be created.

It remains to be seen whether Plum Creek, the Holder, and the third-party holder will, subsequent to the Commission's deliberative sessions and assuming concurrence with its amendments, submit a document to the Commission demonstrating agreement on the financial, fiduciary and administrative terms and conditions, or whether there will be disagreement that the Commission will have to resolve.

Staff/consultants note that some of the terms being recommended for inclusion in the easement(s) in Tab 21 to help ensure active third-party involvement in the easement have financial implications, and staff/consultants would expect that any document(s) subsequently submitted by grantor, holder and third-party pursuant to this amendment would take into account these financial implications should the Commission choose to adopt the recommendations found in Tab 21.

► RECOMMENDATIONS

No recommended changes to these June 4th Commission-generated amendments.

26

OFFSET CONSERVATION, BALANCE EASEMENT:
TERMS GOVERNING ALLOWED ACTIVITIES:
PURPOSE OF EASEMENT

COMMENTING PARTIES

- ► Petitioner Plum Creek
- ► Intervenors and Interested Persons
  - Forest Society of Maine
  - Moosehead Region Futures Committee
  - Native Forest Network
- ► Governmental Review Agencies
  - Maine Department of Inland Fisheries and Wildlife and Maine Natural Areas Program

COMMENTS FILED BY THE PETITIONER

(p. 46)

It is vitally important to Plum Creek that all parties clearly understand the purpose of the two conservation easements: they are working forest conservation easements that maintain the working forest and protect various conservation values. It must be clear that the purpose of the easement is to preserve the commercial working forest, for the continued supply of fiber. This objective is a principal value in the C.L.U.P. It is also vitally important to the economic viability of the region and the Petitioner. Plum Creek feels the purpose of the easements is clearly stated.

For example, the Whereas clauses state:

> "WHEREAS, the parties hereto agree that continued management of the Protected Property as a commercial working forest in accordance with sustainable forestry principles and in a manner that protects rare and endangered species and rare and exemplary natural communities and conserves significant wildlife values, special natural, historical or archaeological features, and areas of high public values, is consistent with the purpose of this Conservation Easement; "
>
> "WHEREAS, the parties hereto agree that as long as the Grantor continues to manage the Protected Property as a commercial working forest in accordance with the sustainable forestry principles established by this Conservation Easement, it will confer the following public benefits: (a) provide a continuing, renewable and long-term source of forest products; (b) provide for long-term management of the forest in accordance with best management practices to prevent erosion, sedimentation and other degradation of soil and water resources; (c) maintain a natural resource base for a forest-based economy and corresponding employment opportunities; and (d) support further investment in local businesses and community services that depend directly upon, or provide ancillary services to, a forest-based economy and forest product industry…."

Plum Creek is willing to work with LURC staff to fine tune the language consistent with the purposes enumerated above.

COMMENTS FILED BY INTERVENORS AND INTERESTED PERSONS

- Forest Society of Maine (p. 10)

  Commission Recommendation (page 78): Clarify and conform "Purpose", "Whereas" clauses, and language in other sections of easement so that when read together and in comparison with other easement language, these sections cannot be interpreted as subordinating or eliminating protection of conservation values when in conflict with Forest Management Activities.

  FSM Comment: FSM concurs with this recommendation. FSM offers suggestions elsewhere within this submittal which we believe help to achieve this goal, and FSM would be pleased to work further with the third-party holder, Plum Creek, and the Commission staff/consultants to ensure that the easement is clear that forest management activities are to be conducted in accordance with sustainable forestry principles and in a manner consistent with the conservation values of the easements.

- Moosehead Region Futures Committee (p. 9)

  If the easement lands are to serve as conservation that will balance the impacts of development, the "Purpose" and "Whereas" clauses of the easements must uphold the highest conservation values. The MRFC Steering Committee strongly agrees with the Commission's statement that the "Purpose" and "Whereas" clauses and related language in

other sections of the easements should be clarified so that conservation values cannot be subordinated or eliminated when in conflict with forest management activities (LURC-generated amendments, June 4, 2008, page 78).

► Native Forest Network

(p. 2)

[On mitigation of impacts:]

Continuing to allow industrial activities at all within the easements does not constitute as a proper balance of development or an adequate means of mitigation, in our opinion. People continue to refer to the easements as "protected areas" when in fact these areas will not remain untouched or allowed to return to a natural, restored state of existence. NFN opposes this use of language which defines the easements as "protected" or labels them as "Conservation Easements", considering the continued allowance of industrial forestry with the introduction of new industrial activities (water extraction, septage spreading, wind generation facilities, etc…) within the easement areas. NFN does not endorse the easements (written by PC or revised by LURC) as viable means for true conservation and we oppose the use of the easements (including Balance, Legacy, Roaches and Bogs areas) as a form of impact mitigation for the development aspects of the CP.

(p. 7)

[Regarding conservation easement pros:]

- Clarifies specific clauses in easement language so as to avoid future conflicts with conservation vs. profit (pg 81)

COMMENTS FILED BY GOVERNMENTAL REVIEW AGENCIES

► Maine Department of Inland Fisheries and Wildlife and Maine Natural Areas Program (p. 5)

We also acknowledge that the primary objectives of the Balance and Legacy easements are to: 1) preserve the working forest environment; 2) prevent future development; and 3) conserve exemplary natural resource features and habitat values. MDIF&W and MNAP have no intention of unreasonably diminishing the value of the protected lands for commercial forestry and the vital economic input that commercial forestry provides to the Moosehead Region. We remain concerned, however, that inclusion of a very few areas of high ecological significance may not lend themselves to economically optimal forest management without significantly compromising their public resource values as identified as a purpose of the easement (see Special Management Areas section below).

STAFF/CONSULTANT DISCUSSION AND RECOMMENDATIONS

► DISCUSSION

Based on comments received, staff/consultants offer the following analysis:

- Regarding the Commission's concern in its June 4th amendments as to whether easement language subordinated or eliminated protection of conservation values:

  Plum Creek's comments express its willingness to work with LURC staff to fine tune the language consistent with the purposes enumerated. Those comments emphasize the dual purpose of the two conservation easements: "they are working forest conservation easements that maintain the working forest and protect various conservation values." (emphasis in original). FSM comments that "forest management activities are to be conducted in accordance with sustainable forestry principles and in a manner consistent with the conservation values of the easements."

  These representations from the proposed grantor and possible holder, and particularly the language suggested by FSM -- "forest management activities are to be conducted in accordance with sustainable forestry principles and in a manner consistent with the conservation values of the easements" -- demonstrate agreement with the Commission on the issue raised in the June 4th amendment, and suggest that clarifying and conforming the language in the easement will be possible.

► RECOMMENDATIONS

No recommended changes to this June 4th Commission-generated amendment.

27

OFFSET CONSERVATION: BALANCE EASEMENT
TERMS GOVERNING ALLOWED ACTIVITIES: CONSTRUCTION MATERIAL REMOVAL

COMMENTING PARTIES

- ► Petitioner Plum Creek
- ► Intervenors and Interested Persons
  - Forest Society of Maine
  - Native Forest Network
  - The Nature Conservancy
- ► Governmental Review Agencies
  - Bureau of Parks and Lands
  - Maine Department of Inland Fisheries and Wildlife and Maine Natural Areas Program

COMMENTS FILED BY THE PETITIONER

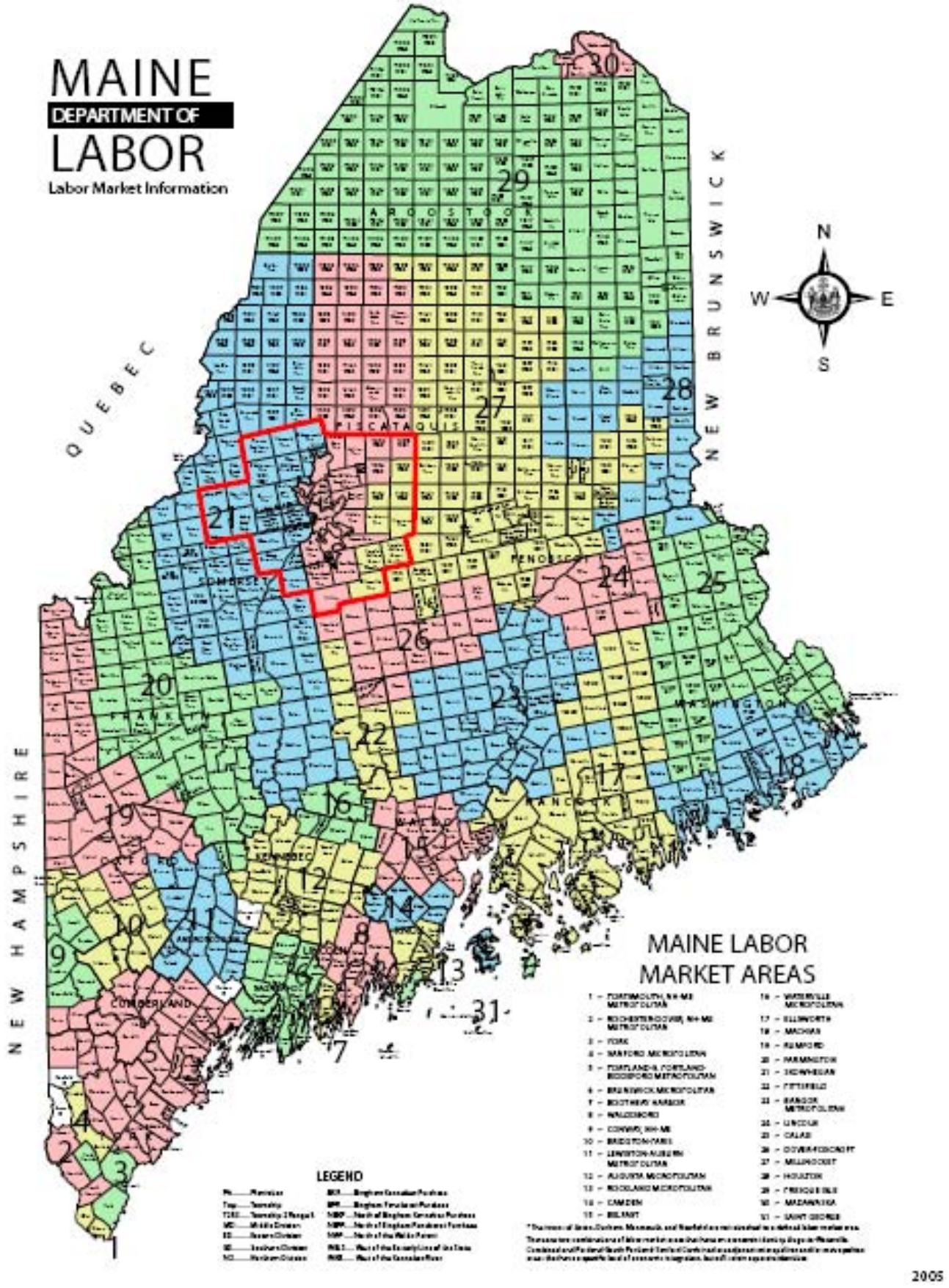
(pp. 38-39)

Plum Creek is amenable to limiting the area in which construction materials could be sold to Somerset and Piscataquis counties, but believes that sales for use on municipal, State or Federal projects would not be subject to this limitation. These counties generally represent the labor market, consistent with Staff's intent.

Plum Creek believes that it is unworkable and inconsistent with a working forest easement to have to show "no reasonable alternative location". Gravel and similar materials are scarce in the Moosehead Region and being forced to survey for and possibly go a great distance to find alternate construction materials substantially increases the costs and unfairly penalizes this area of the State compared to southern Maine. Local communities need to have extraction sites that are close to the areas of use so as to reduce transportation costs and adverse impacts that might occur should haul routes be longer. The Easements currently protect the conservation values by putting limits on the amount of surface alteration that can occur.

Moreover the easements already provide that Plum Creek will consult with the Holder on the siting of such activities. At the same time, Plum Creek agrees with the intent of trying to minimize and/or mitigate site specific impacts that might occur. In order to address the Commission's concerns Plum Creek is willing to add to section 4 of the easements consistent with the approach noted above language similar to the following: "Grantor shall consult in good faith with Holder to reasonably minimize adverse impacts of any such Construction Removal Activity on the Conservation Values of this Conservation Easement."

(Appendix 4)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► Forest Society of Maine (pp. 10-11)

Commission Recommendation (page 79): Limit removal amount allowed for development activities (short term and total) to only that needed for nearby communities (which would be mapped and attached to easement).

FSM Comment: FSM concurs in part with this recommendation. FSM concurs with the recommendation to limit construction material removal to serving nearby communities, and having those communities identified on a map attached to the easement. Regarding short-term and total limits, FSM suggests that appropriate acreage limits (maximum size per extraction site; maximum aggregate acreage actively disturbed and not revegetated at any time; and maximum total acreage in perpetuity) be clearly defined in the easements, and that the Holder not be required to evaluate the short-term or total need of local communities for construction materials, which would require an analysis and expertise beyond what should be expected of an easement holder.

Commission Recommendation (page 79): Ensure sufficient Holder notice for pre-removal determination by Holder, for any proposed removal that Holder believes would adversely impact conservation values, require Landowner showing to Holder of no reasonable alternative location for obtaining needed materials.

FSM Comment: FSM concurs in part with this recommendation. FSM concurs with the recommendation that sufficient notice time be given Holder in its role of consultation with Grantor on decisions relating to construction material removal sites. FSM suggests that a notice period of at least 60 days would constitute sufficient notice. FSM also suggests language be included in the easement that would commit the Grantor to work in consultation with the Holder in decisions for siting such activities so as to minimize the adverse impacts of any such activity on the conservation values of the easement, and further, language be added requiring that the Grantor's plans for siting such locations be designed in a manner that is consistent with the protection of the conservation values of Special Management Areas identified in the Baseline Documentation. FSM does not concur with the recommendation requiring a showing of no reasonable alternative location for such activities. FSM suggests that the Holder not be required to evaluate the availability of alternate sites either within or outside the Protected Properties, which would require an analysis and expertise beyond what should be expected of an easement holder. FSM also understands that decisions on sites of five acres or more require state review and approval and does not feel it is appropriate for the Holder to duplicate the resources or expertise necessary to make those determinations.

► Native Forest Network (p. 7)

[Regarding conservation easement pros:]

- Limit construction material removal/septic spreading/water extraction in easements to supply nearby communities (mapped and attached to easements) only (p 82) Although this might be an improvement, NFN still feels that there is still an issue with allowing these activities at all (see "cons" section, below).

► The Nature Conservancy (p. 2)

TNC supports limiting removals for development activities to that needed for nearby communities. TNC believes the Commission's recommendation regarding pre-approval of any removal is impractical and too restrictive, and respectfully suggests an alternative: Require the Landowner to provide written notice to the Holder prior to opening a new site for removal of construction materials for commercial sale, with a reasonable opportunity for the Holder to comment on any concerns regarding potential impacts on the conservation values protected by the easement. It would also be appropriate to require written records be kept by the applicant (and reviewable by LURC staff) of removals so that there is a simple mechanism to show compliance with LURC's requirements.

COMMENTS FILED BY GOVERNMENTAL REVIEW AGENCIES

► Bureau of Parks and Lands (p. 10)

Required holder approvals. BPL raises strong concerns about the extent of recommended holder approvals introduced by LURC amendment in June 2008. It is true that the absence of holder approvals allows the grantor to conduct activities; this can be framed as a loophole or as a retained right of the grantor. Some holder approvals are essential; see my note on recreational fees above. Some holder approvals are easily executed within the resources and expertise of a qualified and funded holder .... There is no endowment large enough to convince BPL to be holder or third party holder of an easement that requires affirmative holder approval of major infrastructure or controversial extractions. Rather, LURC should provide clear standards in the easement to define what is contemplated, what is allowed, with no ambiguity for the public and the holder and the grantor to debate for perpetuity. LURC might consider language in LURC documents or perhaps in the easement which retains for LURC a heightened standard of LURC review based on easement purposes.

► Maine Department of Inland Fisheries and Wildlife and Maine Natural Areas Program (p. 8)

The Commission has recommended that most general non-forestry land uses require holder notification and determination of no adverse impact of conservation values. We support this approach and recommend that the holder also be required to notify the Management Advisory Team (MAT) and seek input from the MAT for recommendations on siting activities and allowed uses in order to avoid or minimize impact to conservation values. We also feel that the Commission's recommendation further demonstrates the importance of having a public entity as the holder of the proposed easement.

STAFF/CONSULTANT DISCUSSION AND RECOMMENDATIONS

► DISCUSSION

Based on comments received, staff/consultants offer the following analysis:

- Regarding the Commission's June 4th amendment to limit allowed removal to only that needed by nearby communities:

  Plum Creek's comments contain a map (*see* Comments Filed by the Petitioner, Appendix 4, above) that it proposes be attached to the easement to define the "nearby communities" that could be served by the gravel, aggregate, sand, etc., that is mined from the easement area. Staff/consultants believe the communities delineated on this map constitute a reasonable interpretation of "nearby communities," and recommend that this map be attached to the easement as a means of defining the term.

  However, in its comments Plum Creek also stated that "sales for use on municipal, State or Federal projects would not be subject to this limitation." Staff/consultants neither understand the rationale for this proposed exclusion nor support it, as staff/consultants do not believe that the Commission's intent was to allow, for example, a federal or state highway construction project located hundreds of miles away to obtain gravel from lands in the conservation easement(s).

  FSM requests that the Holder "not be required to evaluate the short-term or total need of local communities for construction materials, which would require an analysis and expertise beyond what should be expected of an easement holder." Staff/consultants concur with this comment, and recommend to the Commission that delineating the communities that may be served is sufficient to achieve the Commission's purpose. As a routine part of its monitoring of various terms of the easement, staff/consultants would expect the Holder to require periodic demonstrations by easement landowners and receiving third parties (through tracking and receipt information) that extracted materials were used in the communities delineated on the easement map.

- Regarding the Commission's June 4th amendment to ensure sufficient Holder notice and showing of no unreasonable alternative location if adverse impact on conservation values:

  Plum Creek objected to this amendment due to its concern that a search for a reasonable alternative site could potentially require the landowner to "go a great distance to find alternate construction materials," which would substantially increase costs and unfairly penalize the area. FSM was concerned that this requirement was too vague and suggested a different standard.

  Staff/consultants appreciate these concerns, but continue to believe that it is appropriate, within limits, to require that landowners engage in a limited search for alternatives before removing construction material from those sites for which a finding of adverse impact to conservation values has been made by the Holder. The cost and argued uncertainty associated with the Commission's June 4th amendment can be solved by putting in place two "objective standards" that narrow the search for alternative sites to those (1) located within a two mile radius and (2) accessible by the established road system.

  MDIFW and MNAP requested that the Management Advisory Team be notified of potential extraction activities and allowed to comment to the Holder. Staff/consultants do not support this request, as an established permitting process already exists for extraction activities above a certain size threshold that allow for involvement of state and federal review agencies, including MDIFW and MNAP. *The Commission may want to consider requiring that Holder send to certain review agencies for comment any pre-mining notifications it receives from landowners, or alternatively leaving such decision up to the Holder.*

► RECOMMENDATIONS

Based on the discussion above, staff/consultants offer the following recommendations:

- Regarding the Commission's June 4th amendment to limit allowed removal to only that needed by nearby communities, replace the previous amendment with the following language:

  The easement(s) shall limit the removal of permitted construction materials to only that amount needed by the communities delineated on a map attached to and made part of the easement. The attached map will be the one submitted by Plum Creek in Appendix 4 of its July 11, 2008 comments. The easement shall contain a size limit of 15 acres on the disturbed area per extraction site, and a further limitation of no more than 400 acres within the total acreage of the Balance and Legacy easements being disturbed and not revegetated and stabilized at any one time.

- Regarding the Commission's June 4th amendment to ensure sufficient Holder notice and showing of no unreasonable alternative location if adverse impact on conservation values, replace the previous amendment with the following language:

  Revise language to: (1) require that Holder be given 60-day notice prior to construction material removal at a new or expanded site of one acre or greater; (2) require Landowner to consult with Holder for the purpose of reasonably minimizing adverse impacts to conservation values from the proposed removal activity at these noticed sites; (3) for any proposed removal at these noticed sites that Holder believes would adversely impact conservation values, require Landowner to show to Holder that no reasonable alternative to the proposed site exists within a two mile radius and accessible by the established road system; and (4) require that Landowner's plans for siting construction material removal in a Special Management Area may only go forward if such plans are consistent with and limited by the protections established for those areas.

28

OFFSET CONSERVATION BALANCE EASEMENT:
TERMS GOVERNING ALLOWED ACTIVITIES:
SEPTIC FIELDS

COMMENTING PARTIES

- Petitioner Plum Creek
- Intervenors and Interested Persons
  - Forest Society of Maine
  - Native Forest Network

COMMENTS FILED BY THE PETITIONER

(p. 27)

Agreed. The easements will be amended to provide: "(ii) "Septic Field Activities" means up to 100 acres at any given time of areas where septic tank wastes generated from surrounding communities (including newly developed areas) as are specified on the map attached hereto and made a part hereof (such areas, the "Surrounding Communities") are disposed of through spreading on the land…." See attached Map at Appendix 4.

COMMENTS FILED BY INTERVENORS AND INTERESTED PERSONS

► Forest Society of Maine (p. 11)

Commission Recommendation (page79): Limit spreading to only acreage needed (short-term and total allowed) to serve nearby communities (which would be mapped and attached to easement).

FSM Comment: FSM concurs in part with this recommendation. FSM concurs with the recommendation to limit spreading to serving nearby communities and having those communities identified and shown on a map attached to the easement. FSM suggests that appropriate acreage limits be clearly defined in the easement and that the Holder not be required to evaluate the need of local communities or the availability of alternate sites either within or outside the Protected Properties, which would require an analysis and expertise beyond what should be expected of an easement holder.

► Native Forest Network

(p. 4)

It appears that LURC is not heeding the previously stated concerns regarding certain activities within the easements. While it is an improvement to recommend limiting septic spreading and water extraction to local uses only, this does not address the fact that there remain serious dangerous impacts to the health of area water quality and fisheries by allowing any additional septage spreading or water extraction in the easement lands. The developments would significantly increase both the production of septage sludge (which can include many toxins including household waste cleaners and chemicals, runoff from fertilizers and pesticides, and pharmaceuticals) and the extraction of water for potentially thousands of households (plus water for lawns, golf courses, and pools).

(p. 7)

[Regarding conservation easement pros:]

- Limit construction material removal/septic spreading/water extraction in easements to supply nearby communities (mapped and attached to easements) only (p 82) Although this might be an improvement, NFN still feels that there is still an issue with allowing these activities at all (see "cons" section, below).

(p. 8)

[Regarding LURC staff/consultant recommendations cons:]

- Limits, but continues to allow septage spreading and water extraction

STAFF/CONSULTANT DISCUSSION AND RECOMMENDATIONS

► DISCUSSION

Based on comments received, staff/consultants offer the following analysis:

As explained in the discussion in Tab 27 on a similar amendment, staff/consultants recommend adoption of the map provided by Plum Creek in Appendix 4 of its July 11, 2008 comments. It is equally applicable to this amendment.

► RECOMMENDATIONS

Based on the discussion above, staff/consultants offer the following recommendations:

- Regarding the Commission's June 4th amendment to limit spreading to only that needed by nearby communities, replace the previous amendment with the following language:

  The easement(s) shall limit spreading to only that acreage needed by the communities delineated on a map attached to and made part of the easement. The attached map will be the one submitted by Plum Creek in Appendix 4 of its July 11, 2008 comments.

29

OFFSET CONSERVATION, BALANCE EASEMENT:
TERMS GOVERNING ALLOWED ACTIVITIES:
MINING ACTIVITIES

COMMENTING PARTIES

- ► Petitioner Plum Creek
- ► Intervenors and Interested Persons
  - Forest Society of Maine
  - Native Forest Network

COMMENTS FILED BY THE PETITIONER

(pp. 27-28)

Agreed. Plum Creek notes that it knows of no pre-existing rights after having had extensive independent title research done. Such research has revealed no such rights and a title endorsement in the form attached to these comments will be obtained.

COMMENTS FILED BY INTERVENORS AND INTERESTED PERSONS

► Forest Society of Maine (p. 11)

Commission Recommendation (page 79): Mining activities should not occur. Plum Creek shall insure that no pre-existing rights exist or insure that any claim of a pre-exiting right will not result in any mining activity occurring.

FSM Comment: FSM agrees that mining activities should not be allowed.

► Native Forest Network (p. 7)

[Regarding conservation easement pros:]

- Eliminates mining activities within easements

STAFF/CONSULTANT DISCUSSION AND RECOMMENDATIONS

► DISCUSSION

Comments from parties on this topic present no new information that would cause staff/consultants to reconsider the June 4, 2008 Commission-generated amendments.

Staff/consultants note for the Commission that although Plum Creek in its comments stated that "a title endorsement in the form attached to these comments will be obtained" no form title endorsement was attached to its comments.

► RECOMMENDATIONS

No recommended changes to this June 4th Commission-generated amendment.

30

OFFSET CONSERVATION: BALANCE EASEMENT
TERMS GOVERNING ALLOWED ACTIVITIES:
WIND POWER

COMMENTING PARTIES

- ► Petitioner Plum Creek
- ► Intervenors and Interested Persons
  - Forest Society of Maine
  - Native Forest Network
  - The Nature Conservancy
- ► Governmental Review Agencies
  - Bureau of Parks and Lands

(p. 51)

The State of Maine has adopted the position that developing wind power is an important public policy objective. It follows that one of the conservation values that is being protected by the easements is the potential for finding alternatives to carbon based fuels. In particular, the state has identified areas in the Legacy Easement as being high priorities for the development of wind power. The proposed amendment is unworkable as it provides the Holder with absolute veto authority over a significant public policy decision (which arguably was decided by the Maine Legislature) and perhaps more importantly provides no criteria for the Holder. If conservation value relates to site specific habitat concerns (for example), the Commission's language would bar wind power development. The opportunity for renewable wind power development must remain. Plum Creek believes that the decision to allow wind power development should rest with the State and LURC. That decision would be informed by a full public process at which all interested parties including the Holder and State agencies could participate. This public process should be sufficient to ensure that if there are found to be impacts on the conservation values, those impacts are appropriately minimized and mitigated.

If the Commission is still concerned, Plum Creek is willing to discuss with Staff how the area for wind power could be further limited in the Legacy Easement.

Plum Creek also wishes to clarify the definition of wind power activities with the following language:

"Wind Power Activities" means all activities that may occur on property adjacent to the Protected Property related to converting wind energy into electrical energy, and collecting and transmitting the electrical energy so converted, together with any and all activities related thereto, including, but not be limited to:

- Determining the feasibility of wind energy conversion on the Protected Property, including studies of wind speed, wind direction and other meteorological data, and extracting soil samples;
- Constructing, installing, using, replacing, relocating and removing from time to time, and maintaining and operating, wind turbines, electrical distribution, collection, transmission and communications lines, electric transformers, telecommunications equipment, power generation facilities to be operated in conjunction with commercial wind turbine installations, roads, laydown yards, meteorological towers and wind measurement equipment, control buildings, maintenance yards, and related facilities and equipment.
- Building, constructing, maintaining, repairing, replacing, reconstructing, operating and/or removing electric lines consisting of one or more circuits for the transmission and distribution of electric energy generated from wind energy projects and communications wires and cables necessary to the operation, switching, and transmission and distribution of said electrical energy, including the necessary poles, towers, crossarms, wires, guys, supports and other fixtures required for electric transmission and distribution lines, and roads for the purpose of accessing wind power facilities."

(Plum Creek response to staff/consultant request for additional information, dated 09/02/2008)

[Regarding limitations on wind power activities within Concept Plan area:]

Plum Creek is willing to exclude as an allowed activity the items mentioned in "A" [wind power siting] and "B" [structures and improvements (e.g., transmission lines) necessary for wind generation] above in all areas within the Concept Plan area except in the area depicted on the attached maps, generally known as the "Misery Ridge" area. Plum Creek confirms that wind power farms will be prohibited in all of the Balance Easement area, but structures and improvements such as roads and transmission lines necessary to transmit power and operate/maintain the wind farm may be sited within the Balance Easement, consistent with both the required Commission regulatory approvals and Balance Easement requirements. On the map, the lighter shaded blue color is the area in the Legacy Easement and the darker shaded blue color is the area in the Balance Easement that would allow the relevant wind power activities.

COMMENTS FILED BY INTERVENORS AND INTERESTED PERSONS

► Forest Society of Maine (pp. 11-12)

Commission Recommendation (page 79):
Allow only if Holder determines that such structures and improvements will not adversely impact conservation values of the easements.

FSM Comment:
FSM does not concur with this recommendation. FSM believes that this recommendation inappropriately places what is essentially a broad and significant zoning and planning decision on the Holder. Currently, LURC, under its permitting mandate, has the authority as well as expertise to make zoning and planning decisions regarding the appropriateness of wind power facilities in various locations. We feel that authority for decisions of this type or decisions that require an analysis of need for and appropriateness of wind power facilities should not be pre-empted by the Holder, particularly if the Commission finds through its decision on ZP707 that wind power generation is an allowed use under the easement. We recommend that LURC retain authority for approving wind power on the Protected Properties, as an alternative to requiring Holder approval. We also recommend that language be included in the easements that would commit the Grantor to work in consultation with the Holder in decisions for siting such activities to minimize the adverse impacts of any such activity on the conservation values of the Protected Properties, and that language be added requiring the

Grantor's plans for siting such locations be designed in a manner that is consistent with the protection of the conservation values of Special Management Areas identified in the Baseline Documentation.

► Native Forest Network (p. 8)

[Regarding LURC staff/consultant recommendations cons:]

- Allows wind power generation within easements

► The Nature Conservancy (p. 2)

TNC believes that the proposed "no adverse impact" standard should be modified to "no unreasonable adverse impact." It is appropriate to require the Holder to find that development of wind power will create no unreasonable adverse impact to the conservation values of the easement.

COMMENTS FILED BY GOVERNMENTAL REVIEW AGENCIES

► Bureau of Parks and Lands (p. 10)

Required holder approvals.

BPL raises strong concerns about the extent of recommended holder approvals introduced by LURC amendment in June 2008. It is true that the absence of holder approvals allows the grantor to conduct activities; this can be framed as a loophole or as a retained right of the grantor. Some holder approvals are essential; see my note on recreational fees above. Some holder approvals are easily executed within the resources and expertise of a qualified and funded holder.

Yet this easement creates new and at times welcome precedent in terms of allowed rural infrastructure and services (retained grantor rights). Wind turbines are the best example. BPL does not object to the allowance of wind turbines on Balance/Legacy Lands …. Yet neither BPL nor FSM is qualified or expected to have adequate resources or procedural methodologies to "approve" the best location of wind turbines within the stated purposes of the easement. That function is best held by LURC and/or the Maine Legislature. There is no endowment large enough to convince BPL to be holder or third party holder of an easement that requires affirmative holder approval of major infrastructure or controversial extractions. Rather, LURC should provide clear standards in the easement to define what is contemplated, what is allowed, with no ambiguity for the public and the holder and the grantor to debate for perpetuity. LURC might consider language in LURC documents or perhaps in the easement which retains for LURC a heightened standard of LURC review based on easement purposes.

STAFF/CONSULTANT DISCUSSION AND RECOMMENDATIONS

► DISCUSSION

Based on comments received, staff/consultants offer the following analysis:

- Holder's responsibility:

  The June 4th Commission-generated amendments acknowledged the potential of wind power within the easement areas and would allow it without geographic limitation, but only if the Holder of the easements determines that such structures and improvements will not adversely impact conservation values of the easements. Based on comments received from Plum Creek and other parties, staff/consultants agree that before being put in this role the Holder needs greater clarity from the Commission as to what standards and criteria the Holder would be applying in making the a determination on adverse impact.[1]

- Location of wind power siting and associated structures and improvements:

  Staff/consultants believe there is at least one ridge formation within the southwest quadrangle of the Concept Plan that is appropriate for wind development. It is staff/consultants' understanding that the area within the Concept Plan boundaries the ridge formation known as Misery Ridge contains both the best potential for wind power generation and reasonable proximity to a transmission corridor.[2]

  The potential impacts from wind turbine and infrastructure development on Misery Ridge to existing recreational resources and uses (e.g., the Cold Stream Pond complex of remote and other pristine ponds, primitive and other campsites and other recreational opportunities located west of Misery Ridge and west of the Capital Road) will vary depending on exact wind turbine and utility corridor siting and design. Staff/consultants believe that any potential adverse impacts from wind development on this ridgeline would be (1) minimized by the ridgeline's distance from these existing resources and (2) offset by the recreational opportunities and resource protections afforded by other plan elements[3]. (*See* staff/consultant discussion of impacts to diverse and abundant recreational opportunities, Tab 12 starting at p. 12.10.)

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[1] Recent state legislation on wind power enacted an expedited permitting process for parts of the State, including for the area mapped by Plum Creek in its September 2, 2008 filing where it wishes to retain wind development rights (i.e., the southwest quadrangle of the Concept Plan) – meaning that, should the Commission conclude that wind development ought to be a permitted activity in all or parts of this area, such a project would not require rezoning to a D-PD subdistrict and the meaning of certain of LURC's existing criteria used in the past to review large-scale wind power projects -- principally "harmonious fit" to review scenic impacts -- have been defined by the recent legislation.

[2] This is a ridge approximately 5 miles long, bounded roughly by the intersection of Misery Gore Township and Misery Township boundaries on the north, Milliken Farm Road on the southeast, Capital Road on the southwest, and Adams Dam Road on the northwest.

[3] Based on record evidence before it, staff/consultants cannot conclude with certainty that other areas within this southwest quadrangle with wind power generation potential (e.g. the Williams Mountain and Little Chase Stream Mountain areas) would have no undue adverse impacts on existing recreational resources, nor whether any such potential impacts would be offset by the recreational protections afforded by the Concept Plan proposal as a whole.

► RECOMMENDATIONS

Based on the discussion above, staff/consultants offer the following recommendations:

- Regarding holder responsibility:

  Do not vest the conservation easement holder with the responsibility or authority to determine whether a wind power development project will adversely impact conservation values of easements. Permitting of a wind power development project within the easement area would follow the normal process set forth in state law and rules.

- Regarding area in which wind power activities would be allowed:

  Recommended Option 1:

  Limit wind power siting to Misery Ridge proper. Direct staff/consultants to identify the boundaries of this area as part of second tier drafting. Allow wind power activities (e.g. transmission lines, supporting infrastructure) within either the Balance or Legacy easements, as proposed by Plum Creek in its September 2, 2008, filing.

  Recommended Option 2:

  Should the Commission wish to explore whether additional areas beyond Misery Ridge proper are appropriate for wind power siting:

  Direct the Chair to establish a short comment period whereby parties are provided an opportunity to submit information on whether wind power siting on any or all of the ridge formations within the southwest quadrangle of the Concept Plan area would cause adverse impacts to existing recreational resources and uses, and if so, whether such potential impacts would be offset by the recreational opportunities and resource protections afforded by the Concept Plan proposal as a whole.

  Based on these comments and further staff/consultant analysis, direct staff/consultants to identify the boundaries of any additional areas appropriate for wind power siting as part of second tier drafting.

31

OFFSET CONSERVATION: BALANCE EASEMENT
TERMS GOVERNING ALLOWED ACTIVITIES: WATER EXTRACTION

COMMENTING PARTIES

- Petitioner Plum Creek
- Intervenors and Interested Persons
  - Forest Society of Maine
  - Native Forest Network
- Governmental Review Agencies
  - Bureau of Parks and Lands

COMMENTS FILED BY THE PETITIONER

(p. 39)

Plum Creek agrees to limit water extraction activity to benefit nearby communities, the areas approved for development within the Plan Area and for forest management operations.

Requiring a finding of no reasonable alternative location for obtaining needed water is unworkable and would require expensive surveys of the entire area. Section 4 of the easements already provides in pertinent part: "Grantor shall have the right to conduct surface and subsurface water extraction activities for forestry and residential purposes only, and to construct and maintain structures and facilities necessary for the same, provided that any such extraction is conducted in a sustainable manner and does not adversely affect the conservation values protected by this Conservation Easement [emphasis added]; and provided further that such water extraction shall not be for commercial consumer retail or "bottled water industry" purposes. In the event Grantor conducts water extraction activities on the Protected Property, such activities shall be included in the Multi-Resource Management Plan approved by Holder."

This language already limits the commercial use of any such water and precludes any water extraction that is inconsistent with the conservation values. Moreover, by requiring that such activities be added to the Management Plan, Holder must be given prior notice and Holder approval is necessary.

Plum Creek is amenable to limiting the use of the water to the surrounding areas and will provide a map in the easements. Plum Creek proposes the same map as is used for septic activities. Plum Creek would also like to clarify that the Surrounding Areas includes the proposed residential and resort development proposed in the Plan.

COMMENTS FILED BY INTERVENORS AND INTERESTED PERSONS

- Forest Society of Maine (p. 12)

  Commission Recommendation (page 80):
  Limit activity to only that needed by nearby community, which would be mapped and attached to easement

  FSM Comment:
  FSM concurs in part with this recommendation. FSM concurs with the recommendation to limit water extraction to serving nearby communities and having those communities identified and shown on a map attached to the easement. FSM recommends against the Holder being required to evaluate the "need" of those local communities for water, which would require an analysis and expertise beyond what should be expected of an easement holder.

  Commission Recommendation (page 80):
  Revise language to ensure sufficient Holder notice for pre-extraction determination by Holder; for any proposed extraction that Holder believes would adversely impact conservation values, require Landowner showing Holder of no reasonable alternative location for obtaining needed water.

  FSM Comment:
  FSM concurs in part with this recommendation. FSM concurs with the recommendation that sufficient notice time be given Holder, in its role of review and approval on decisions of water extraction activities. FSM suggests that a notice period of at least 60 days would constitute sufficient notice. FSM does not concur with the recommendation requiring a showing of no reasonable alternative location. FSM suggests that the Holder not be required to evaluate the availability

of alternate locations either within or outside the Protected Properties for obtaining needed water, which would require an analysis and expertise beyond what should be expected of an easement holder.

► Native Forest Network

(p. 4)

It appears that LURC is not heeding the previously stated concerns regarding certain activities within the easements. While it is an improvement to recommend limiting septic spreading and water extraction to local uses only, this does not address the fact that there remain serious dangerous impacts to the health of area water quality and fisheries by allowing any additional septage spreading or water extraction in the easement lands. The developments would significantly increase both the production of septage sludge (which can include many toxins including household waste cleaners and chemicals, runoff from fertilizers and pesticides, and pharmaceuticals) and the extraction of water for potentially thousands of households (plus water for lawns, golf courses, and pools). Furthermore, Aqua Maine expressed plans to handle water operations for the resorts, and this would result in the largest private water company in the US (which makes increased profits proportionate to increased water extraction) having an incentive to extract increasingly large amounts of water from the local aquifers.

(p. 7-8)

[Regarding conservation easement pros:]

- Limit construction material removal/septic spreading/water extraction in easements to supply nearby communities (mapped and attached to easements) only (p 82) Although this might be an improvement, NFN still feels that there is still an issue with allowing these activities at all (see "cons" section, below).

[Regarding LURC staff/consultant recommendations cons:]

- Limits, but continues to allow septage spreading and water extraction

COMMENTS FILED BY GOVERNMENTAL REVIEW AGENCIES

► Bureau of Parks and Lands (p. 10)

Required holder approvals.

BPL raises strong concerns about the extent of recommended holder approvals introduced by LURC amendment in June 2008. It is true that the absence of holder approvals allows the grantor to conduct activities; this can be framed as a loophole or as a retained right of the grantor. Some holder approvals are essential; see my note on recreational fees above. Some holder approvals are easily executed within the resources and expertise of a qualified and funded holder ...

... There is no endowment large enough to convince BPL to be holder or third party holder of an easement that requires affirmative holder approval of major infrastructure or controversial extractions. Rather, LURC should provide clear standards in the easement to define what is contemplated, what is allowed, with no ambiguity for the public and the holder and the grantor to debate for perpetuity. LURC might consider language in LURC documents or perhaps in the easement which retains for LURC a heightened standard of LURC review based on easement purposes.

STAFF/CONSULTANT DISCUSSION AND RECOMMENDATIONS

► DISCUSSION

Based on comments received, staff/consultants offer the following analysis:

- Regarding the Commission's June 4th amendment to limit water extraction to only that needed by nearby communities:

  In its comments Plum Creek provided the same map for delineating nearby communities as provided for construction material removal and septic fields. It also stated that "Plum Creek would also like to clarify that the Surrounding Areas includes the proposed residential and resort development proposed in the Plan."

  Staff/consultants believe the communities delineated on this map, including the residential and resort development that may be approved by the Commission pursuant to the Concept Plan and subsequent development review, constitute a reasonable interpretation of "nearby communities" for purposes of water extraction. In addition, other existing limitations on water extraction proposed by Plum Creek in the easement (i.e., no extraction for commercial or "bottle water purposes") would remain in the easement.

- Regarding the Commission's June 4th amendment to ensure sufficient Holder notice and showing of no unreasonable alternative location if adverse impact on conservation values:

  Plum Creek objected to this amendment because it "is unworkable and would require expensive surveys of the entire area." Staff/consultants appreciate these concerns, but continue to believe that it is appropriate, within limits, to require that landowners engage in a limited search for alternatives before extracting water from those sites for which a finding of adverse impact to conservation values has been made by the Holder. The argued expense and unworkability associated with the Commission's June 4th amendment can be solved by putting in place two "objective standards" that narrow the search for alternative sites: an alternative is unreasonable if (1) it is located more than a two mile radius from the proposed site, and (2) is not currently accessible by the established road system.

► RECOMMENDATIONS

Based on the discussion above, staff/consultants offer the following recommendations:

- Regarding the Commission's June 4th amendment to limit water extraction to only that needed by nearby communities, replace the previous amendment with the following language:

  The easements shall limit water extraction to that amount needed by the communities delineated on a map attached to and made part of the easement, as well as the residential and resort development that may be approved by the Commission pursuant to the Concept Plan and subsequent development review. The attached map will be the one submitted by Plum Creek as Appendix 4 of its July 11, 2008 comments.

- Regarding the Commission's June 4th amendment to ensure sufficient Holder notice and showing of no unreasonable alternative location if adverse impact on conservation values, replace the previous amendment with the following language:

  Revise language to: (1) require that Holder be given 60-day notice prior to disturbance at any site for purposes of water extraction; (2) require Landowner to consult with Holder for the purpose of reasonably minimizing adverse

impacts to conservation values from the proposed water extraction and associated activities at these noticed sites; (3) for any proposed activities at these noticed sites that Holder believes would adversely impact conservation values, require Landowner to show to Holder that no reasonable alternative to the proposed site exists within a two mile radius and accessible by the established road system; and (4) require that Landowner's plans for extracting water in a Special Management Area may only go forward if consistent with and limited by the protections established for those areas.

32

OFFSET CONSERVATION: BALANCE EASEMENT
TERMS GOVERNING ALLOWED ACTIVITIES: CAMPGROUNDS

COMMENTING PARTIES

- Petitioner Plum Creek
- Intervenors and Interested Persons
  - Appalachian Mountain Club
  - Maine Professional Guides Association

COMMENTS FILED BY THE PETITIONER

(p. 27)

Generally agreed, provided that locations desired by BPL (to be sold, gifted or leased) are approved by Plum Creek.

Plum Creek is amenable to adding “campgrounds”, “campsites”, and “remote campsites” (all defined terms in Chapter 10.02 of LURC’s Rules and Standards) to the uses and structures and improvements allowed under the conservation easements.

COMMENTS FILED BY INTERVENORS AND INTERESTED PERSONS

- Appalachian Mountain Club (p. 12)

  Chapter 10 and other Administrative Changes

  Focusing primarily on the General Management (M-GNM) zone that would apply to the Balance and Legacy Easement areas,[6] the Commission-generated amendments contain two important improvements. First, the proposed amendments reinstate campgrounds as an allowed use in the M-GNM zone, and correspondingly propose revisions to the conservation easement language to allow, but more tightly restrict, campground development.[7] Commission-Generated Amendments at 51 and 80. Second, the M-GNM regulations were clarified to allow backcountry huts as a use allowed by special exception, subject again to more tight limitations via the easement language. Commission-Generated Amendments at 51 and 83. Both of these changes are critical to ensuring that a diversity of recreational experiences can occur across the vast area covered by the Concept Plan.

- Maine Professional Guides Association (p. 5)

  We support adding back provisions for allowing camping, both tenting and RV-ing. The landowner, easement holder and Community Stewardship Fund’s recreational management plan should be the determining authorities. Any facilities should be managed by the Community Stewardship Fund’s Board, or by its own designees.

[6] For comment on the positive changes to the resort zones, see footnote 1, above. For comment on further changes needed for the residential zone at Brassua Peninsula, see footnote 4, above. Beyond those comments, AMC has refrained from commenting on changes to the various proposed development zones.

[7] The Balance and Legacy Easements will allow campgrounds "so long as size is limited, locations are determined by BPL, and campgrounds are operated by BPL or its agent."

STAFF/CONSULTANT DISCUSSION AND RECOMMENDATIONS

► DISCUSSION

Comments from parties on this topic present no new information that would cause staff/consultants to reconsider the June 4th Commission-generated amendments. The type of campground (primitive, RV, etc.) would be determined by BPL.

Staff/consultants recommend that an additional sentence be added to the Commission's June amendment, providing Holder approval of any site proposed by BPL and allowing operations by BPL, its agent, or a non-profit entity.

► RECOMMENDATIONS

Based on the discussion above, staff/consultants offer the following recommendations:

Allow so long as size is limited, locations are determined by BPL subject to the prior approval of the Holder, and campgrounds are operated by BPL, its agent, or a non-profit entity and open to the public.

33

OFFSET CONSERVATION, BALANCE EASEMENT:
TERMS GOVERNING ALLOWED ACTIVITES:
PERMITTED EASEMENT RIGHTS FOR ALL LAWFUL PURPOSES

COMMENTING PARTIES

- ► Petitioner Plum Creek
- ► Intervenors and Interested Persons
  - Forest Society of Maine

(p. 35)

Easements provide protections in limiting the aggregate acres; we will consider all the impacts of the activity (the activity itself, structures and improvements and roads leading to it) when addressing the conservation values.

(pp. 41-42)

Section 3 of the easements as proposed currently provides: New roads, utilities and telecommunications facilities, and/or public fire and safety buildings may be installed, constructed, maintained, repaired, and replaced from time to time, and easements, rights of way, or other interests may be granted to others in connection therewith, without the consent of Holder provided that such roads, utilities, telecommunications facilities, and/or buildings are approved by the Maine Land Use Regulation Commission (or its successor agency), and are installed and constructed in accordance with applicable laws and regulations, and further provided that, to the extent reasonably practical, such roads, utilities, facilities, and/or buildings crossing or located on the Protected Property shall be located in a manner to minimize their impact on the Protected Property's conservation values, and provided further that notwithstanding the foregoing, the siting of new roads for uses other than Forest Management or access to the development zones in the Concept Plan shall require the consent of Holder, which consent will not be unreasonably withheld, and which shall be based on a determination that such activity will be consistent with the Protected Property's conservation values. [emphasis added]

Plum Creek is amenable to strengthening Section 1 of the easements to provide additional protection for the conservation values when granting easements as follows: "land covered by such easements shall continue to be subject to this Conservation Easement; and provided further that the such easements will comply with the terms of Section 3 hereof. Grantor shall provide notice to and consult with Holder prior to the grant of such easement rights. Grantor agrees to take into consideration the Protected Property's conservation values (including the avoidance of habitat fragmentation) to the extent reasonably practicable when granting such rights, provided that the ultimate decision to grant such easement rights shall be made in the sole discretion of Grantor after consultation with Holder." [emphasis added]

This is a working forest easement and it is vitally important to Plum Creek to be able to build new roads and grant easements to others on its private property. The easements do require that Plum Creek minimize the impacts on the conservation values if feasible. Roads must be installed in accordance with law. Plum Creek must consult with the Holder. Finally, LURC approval is required providing assurances that only appropriate roads utilities and telecommunications are located on the Protected Property.

The easements are not the appropriate place to grant rights to BPL. The easements just make clear what is and is not allowed to occur on the Protected Property. Moreover, there is nothing in the record that supports having BPL be the entity that builds trails or other facilities on Plum Creek property. Finally, separate agreements would need to be reached with BPL or other entity that wishes to come on Plum Creek private property to build such facilities. These agreements would need to include customary indemnities and insurance provisions and are best negotiated once specific locations and times are determined.

► Forest Society of Maine (pp. 12-13)

Commission Recommendation (page 80):
Revise language to ensure same level of Holder review and approval of grant of easement rights as required for specific permitted activity for which easement is needed: remove language waiving consideration of conservation value.

FSM Comment:
FSM concurs with the goal of this recommendation. FSM believes that the Commission's goal can be accomplished, and clarity can be achieved with respect to the granting of rights of way, easements or other interests by making the following changes to the conservation easements: (1) delete all reference to "easements, rights of way, or other interests … in connection therewith" from Section 3 of the conservation easements; (2) add language to Section 1 of the conservation easements regarding the granting of easements by Plum Creek to third parties that permits Plum Creek to grant "easements, rights of way or other interests" for "ingress, egress, utilities, roads, telecommunication facilities and/or public safety buildings"; (3) add language to Section 1 of the conservation easements clarifying that the land covered by any easement, right of way, or other interest granted by Plum Creek shall continue to be subject to the conservation easements, and that the exercise of any rights under such interests shall comply with terms of the conservation easements; and (4) add language to Section 1 of the conservation easements requiring that any such interest granted by Plum Creek make specific reference to the conservation easements so as to provide notice to the grantee that their activities must conform with the terms of the conservation easements. These changes will ensure that Holder can enforce the terms of the conservation easements against any party to whom Plum Creek grants rights-of-way, easements or other interests. A third-party right-of-way or easement holder would need to seek and obtain Holder consent and approval for the construction of all structures and improvement in all cases where Plum Creek would be required to do so. FSM does not believe that it is necessary for the Holder to approve the actual grant of a right-of-way or easement to a third-party, provided that the third-party takes any such rights subject to the terms of the conservation easements, and provided further that the Holder receives notice such that Holder is aware of the identity and activity of any third-party and is therefore able to enforce the terms of the conservation easements against that third-party.

STAFF/CONSULTANT DISCUSSION AND RECOMMENDATIONS

► DISCUSSION

Based on comments received, staff/consultants offer the following analysis:

- Regarding the Commission's June amendment to revise language to ensure same level of Holder review, etc:

  Staff/consultants and legal counsel believe that the proposed easement language changes offered by FSM in its comments (p. 33.4) are consistent with the intent of the Commission's June amendment.

- Regarding the granting of easement rights to BPL for trail building, etc:

  Comments from parties on this topic present no new information that would cause staff/consultants to reconsider the June 4th Commission-generated amendments.

► RECOMMENDATIONS

Based on the discussion above, staff/consultants offer the following recommendations:

- Regarding the Commission's June amendment to revise language to ensure same level of Holder review, etc:

  Staff/consultants and legal counsel are directed to draft revised easement language that is consistent with the comments submitted to the Commission by the Forest Society of Maine on July 11, 2008 at paragraph 6, pages 12-13.

- Regarding the Commission's June 4th amendments granting of easement rights to BPL for trail building, etc:

  No recommended changes to this amendment.

34

OFFSET CONSERVATION: BALANCE EASEMENT
TERMS GOVERNING ALLOWED ACTIVITIES: SUBDIVISION / PARCELIZATION OF EASEMENT LANDS

COMMENTING PARTIES

- ► Petitioner Plum Creek
- ► Intervenors and Interested Persons
  - Forest Society of Maine
  - Maine Audubon and Natural Resources Council of Maine
  - Moosehead Region Futures Committee
  - Native Forest Network
  - The Nature Conservancy
- ► Governmental Review Agencies
  - Maine Department of Inland Fisheries and Wildlife and Maine Natural Areas Program

COMMENTS FILED BY THE PETITIONER

(pp. 28-29)

[Regarding subdivision limits]:

Generally agreed. The ability to sell and divide land is a basic right of landownership that has great value. Although Plum Creek has already proposed significant limitations on this right (25 divisions) in its October 2007 filing, Plum Creek understands Staff's concerns and is amenable to limiting divisions to ten (not counting divisions made pursuant to Section 2 B or D of the easements (transfers to conservation organizations and limited public purpose transfers)). Given the layout of the two easements and the requirement that no division be less than 5000 acres this provides both an opportunity for the landowner to divide land if the demand arises while at the same time keeping the number of owners low enough to be administratively practical for the Holder. Plum Creek notes that the easement stewardship fund would be increased should there be land divisions that would cover the increased costs of administering multiple "grantors".

[Regarding 50 acre parcelization limits]:

Agreed. Plum Creek is amenable to language in the easements such as:

"D. Notwithstanding any other provision hereof, Grantor may gift or sell no more than 50 acres of the Protected Property in the aggregate with no more than any one such gift or sale being greater than five acres unless otherwise agreed to by Holder to a governmental or quasi-governmental entity (such as, for example only, a sewer or water district or other entity carrying out a public purpose) free of the restrictions of this Conservation Easement (the "Permitted Public Purpose Transfers")."

"In selecting Protected Property for any Permitted Public Purpose Transfer, Grantor shall obtain the consent of Holder which shall not be unreasonably withheld provided, to the extent reasonably practical, the siting of land covered by such gift or sale has taken into consideration the Protected Property's conservation values (including the avoidance of habitat fragmentation) and the proximity of such land to existing development or existing roads."

COMMENTS FILED BY INTERVENORS AND INTERESTED PERSONS

- Forest Society of Maine (pp. 13-14)

  Commission Recommendation (page 81):
  For the Balance and Legacy easements combined, the Commission has tentatively concluded that the total number of subdivisions should be limited to a number no less than 5 or greater than 10, with no subdivision being smaller than 5,000 acres, and with permission for subdivision boundaries to cross over the boundaries of the two easements. The Commission is particularly interested in public comment on: (1) the appropriate number of subdivisions for the two easements within this range; (2) the specific reasons supporting the number chosen; and (3) any implications to stewardship funding needs or other needs created or not created by the number of subdivisions allowed.

  FSM Comment:
  FSM concurs with this recommendation. FSM supports the limit of subdivisions, combined between the Balance and Legacy easements, being set at no more than ten. FSM is also supportive of the limit of no subdivision being less than 5,000 acres and of allowing subdivision boundaries to cross over the boundaries of the two easements.

The purpose of limiting the number of subdivisions allowed within large-scale working forest conservation easements is to preserve unified management of large parcels and for administrative feasibility of monitoring and enforcing the conservation easement (LMFB Working Forest Easement Guidelines). Large working forest conservation easements began in Maine at the township level (Attean and Nicatous), and that scale has been found to meet the goals of unified forest management of large parcels and administrative feasibility of monitoring. Following township boundaries has also fit within traditional patterns of manner in which large-scale working forestlands have been bought, sold and managed in Maine and has further fit within the typical landowner's plans and goals. With the advent of exceptionally large working forest conservation easements, which cover hundreds of thousands of acres and multiple townships, the convention evolved of using the number of townships included in the easement as a rough guide to the number of allowed subdivisions. The final number of subdivisions permitted under an easement is typically a negotiated outcome based on that rough one-per-township guideline and other project specific details (geography of the property, surrounding landownership patterns, etc.). For example, the Katahdin Forest easement, which includes all or part of twelve townships allows for no more than six parcels and the West Branch easement, which includes all or part of 17 townships, allows for no more than 15 parcels.

Combined, the Balance and Legacy easements include all or parts of 25 townships. Limiting the number of parcels to no more than ten would result in the easements having one of the most restrictive limits on subdivision of any easement of which FSM is aware, and would readily meet the goals of preserving unified management of large parcels and maintaining administrative feasibility of monitoring and enforcement.

Since the cost of stewardship and oversight of a conservation easement increases each time a new parcel and ownership/management entity is created, adequate stewardship funds are essential. FSM suggests the Commission consider adding language to the easement that would require the Grantor to add a contribution to the unified monitoring, stewardship, and enforcement fund the Commission is recommending each time one of the allowed new parcels is created. The calculation of the amount needed to be added per subdivision could be part of the stewardship fund analysis the Commission is seeking from the Holder, third-party backup holder and Plum Creek under an earlier Commission recommendation found on page 77. If FSM is determined by the Commission to be the Holder, it will use its expertise in these matters in working with the third-party backup holder and Plum Creek to develop a mutually agreeable proposal to the Commission that addresses this need.

► Maine Audubon and Natural Resources Council of Maine (pp. 38-39)

The Commission Amendments specifically leave for public comment the issue of whether the conservation easements, when combined, should be limited to no more than five to ten subdivisions of no less than 5,000 acres. We would support allowing no more than a total of five subdivisions of no less than 5,000 acres (subdivision boundaries can cross over the boundaries of the two easements).

The basis for the limit of five subdivisions is to enable the Holder – presumably, a state entity – to monitor the activities of five different owners of sizeable parcels (even if the subdivisions were close to the minimum permitted 5,000 acres) to be carried out in a manageable and efficient fashion. Increasing the number of subdivisions increases the expense of monitoring. In addition, increasing the number of subdivisions interferes with the ability to manage the lands at a landscape scale in order to provide the habitat protection contemplated by the easements. It is already clear that the baseline documentation and management aspects of the easements will need to be kept as efficient and manageable as possible, and therefore the lower number of five subdivisions is the least likely to interfere with that manageability and the efficiency of managing at a landscape scale.

► Moosehead Region Futures Committee (p. 10)

In the MRFC post-hearing opening brief (submitted March 7, 2008), we stated that "Subdivision of the easement lands must be kept to a minimum in order to facilitate management and to allow crafting of a seamless recreational plan" (pages 37 and 40). Therefore, in response to the Commission's tentative conclusion that the total number of

subdivisions should be limited to a number between 5 and 10, and the Commission's accompanying request for public comment on the appropriate number (LURC-generated amendments, June 4, 2008, page 81): we believe that limiting subdivisions to the lowest number (5) would allow more efficient monitoring and enforcement, would permit more effective recreational planning, and would thereby provide better protection of the public interest.

Furthermore, no subdivision of the easement lands should occur until BPL has completed a recreational planning process to determine the locations of trails, trailhead parking areas, campsites, campgrounds, and public boat launches.

► Native Forest Network (p. 7)

[Regarding conservation easement pros:]

- Reduces amount of subdivisions within easements from 25 to 5-10 (p 84) (CON: allowing subdivisions at all)

► The Nature Conservancy (p. 2)

TNC supports the Commission's recommendation to reduce the number of allowed subdivisions to no more than 10 for the combined easement area. TNC believes that ten is a manageable number of divisions and is consistent with historical practice with large landscape easements in Maine.

COMMENTS FILED BY GOVERNMENTAL REVIEW AGENCIES

► Maine Department of Inland Fisheries and Wildlife and Maine Natural Areas Program (pp. 8-9)

We agree with the Commission's recommendation to significantly reduce the number of allowed sub-divisions and feel that the proposed no less than 5 and no greater than 10 subdivisions no smaller than 5,000 acres is appropriate. We ask the Commission to consider requiring that Special Management Areas designated through the baseline documentation process or into the future should be kept under a single ownership whenever possible and consultation with the holder, third party monitor and Management Advisory Team members should be required when a Special Management Area is part of a proposed sub-division. As the Commission has recognized the need to ensure adequate land is available to ensure the public's right to use the property for recreation purposes through an amendment that allows the applicant to sell or donate additional lands to BPL for recreation purposes (pg. 119) we ask the Commission to consider extending this right to lands with the highest ecological significance, to ensure these public values are also adequately protected and available for appropriate public use.

STAFF/CONSULTANT DISCUSSION AND RECOMMENDATIONS

► DISCUSSION

Based on comments received, staff/consultants offer the following analysis:

- Regarding the prohibition on subdivisions less than 5,000 acres in size:

  Comments from parties on this topic present no new information that would cause staff/consultants to reconsider the June 4th Commission-generated amendments.

- Regarding the question posed in the Commission's June amendments as to the total number of 5,000+ acre subdivisions that should be allowed in both easements combined ("no less than 5 or greater than 10"):

  In response to the Commission's request for public comment on this issue, one party, FSM, submitted factual information on the question posed by the Commission regarding the appropriate number of subdivisions. That information suggests that allowing ten subdivisions would not be inconsistent with what is allowed in other landscape-scale easements in Maine. At the same time, to the best of staff/consultants' knowledge, the lands covered by the easements referenced by FSM have *not* experienced significant subdividing, *meaning that there is no working model in Maine of a holder effectively monitoring and enforcing the terms of a complicated easement with many owners across a vast landscape.* Comments by BPL (both recently and in its testimony) underscore the extremely limited experience to date in monitoring landscape-scale easements.

  Given this situation, staff/consultants recommend to the Commission the following two-part approach to this issue: First, change the Commission's June amendment to allow up to ten subdivisions total on the combined lands comprising the Balance and Legacy easements. Second, make clear that the Commission will be carefully reviewing the proposal(s) submitted by Plum Creek, the Holder and the Third Party holder for a monitoring, stewardship, and enforcement plan (see Tab 25), and will expect to see evidence that the funding and other terms and conditions contained in the proposal(s) are based on a Holder and Third Party holder potentially having to monitor and enforce the easement terms with ten different landowners, and that the Commission expects a demonstration that the terms and conditions proposed are not solely based on the limited historical experiences (costs, amount of enforcement, etc.) of monitoring and enforcing easements involving only one or a very limited number of different landowners.

  An additional issue raised in MDIF&W/MNAP comments is the request to prohibit allowing subdivision and keep in a single, unified ownership structure each "special management area," meaning lands which, due to their unique ecological features/attributes, merit specially-developed and possibly site-specific management and oversight. Staff/consultants respond to this issue in the recommendations, below.

- Regarding the Commission's June amendment limiting the size of any parcel gifted or sold by Grantor to a governmental or quasi-governmental entity and providing Holder oversight:

  Only Plum Creek submitted comments and proposed language on this issue (see page 34.2). Staff/consultants oppose provisions in Plum Creek's proposed language that: (1) allow the continued ability of Grantor to gift or sell at least one large parcel (and potentially more) with an undetermined upper size limit *and* "free of the restrictions of this Conservation Easement"; (2) allows property to be gifted or sold that may adversely impact conservation values and may not be located near development areas, so long as these issues have been "taken into consideration" by the Grantor.

Staff/consultants reiterate to the Commission their concern that this provision, even as currently redrafted, allows the Grantor to gift or sell a significantly-sized piece of land to a governmental or quasi-governmental entity for uses that may be entirely inconsistent with conservation values in the easement. Staff/consultants continue to be sympathetic to the need to allow the transfer of modest-sized parcels of land for legitimate governmental functions *so long as* the placement and operation of those functions is done in such a way as to not adversely impact conservation values and the parcels are located near development areas.

► RECOMMENDATIONS

Based on the discussion above, staff/consultants offer the following recommendations:

- Regarding the Commission's June amendment on the appropriate number and size of subdivisions, revise the amendment to state:

  For the Balance and Legacy easements combined, the total number of allowed subdivisions should be limited to ten, with no subdivision being smaller than 5,000 acres, and with permission for subdivision boundaries to cross over the boundaries of the two easements should the Commission determine that the Balance and Legacy easements are not combined.[1] Lands treated as "special management areas" should remain in single ownership.

- Regarding the Commission's June amendment on limiting the size of any parcel gifted or sold by Grantor to a governmental or quasi-governmental entity and providing Holder oversight:

  No change recommended by staff/consultants.

[1] The Commission will be carefully reviewing the proposal(s) submitted by Plum Creek, the Holder and the Third Party holder for a monitoring, stewardship, and enforcement plan, and will expect to see evidence that the funding and other terms and conditions contained in the proposal(s) are based on a Holder and Third Party holder potentially having to monitor and enforce the easement terms with ten different landowners. The Commission expects a demonstration that the terms and conditions proposed are not solely based on the limited historical experiences (costs, amount of enforcement, etc.) of monitoring and enforcing easements involving only one or a very limited number of different landowners.

35

OFFSET CONSERVATION, BALANCE EASEMENT:
TERMS GOVERNING ALLOWED ACTIVITIES:
STRUCTURES AND IMPROVEMENTS FOR PERMITTED USES

COMMENTING PARTIES

- ► Petitioner Plum Creek
- ► Intervenors and Interested Persons
  - - Forest Society of Maine
  - - Native Forest Network
- ► Governmental Review Agencies
  - -- Bureau of Parks and Lands

COMMENTS FILED BY THE PETITIONER

(p. 47)

Plum Creek notes that the first paragraph of Section 1 provides: "There shall be no structural development, commercial, residential, industrial, energy generation (other than access to and utilities for Wind Power Activities, as defined below, that may be located on lands adjacent to the Protected Property), landfill, and waste disposal activities on the Protected Property except for: (i) Forest Management Activities (defined below), (ii) to the extent allowed by the Grantor, traditional recreational uses of the Protected Property by commercial guides, by customers of commercial sporting camps, and by non-profit camping and educational and scientific institutions, provided that they occur in a manner that is consistent with the terms and the purposes of this Conservation Easement, and (iii) activities otherwise expressly permitted herein. Without limiting the generality of the foregoing, houses, apartment buildings, multi-family housing units, , condominiums, trailer parks, mobile homes, permanent outdoor high-intensity lights, motels or hotels, billboards, junk yards, and commercial and industrial uses of all kind, are specifically prohibited on the Protected Property unless otherwise provided herein. (emphasis added)

Thus, unless it's authorized under clauses i, ii or iii, no activity is allowed. Moreover, unless specifically allowed, no commercial or industrial use of the Protected Property is allowed. Permanent sawmills are clearly prohibited in the Easements. Plum Creek is amenable to further clarifying this.

It is vital to Plum Creek that the easements remain commercial working forest easements. Thus, it is appropriate to define forestry improvements broadly.

Plum Creek also wishes to clarify that while no billboards are allowed on the Protected Property, limited signage should be allowed for the development allowed under the Plan as follows: "Notwithstanding the foregoing, Grantor may construct, place, maintain, replace and repair at any time and from time to time signage and informational gatehouse(s) related to areas zoned for development under the Concept Plan (the "Development Signage"). In designing and siting the Development Signage, Grantor shall consult with Holder to reasonably minimize the intrusiveness of the Development Signage and ensure that Development Signage reasonably blends in with the local setting. Holder's prior consent to such Development Signage shall be required, which such consent shall not be unreasonably withheld."

COMMENTS FILED BY INTERVENORS AND INTERESTED PERSONS

► Forest Society of Maine (p. 15)

Commission Recommendation (page 83):
Direct staff/consultants and legal counsel to carefully review the open-ended nature of this language

FSM Comment:
FSM concurs with this recommendation. FSM believes that the issues discussed elsewhere in FSM's submission, and undoubtedly by others in their submissions, address many of these concerns. FSM would be pleased to work with the Commission staff and consultants, Third Party backup holder, and Plum Creek to identify and address any specific language which remains a matter of concern to the Commission or its staff.

► Native Forest Network (p. 7)

[Regarding conservation easement pros:]

- With conservation values in mind, fixes open-ended PC language regarding structures and improvements within the easements to prohibit or limit proliferation of certain structures

► Bureau of Parks and Lands (pp. 10-11)

East West Highways, major transmission corridors, major new gas corridors, and other hypotheticals.

The draft easements (now outdated by LURC amendment direction) would allow new roads and new utilities. BPL has not objected, in deference to other parties' comments and LURC's expertise as the planning body for the region. The June 2008 LURC amendments significantly tightened these provisions, by directing LURC staff to "carefully review the open-ended nature…to ensure that significant commercial and industrial structures...are prohibited." The Commission should be more explicit either pro or con re certain hypotheticals (retained rights), noting the relative lack of public comment or public awareness on this subject.

BPL on July 1, 2008, received reports that Cianbro reported to Appalachian Trail interests that the preferred route for crossing the Appalachian Trail for the proposed toll highway accommodating global freight pressures is immediately adjacent to Balance/Legacy lands in Elliottsville in a rail corridor. That report is today sent to LURC under separate cover, for the Concept Plan record. BPL declines to opine whether a rail corridor is too tight to accommodate a four lane highway. Thus there is reason to believe that Balance/Legacy lands would be scoped, or have already been scoped by either Cianbro or Plum Creek or both. This is not a hypothetical for the Commission to ask staff to resolve in negotiations, but rather a matter for the Commission to resolve specifically. BPL has not reviewed alternative possible locations or modes for accommodation of global freight pressures, or alternative strategies for economic development in Maine, nor would we as holder or third party holder want to undertake such review or meaningfully monitor construction impacts under easement terms, now or as we approach perpetuity.

STAFF/CONSULTANT DISCUSSION AND RECOMMENDATIONS

► DISCUSSION

Comments from parties on this topic present no new information that would cause staff/consultants to reconsider the June 4th Commission-generated amendments. While Plum Creek's comments on this matter, reproduced here at page 35.2, restate accurately those limitations on structural development found in paragraph 1 of the proposed easement, the concerns that led to this Commission amendment were principally based on the language instead found in paragraph 3 (Structures and Improvements).

Paragraph 3 contains language stating that new roads, utilities and telecommunication facilities, and/or public fire and safety buildings may be installed, constructed, etc. provided that such roads, utilities, telecommunication facilities, etc. are approved by the Commission or its successor agency and, in certain circumstances, receive the consent of the Holder. In staff/consultants' and legal counsel's opinion, this open-ended language could allow in the future the construction of a major highway or a major transmission corridor through the easement lands so long as a subsequent Commission (or successor agency) approves. The grounds for approval or denial are not stated, nor is it known what type of statutory authority will rest with LURC or its successor in perpetuity. These potential roads or utility corridors are not limited to only those servicing allowed land uses taking place in the easement area, but are permitted under the easement for purposes entirely unrelated to activities allowed in the easement. This is the situation that is addressed in BPL's comments regarding the proposed East-West Highway. Another example that appears to be allowed under current easement terms would be construction of a major transmission corridor bringing electrical power from points north to the substation and transmission corridor at Harris Dam.

► RECOMMENDATIONS

No recommended changes to this June 4th Commission-generated amendments.

36

OFFSET CONSERVATION: BALANCE EASEMENT
TERMS GOVERNING ALLOWED ACTIVITIES: STRUCTURES AND IMPROVEMENTS, HOLDER RIGHTS

COMMENTING PARTIES

- Petitioner Plum Creek
- Intervenors and Interested Persons
  - Forest Society of Maine
- Governmental Review Agencies
  - Bureau of Parks and Lands

COMMENTS FILED BY THE PETITIONER

(p. 35)

Easements provide protections in limiting the aggregate acres; we will consider all the impacts of the activity (the activity itself, structures and improvements and roads leading to it) when addressing the conservation values.

COMMENTS FILED BY INTERVENORS AND INTERESTED PERSONS

► Forest Society of Maine (p. 15)

Commission Recommendation (page 83): With regard to the granting of easements by Plum Creek, the easement should require the same level of Holder review and approval of structures and improvements as required for specific permitted activity for which structure/improvement is needed.

FSM Comment: FSM concurs with the goal of this recommendation. FSM suggests removing the language regarding "easements, rights of way or other interests" completely from Section 3 of the conservation easements and moving it to Section 1 of the conservation easements which deals with the granting of easements for ingress, egress and utilities. FSM's proposed language revisions are outlined above in response to a similar Commission recommendation on page 80. FSM further suggests that the Commission's concerns expressed in this recommendation be addressed by adding language to Section 3 of the conservation easements that requires that the siting of any new utilities, telecommunications facilities, and/or public fire and safety buildings not subject to LURC or successor agency review shall require the consent of the Holder. Such a provision would ensure that these permitted activities (and the exercise of any easement rights granted in accordance therewith) would either be approved by the Commission or by Holder.

COMMENTS FILED BY GOVERNMENTAL REVIEW AGENCIES

► Bureau of Parks and Lands (p. 10)

... LURC should provide clear standards in the easement to define what is contemplated, what is allowed, with no ambiguity for the public and the holder and the grantor to debate for perpetuity. LURC might consider language in LURC documents or perhaps in the easement which retains for LURC a heightened standard of LURC review based on easement purposes.

STAFF/CONSULTANT DISCUSSION AND RECOMMENDATIONS

► DISCUSSION

Comments from parties on this topic present no new information that would cause staff/consultants to reconsider the June 4th Commission-generated amendment. Neither the comments from Plum Creek nor FSM address the concern raised in the Commission's amendment. That amendment said, for instance, that the Holder should have the same review/approval authority over a proposed new road going to a gravel pit or a proposed new building adjoining a septic spreading site as the Holder has over the locations of the gravel pit or a septic spreading site. As the easement is currently written, decisions on the location of structures and improvements "shall be made in the sole discretion of Grantor."

► RECOMMENDATIONS

No recommended changes to this June 4th Commission-generated amendment.

37

OFFSET CONSERVATION: BALANCE EASEMENT
TERMS GOVERNING ALLOWED ACTIVITIES: STRUCTURES AND IMPROVEMENTS, PUBLIC BOAT LAUNCHES

COMMENTING PARTIES

- ► Petitioner Plum Creek
- ► Intervenors and Interested Persons
  - Forest Society of Maine

COMMENTS FILED BY THE PETITIONER

(p. 29)

Agreed. Plum Creek is amenable to language in the easements such as: “Notwithstanding the foregoing, new public boat launches, campgrounds and Back Country Huts (as defined below) may be installed, constructed and replaced from time to time only with the consent of Holder, which consent will not be unreasonably withheld, and which shall be based on a determination that such activity will not adversely impact the Protected Property’s conservation values

COMMENTS FILED BY INTERVENORS AND INTERESTED PERSONS

- Forest Society of Maine (p. 15)

  Commission Recommendation (page 83): Allow public boat launches only if Holder determines that boat launches will not adversely impact conservation values of easements.

  FSM Comment: FSM concurs with this recommendation. FSM further suggests that any determination on the number and type of public boat launches be made in consultation with BPL and the landowner or other entity responsible for recreational management on the Protected Properties.

STAFF/CONSULTANT DISCUSSION AND RECOMMENDATIONS

► DISCUSSION

Based on comments received, staff/consultants offer the following analysis:

No commenter objected to this amendment. The language changes proposed by Plum Creek and FSM capture what staff/consultants understood to be the Commission's intent, and are captured in the revised amendment recommendation below.

► RECOMMENDATIONS

Based on the discussion above, staff/consultants offer the following recommendations:

- Regarding the Commission's June 4th amendment to require holder approval of boat launches, revise the amendment to state:

  The easement must include language stating that new public boat launches may be installed and replaced from time to time only after consultation with BPL and with the consent of Holder, which consent will not be unreasonably withheld, and which shall be based on a determination that such activity will not adversely impact the Protected Property's conservation values.

38

OFFSET CONSERVATION, BALANCE EASEMENT:
TERMS GOVERNING ALLOWED ACTIVITES:
STRUCTURES AND IMPROVEMENTS, BACKCOUNTRY HUTS

COMMENTING PARTIES

- Petitioner Plum Creek
- Intervenors and Interested Persons
  - Appalachian Mountain Club
  - Forest Ecology Network and RESTORE: The North Woods
  - Forest Society of Maine
  - Native Forest Network

COMMENTS FILED BY THE PETITIONER

(p. 29)

Generally agreed. Plum Creek assumes that this recommended amendment would eliminate the specific limits that are currently in the draft easements. Plum Creek is amenable to language in the easements such as: "Notwithstanding the foregoing, new public boat launches, campgrounds and Back Country Huts (as defined below) may be installed, constructed and replaced from time to time only with the consent of Holder, which consent will not be unreasonably withheld, and which shall be based on a determination that such activity will not adversely impact the Protected Property's conservation values. Once installed and constructed, such campgrounds, Back Country Huts and boat launches may be maintained and repaired from time to time, without the consent of Holder. For purposes of this Conservation Easement, the term "Back Country Hut" shall generally mean a structure with a ground level building footprint of approximately 5,000 square feet and an overall height of approximately 40 feet or such other structure the size and purpose of which shall be determined jointly by the Grantor and Holder, provided that the size and purpose of any such hut shall be consistent with the conservation values of this Conservation Easement."

COMMENTS FILED BY INTERVENORS AND INTERESTED PERSONS

► Appalachian Mountain Club (p. 12)

Focusing primarily on the General Management (M-GNM) zone that would apply to the Balance and Legacy Easement areas,[6] the Commission-generated amendments contain two important improvements. First, the proposed amendments reinstate campgrounds as an allowed use in the M-GNM zone, and correspondingly propose revisions to the conservation easement language to allow, but more tightly restrict, campground development.[7] Commission-Generated Amendments at 51 and 80. Second, the M-GNM regulations were clarified to allow backcountry huts as a use allowed by special exception, subject again to more tight limitations via the easement language. Commission-Generated Amendments at 51 and 83. Both of these changes are critical to ensuring that a diversity of recreational experiences can occur across the vast area covered by the Concept Plan.

However, the language reinstating backcountry huts as an allowed use in the M-GNM appears to limit the huts to those proposed only as part of the Moosehead-to-Mahoosucs trail. Commission-Generated Amendments at 51. In fact, that trail covers only a small geographic area relative to the entire area covered by the Balance and Legacy Easements, where other trail easements most likely will be located. The Balance and Legacy Easement terms presently impose limits on the number of permissible backcountry huts that may be built within the Plan Area.[8] Needlessly limiting the

[6] For comment on the positive changes to the resort zones, see footnote 1, above. For comment on further changes needed for the residential zone at Brassua Peninsula, see footnote 4, above. Beyond those comments, AMC has refrained from commenting on changes to the various proposed development zones.

[7] The Balance and Legacy Easements will allow campgrounds "so long as size is limited, locations are determined by BPL, and campgrounds are operated by BPL or its agent."

[8] It is unclear whether the Commission proposes amending the easement language to eliminate the strict limitation on number of huts in each easement. See Commission-Generated Amendments at page 83. AMC would support such an amendment, but absent such a change, the easements prohibit more than six huts (3 in each easement) within the entire 300,000+ acres of easement lands. The BPL has also expressed a preference for less restriction on the of backcountry huts permissible in the easements. Comments of the Bureau of Parks and Lands, 11/20/07 at 8 ("We are somewhat disappointed that recent easement revisions reduce the number of allowed huts [from 5 to 3]. We would encourage retention of generous allowance of huts to accommodate hikers and other recreationists.")

location and context of those huts would fail to accomplish the Commission's intended purpose of providing opportunities for diverse recreational experiences throughout the Plan Area. AMC recommends that, at the 'second tier' stage of drafting, the Commission clarify that this special exception use is permissible throughout the Concept Plan Area, and that such huts need not necessarily be associated with the Moosehead-to-Mahoosucs trail.

► Forest Society of Maine (p. 15)

Commission Recommendation (page 83): Consistent with protecting conservation values, Holder and landowner shall determine the appropriate maximum number and size of huts in the Balance and Legacy easements.

FSM Comment: FSM does not concur with this recommendation. FSM suggests that the Commission provide clearer guidance as to the appropriate upper limits regarding the number and size of allowed huts, and that language be incorporated into the conservation easements regarding such guidance. The Holder's role should be to determine if the siting of such huts in each specific case is consistent with the conservation values of the easements, not to determine the overall number of such facilities to be permitted on the Protected Properties.

► FEN-RESTORE (pp. 14-15)

The methodologies staff used vary from the inexplicable to the merely unpersuasive. For example, staff would remove the already inadequate restrictions within the conservation easements on the number and size of "back country huts" that can be built in the conservation areas. This would leave the number and size of the huts up to the landowner and the holder of the easement. Thus it is possible that a "back country hut" could be larger than a remote resort. We do not understand the rationale for removing these safeguards from the conservation easements.

► Native Forest Network (pp. 7-8)

[Regarding LURC staff/consultant recommendations cons:]

- Allows unlimited amount of backcountry "huts" in easements of 5,000 sq feet and up to 40 ft in height (seemingly removing size requirements for these huts)

STAFF/CONSULTANT DISCUSSION AND RECOMMENDATIONS

► DISCUSSION

Based on comments received, staff/consultants offer the following analysis:

- Regarding the removal of limitations in size of backcountry huts in the Commission's June 4th amendment:

  Concern has been raised in the comments that the Commission's amendment provides the Holder open-ended discretion to determine the appropriate size of a backcountry hut and therefore could result in very large structures being built. For this reason, staff/consultants are recommending the re-insertion of the size and height limits proposed in the easements.

- Regarding the removal of the maximum number of allowable backcountry huts in the Commission's June 4th amendment:

  Staff/consultants believe that placing an upper limit on the number of backcountry huts that can be constructed within the easements in perpetuity, given the vast scale of the easements, creates unnecessary rigidity. Instead, and similar to how the staff/consultants recommend handling the siting of campsites and campgrounds, staff/consultants here recommend a slight change to the Commission's June amendment to require both BPL and Holder approval for siting new huts.

► RECOMMENDATIONS

Based on the discussion above, staff/consultants offer the following recommendations:

- Revise the Commission's June 4th amendments to now state:

  Landowner and BPL shall determine the appropriate location and number of backcountry huts, subject to the prior approval of the Holder. Backcountry huts may be operated by BPL, its agent, or a non-profit entity and open to the public. The square foot and height limit for backcountry huts stated in the proposed easement shall remain unchanged.

39

OFFSET CONSERVATION: BALANCE EASEMENT
TERMS GOVERNING ALLOWED ACTIVITIES:
FOREST MANAGEMENT, DEFINITION OF ALLOWED ACTIVITIES

COMMENTING PARTIES

- Petitioner Plum Creek

(p. 48)

Plum Creek notes LURC's own definition of "forest management activities" contained in Chapter 10.02 that contains broad language: "Forest management activities include timber cruising and other forest resource evaluation activities, pesticide or fertilizer application, timber stand improvement, pruning, timber harvesting…and other similar or associated activities…." [Emphasis added] It is crucial to Plum Creek that all commercial forest management practices currently used or developed in the future that meet at least the current standards of the SFI be allowed under these working forest easements. Thus this language must remain broad. Plum Creek will address LURCs concern by amending the catchall phrase at the end to be identical to the LURC phrase: "…and any other similar or associated activities."

STAFF/CONSULTANT DISCUSSION AND RECOMMENDATIONS

► DISCUSSION

Comments from parties on this topic present no new information that would cause staff/consultants to reconsider the June 4, 2008 Commission-generated amendments. Plum Creek has stated its willingness to amend the easement to remove the open-ended nature of this language. As part of the Second Tier drafting process, staff/consultants and legal counsel will evaluate whether the proposed specific wording suggested by Plum Creek meets the directive contained in the June amendment, and will suggest additional changes if necessary.

► RECOMMENDATIONS

No recommended changes to this June 4th Commission-generated amendments.

40

OFFSET CONSERVATION: BALANCE EASEMENT
TERMS GOVERNING ALLOWED ACTIVITIES:
FOREST MANAGEMENT ACTIVITIES, MANAGEMENT ADVISORY TEAM

COMMENTING PARTIES

- ► Petitioner Plum Creek
- ► Intervenors and Interested Persons
  - Forest Ecology Network and RESTORE: The North Woods
  - Forest Society of Maine
  - Maine Audubon and Natural Resources Council of Maine
  - Native Forest Network
  - The Nature Conservancy
- ► Governmental Review Agencies
  - Maine Department of Inland Fisheries and Wildlife and Maine Natural Areas Program

COMMENTS FILED BY THE PETITIONER

(pp. 48-49)

[Structure of MAT:]

Few, if any other, working forest conservation easements afford the holder and state wildlife agencies a forum and a process to give scientific input on forestry issues to the landowner who is granting the conservation easement. Plum Creek believes its intent is consistent with the Commission's intent, in that the MAT would be an advisory body. In this Plan, Plum Creek is offering an unparalleled opportunity for collaboration that goes above and beyond what is in the standard working forest conservation easement. That being said, the MAT must remain an advisory, collaborative body with respect to forestry issues only. The MAT should not supersede the structure of the easements: primary oversight responsibilities by the Holder, third party auditing, and back up oversight by BPL. The MAT, to function effectively as a collaborative body, must include the Grantor and other organizations that are willing to work in good faith to accomplish the purposes of the MAT. Plum Creek believes that the current language in the easements and the Management Plan appropriately sets out the purpose and role of the MAT.

This language in the easements and the management plan makes clear that both USFWS and IFW and MNAP will be included in the MAT with the flexibility to add other experts chosen by the Grantor and Holder. Plum Creek thinks it important, for example, that another commercial forestry representative be included on the MAT. The MAT will advise and consult on forest management issues and on how to best achieve the conservation values. The language also allows for interaction between the MAT and the certification auditor. There is no oversight, regulatory or enforcement nature to this group; it is meant to be advisory and a forum for open discussion.

Plum Creek shares the Commission's intent to afford the MAT participants a process during which Plum Creek will consider advice given by the MAT in good faith (this can be done at various levels of formality from verbal discussions at meetings to written documentation). In any event Grantor's Forest Management Activities must remain in compliance with all laws and the SFI standards.

► Forest Ecology Network and RESTORE: The North Woods (pp. 11-13)

FEN-RESTORE recognizes that the staff recommendations represent progress in making the conservation easements meaningful. Throughout these hearings FEN-RESTORE has consistently challenged the so-called conservation easements as ineffective. One of the primary problems with the easements is that, while they refer to laudable goals like "sustainable forestry" and preserving wildlife habitat, they do not offer an effective mechanism to achieve those goals....

...To address this, staff proposed, and the Commission accepted, several critical improvements to the easements. ...

Third, staff proposes to put the Maine Dept. of Inland Fisheries and Wildlife ("IFW") in charge of the Management Advisory Team and to remove Plum Creek and all subsequent landowners from the MAT altogether. Fourth, the staff recommendation would not only require Plum Creek and the other landowners to respond to MAT advice but will make both the MAT advice and the landowner's response public....

...The end result of all these changes is that a significant amount of power shifts from the landowner to the easement holder and the Management Advisory Team run by the IFW. As Chair Harvey succinctly stated during the deliberations, the wording of the easement is changing: "such that the holder becomes clearly in charge. I guess that's what it amounts [to]." DT P 296 L 3-4.

► Forest Society of Maine (pp. 15-17)

Commission Recommendation (page 85):
Structure MAT so that IFW is responsible for its operations and functioning.

FSM Comment:
FSM does not concur with this recommendation. FSM recommends that the Holder of the easements be responsible for the operation and functioning of the MAT, rather than IFW. Administration and coordination of all functions, communications, procedures and operations related to the easement are the responsibility of the Holder and the Third Party backup holder. Adding another new entity with management or administrative authority over the easement to the existing lines of communication and authority would add unnecessary and unproductive complexity, duplication and costs to the process.

Commission Recommendation (page 85):
Remove Plum Creek (and all subsequent landowners) from voting membership on MAT but ensure that language allows it to advise and coordinate with MAT on an ongoing basis.

FSM Comment:
FSM does not concur with this recommendation. The Management Advisory Team was proposed in response to the state and federal fish and wildlife agencies' requests for increased opportunities to understand the forest management activities on the Protected Properties and for increased access to discussions with the landowner relating to fish and wildlife habitat management needs and considerations. The Management Advisory Team is not intended to assume a mandate or authority independent of the statutory mandates and authorities of the governmental entities of which its is composed, nor is it intended to replace the roles or authorities of the Holder and Third Party backup holder. If changes are made regarding the make-up or operations of the MAT, FSM asks the Commission to use care to ensure that the result is a structure and process that promotes openness, transparency, and respectful discussions, and one that avoids polarization or rigidity of positions. A great strength of the proposed conservation easements is the inclusion of an adaptive management approach to the decision-making as it relates to forest management activities and fish, wildlife

and other special habitats. The MAT plays a key and unprecedented role within that adaptive management process by directly bringing state and federal agencies to the table with the landowner, on a regular and ongoing basis, to openly discuss issues of management concern and to collaboratively find opportunities for management solutions for various species and habitats.

The unique and unprecedented forum and process provided by the MAT can work to its best advantage if care is taken to avoid having the MAT duplicate the roles and authorities for easement oversight and compliance vested in the Holder, Third Party backup holder, and third-party forest certification entity, and if further care is taken to create a forum where parties can work together through this new venue in addition to other processes or more traditional roles (such as the regulatory roles of the individual participating agencies).

FSM views the MAT as a deliberative, collaborative forum rather than a voting or enforcement forum. Consistent with that view, FSM believes that the landowner should have the same voice at the table as any other member. FSM believes that this structure brings a sense of equity to all, which will help achieve the open dialogue envisioned for the MAT, and therefore recommends that the provision requiring consent of all parties to add a new member to the MAT be retained.

Commission Recommendation (page 85):
Redraft language to make clear that MAT has authority to provide ongoing written advice to Holder and to landowner(s) on outcomes and proposed changes in forest management activities, as well as advise audit team and Holder during any forest certification process.

FSM Comment:
FSM concurs with this recommendation provided that the language makes it clear that normal and customary communications between the MAT and the landowner and Holder need not follow such a formal written communication process.

Commission Recommendation (page 85):
Redraft language to require timely written response from landowner(s), Holder, and forest certification audit team to all such MAT written notice.

FSM Comment:
FSM concurs with this recommendation provided that the language makes it clear that normal and customary communications between the MAT and the landowner and Holder need not follow such a formal written communication process.

Commission Recommendation (page 85):
Redraft language to require all MAT and response documents to be public.

FSM Comment:
FSM concurs with this recommendation provided that the language makes it clear that normal and customary communications between the MAT and the landowner and Holder need not follow such a formal written communication process.

Commission Recommendation (page 85):
Redraft language to provide opportunity for MAT input to Holder on certain significant proposed non-forestry landowner activities and structures for which Holder review is either allowed or required.

FSM Comment:

FSM concurs with this recommendation to the extent that it is limited to significant non-forestry landowner activities and structures, does not duplicate the existing role of individual MAT members acting within their normal jurisdiction, and does not unduly complicate or delay Holder review and approval decisions.

► Maine Audubon and Natural Resources Council of Maine (pp. 39-40)

The proposed changes to the MAT structure and its relationship to Plum Creek, the Holder, and the certification audit teams are positive, but very limited in effectiveness and still do not address the basic MAT issues raised on pages 4-5 of Rob Bryan's pre-filed testimony of November 20, 2007. Specifically, the management plan will still contain vague language that does not require Plum Creek to develop and implement plans and strategies to achieve the conservation goals of the MAT or otherwise commit to implementing its advice. The management plan language should require that the landowner specify how it will implement the MAT advice, or if the landowner chooses alternative strategies, to describe how the conservation goals of the MAT will be achieved and provide an objective summary of the benefits of the alternative approach. The certification auditor's response should clearly describe the adequacy of the landowner plans and resulting management, relative to the MAT advice. As mentioned above, of most value to the MAT and to the public are the requirements of clear written descriptions of the strengths and weaknesses of the landowner in implementing the advice of the MAT.

► Native Forest Network (p. 7)

[Regarding conservation easement pros:]

- MAT (management advisory team regarding forestry activities within easements) structured so IFW is responsible, removes PC and all other landowners from its membership, plus makes all documents available to public (p 86)

► The Nature Conservancy (p. 3)

TNC understands the Commission's desire to ensure the independence of the Management Advisory Team (MAT). However, TNC encourages the Commission to recognize the importance of the MAT as a collaborative vehicle for fostering communications and understanding between state and federal resource professionals, the Holder and the landowner, about how best to protect important conservation values on the easement lands. TNC believes it is critical for the landowner to be and active participant in the MAT to enable effective communication and understanding on both sides.

COMMENTS FILED BY GOVERNMENTAL REVIEW AGENCIES

► Maine Department of Inland Fisheries and Wildlife and Maine Natural Areas Program (pp. 5, 9-10)

MDIF&W and MNAP agree with the Commission's recommendations that the conservation easements resulting from Plum Creek's Moosehead Lake Region Concept Plan must be monitored through a transparent process of public accountability given that the easement lands are being offered as mitigation for extraordinary development rights. A public entity should be empowered to better assure that public rights and protections contained in the easement are being monitored and enforced by the holder. It is our hope that the role of MNAP and MDIF&W on the Management Advisory Team will help to address this issue.

Management Advisory Team (page 85)

We concur with the Commission's recommendation that Plum Creek (and subsequent landowners) not be a voting member of the MAT, but feel that it is important that they be in a position that facilitates a close, cooperative working

relationship that allows MAT membership to best convey important resource issues and management needs and allows the landowner to convey commercial timber harvest objectives and forest operation needs. As structured, we do not see our role on the MAT as being a regulatory one, but rather as an important opportunity to formally communicate with the easement holder, as a member of the MAT, and landowner on non-forestry land use activities in a manner that would not delay holder approval, and that allows us to provide guidance and advice regarding habitat management issues in a publicly transparent process better ensuring consideration by land owners and a third party forest certification program. As a result of the MAT process as currently outlined, MNAP and MDIFW look forward to working in unison with the applicant, LURC staff, and the LURC Commission in continued efforts to protect the critical elements of northern Maine landscape planning as identified in our previous comments:

1) Maintaining large un-roaded or otherwise unfragmented blocks of forest and maintaining connectivity between these blocks
2) Conserving high value plant and animal habitats
3) Protecting rare and exemplary natural communities
4) Providing adequate early successional habitat for wildlife species
5) Increasing the amount and distribution of late successional habitats for mature forest dependent species
6) Provide enhanced protection for riparian areas
7) Avoid and minimize the impact of roads
8) Provide and maintain appropriate public use opportunity

Although many of the comments included above focus on the designation of Special Management Areas and how these areas will be utilized as a tool to address northern Maine planning objectives 2, 3, and 5 above specifically, the role of the MAT as an advisory body must encompass all 7 objectives holistically through the baseline documentation process, crafting of outcome based management recommendations, and through continual, publicly accessible feedback to the easement holder and third party certification process. This approach as outlined in these and previous comments will result in better protections for the multiple public resource benefits intended for protection through this offset easement.

STAFF/CONSULTANT DISCUSSION AND RECOMMENDATIONS

► DISCUSSION

Based on comments received, staff/consultants offer the following analysis:

Comments submitted by Plum Creek and FSM suggest that there is significant misunderstanding or miscommunication concerning the intent behind the amendments to the MAT structure and process. A clear summary of staff/consultants' basic views on the MAT -- views that formed the foundation of the recommendations made to the Commission in May, as amended by the recommendations being made now -- is an important preface to a more specific discussion of each amendments and the comments received thereon.

Staff/consultants believe that the MAT should be:

- independent of the landowner(s), the Holder and the Third Party holder;
- at the same time, highly collaborative and in close communication with landowners, the Holder and the Third Party holder;
- focused solely on forest management issues, standards, programs and practices as they affect the easement;
- made up of state and federal governmental officials with expertise in, and jurisdiction over these issues, as well as other recognized, independent, neutral experts on these issues as the existing MAT members may from time to time choose to invite to join in its work;
- advisory and consultative to the landowner(s), Holder, Third Party holder and qualified auditors, with no regulatory role in the monitoring or enforcement of easement terms, which is solely in the province of the Holder, Third Party holder, and the Office of the Attorney General.

With this understanding, staff/consultants address comments provided on each of the Commission's June 4th amendments:

- Regarding the Commissions June 4th amendment in which MDIFW is "responsible for" MAT "operations and functioning":

  FSM commented that the Holder, and not MDIFW, should be responsible for the operation and functioning of the MAT, fearing that the Commission's amendment would create "another new entity with management or administrative authority over the easement..."

  Staff/consultants have no objection to the Holder being responsible for administering the functions of the MAT such as scheduling and convening meetings, keeping minutes of the meetings, etc. Given that under staff/consultants' view the Holder would be attending all, or the vast majority of the MAT meetings, performing this administrative function is not inconsistent with its position as Holder. How well the Holder performs this function over time could be formally addressed in the audit of Holder conducted every three years by BPL, per staff/consultants' recommendation at Tab 21.

- Regarding the Commission's June 4th amendment removing Plum Creek and subsequent landowners from the MAT but ensuring it an advisory/collaborative role in discussions:

  Plum Creek and FSM strongly oppose this amendment, alleging that the collaborative, advisory role of the MAT is undermined if all landowners and the Holder are not members of the MAT. Other commenting parties strongly support the Commission's June amendment.

Staff/consultants respectfully disagree with Plum Creek and FSM. As discussed above, staff/consultants envision and expect an ongoing, open, back-and-forth sharing of information between the MAT and the landowner(s), Holder, and Third Party holder. These parties would almost certainly attend and participate in MAT meetings, unless the MAT determines that on occasion on a particular issue it needed to meet without one or more of these parties to assist it as it gathers information and formulates its views on what should happen under the easement, *in exactly the same way that the landowner may from time to time meet just with the Holder or just with its own gathered experts.* Staff/consultants can easily envision instances in which the MAT may wish to provide comments to the auditors or the Holder which are opposed by one or more landowners, notwithstanding having had an open, collaborative discussion of the issue with the landowner prior to these comments being formed. The opportunity for independently reaching this decision and filing these comments must be preserved if the MAT is to have any credibility or vitality as an advisory body distinct from the landowner(s), Holder or Third Party holder.

- Regarding the Commission's June 4th amendments (1) providing the MAT with authority to provide ongoing written advice to the landowner, Holder and audit team, (2) requiring timely written response from landowners, Holder and audit team, and (3) requiring MAT and response documents to be public:

  FSM commented that it agreed with these amendments, "provided that the language makes it clear that normal and customary communications between the MAT and the landowner and Holder need not follow such a formal written communication process." Staff/consultants agree with this comment, and believe the existing language of the amendments are not inconsistent with the point being made by FSM. Staff/consultants will ensure that any Second Tier language proposed to the Commission by staff/consultants does not require that communications between these entities be in writing if the MAT desires otherwise, but that those communications that are in writing be made available to the public.

- Regarding the Commission's June 4th amendment providing the MAT with opportunity for MAT input to Holder on significant non-forestry landowner activities:

  Staff/consultants have concluded that this amendment, originally recommended by staff/consultants, is both unnecessary and inconsistent with the fundamental purpose of the MAT. Consultation on non-forestry landowner activities will occur anyway between Holder and individual state/federal resource agencies (e.g., MDIFW, MNAP, US FWS) pursuant to normal regulatory practice; the focus of the MAT as a collective body should be on forestry practices on the easement.

► RECOMMENDATIONS

Based on the discussion above, staff/consultants offer the following recommendations:

- Regarding granting responsibility to MDIFW for MAT operations in the Commission's June 4th amendments, change the language to read as follows:

  Holder shall be responsible for providing administrative support to the MAT.

- Regarding removing Plum Creek and subsequent landowners from the MAT in the Commission's June 4th amendments:

  No change recommended by staff/consultants.

- Regarding the provisions (1) providing the MAT with authority to provide ongoing written advice to the landowner, Holder and audit team (2) requiring timely written response from landowners, Holder and audit team, and (3) requiring MAT and response documents to be public, all in the Commission's June

4th amendments:

No change recommended by staff/consultants.

- Regarding providing the MAT with opportunity for MAT input to Holder on significant non-forestry landowner activities in the Commission's June 4th amendments:

  Delete the amendment.

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OFFSET CONSERVATION: BALANCE EASEMENT
TERMS GOVERNING ALLOWED ACTIVITIES:
FOREST MANAGEMENT ACTIVITIES, QUALIFYING CERTIFICATION PROGRAMS

COMMENTING PARTIES

- ► Petitioner Plum Creek
- ► Intervenors and Interested Persons
  - Forest Society of Maine
  - Native Forest Network

COMMENTS FILED BY THE PETITIONER

(p. 43)

Plum Creek has already agreed to a "no back sliding provision" in the easements. This provision means that standards can be strengthened but cannot be relaxed. Plum Creek is willing to clarify the easements to provide that if the standards and procedures of any pre qualified system went below the standards and procedures in place today, then that system would no longer be a qualifying program. Having a Holder take the position that SFI, FSC or other program is "inadequate" in the future even if the standards and procedures exceeded those in force today is not workable for Plum Creek. The landowner must have the right to pick whatever certification system it chooses, provided that the standards and procedures, including audit standards and procedures are at least as good as the current SFI system.

The ATFS certification program was included should a small landowner became subject to the easements. Small landowners typically are certified by ATFS and not SFI. Plum Creek is willing to clarify the easements to require Holder approval and to limit the applicability of the ATFS certification to only small landowners with the following changes to Section 5.D of the easements: "(iii) if approved by Holder, the American Tree Farm System Certification for parcels of no more than 7500 acres created and conveyed by Grantor to unaffiliated third parties pursuant to Section 2 above …."

COMMENTS FILED BY INTERVENORS AND INTERESTED PERSONS

► Forest Society of Maine (p. 17)

Commission Recommendation (page 86):
Draft language to establish right of Holder to remove pre-qualified certification program based on demonstrated inadequacy of audit standards and procedures.

FSM Comment:
FSM concurs with this recommendation.

► Native Forest Network (p. 7)

[Regarding conservat easement pros:]

- Tighten language/control of forestry certification programs and forestry practices within the easements(p 87/88)

STAFF/CONSULTANT DISCUSSION AND RECOMMENDATIONS

► DISCUSSION

Based on comments received, staff/consultants offer the following analysis:

- Regarding the June 4th Commission amendment to establish right of Holder to remove pre-qualified certification program based on demonstration of inadequacy:

  Although FSM, as the potential easement Holder, supports this change to the easement, Plum Creek does not. Plum Creek argues in its comments that it should not be held to higher auditing "standards and procedures" than are in force today. Staff/consultants believe that Plum Creek misinterprets the purpose of this amendment. Staff/consultants do not understand its purpose being to indirectly impose, through allowing the Holder to eliminate a certification program, forest management programs and practices more stringent than those contained in the Easement or the Multi-Resource Management Plan. The amendment's purpose *is* to ensure that if, under the easement terms, certification by a particular program carries with it a presumption of landowner compliance with easement terms, then that certification program *better have the ongoing capability* of determining whether the easement and the Multi-Resource Management Plan are indeed being complied with by the landowner. Staff/consultants believe that the quality of forestry practiced is (or should be) governed by the programs and practices contained in the Multi-Resource Management Plan, regardless of who is conducting the certification. These programs and practices should not be SFI specific, although they may well replicate or draw from SFI objectives, programs and practices.

- Regarding the June 4th Commission amendment on eliminating American Tree Farm System certification program as pre-qualified:

  As drafted, the proposed easement allowed a landowner to use the American Tree Farm System certification program to audit landscape easements, a task which record evidence demonstrated this certification system was not conceived or capable of undertaking. In its comments, Plum Creek proposed easement language to correct this situation (page 41.2), allowing the American Tree Farm certification system to be used only for certification on landholdings of 7500 acres or smaller. Record evidence supports this change.

► RECOMMENDATIONS

Based on the discussion above, staff/consultants offer the following recommendations:

- Regarding the June 4th Commission amendment to establish right of Holder to remove pre-qualified certification program based on demonstration of inadequacy:

  No change recommended by staff/consultants.

- Regarding eliminating the American Tree Farm System certification program as pre-qualified, change the Commission's June 4th amendments to state:

  Substitute the language proposed by Plum Creek in its July 11, 2008 comments for existing language in the proposed Concept Plan easement.

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OFFSET CONSERVATION: BALANCE EASEMENT
TERMS GOVERNING ALLOWED ACTIVITIES:
FOREST MANAGEMENT ACTIVITIES, IMPACT OF THIRD PARTY CERTIFICATION

COMMENTING PARTIES

- Petitioner Plum Creek
- Intervenors and Interested Persons
  - Appalachian Mountain Club
  - Forest Ecology Network and RESTORE: The North Woods
  - Forest Society of Maine
  - Maine Audubon and Natural Resources Council of Maine

COMMENTS FILED BY THE PETITIONER

(pp. 30-31)

[Regarding role of Certification:]

Generally agreed. Plum Creek will make it clear that certification is a rebuttable presumption and that the forestry principles and management plan will be addressed by the audit by making the following changes to Section 5.D(ii) of the easements: "(ii) Third party certification: Grantor shall comply with the Forestry Principles set forth in 5.C., above and 6 below, by conducting its Forest Management Activities in accordance with the Management Plan. So long as Grantor maintains a third party certification that the Protected Property is being managed in accordance with a Qualifying Forestry Certification Program (as defined below) (which certification audit shall cover the Forestry Principles of this Easement and the Management Plan in addition to the standards of such Qualifying Forestry Certification Program) then there shall be a rebuttable presumption that Grantor is in full compliance with said Forestry Principles and the Management Plan. [Language here deleted -- Rebutting the presumption will not require a showing of material mistake of fact or material misapplication of the certification program standards.]-- In order to rebut such presumption, Holder shall first seek to resolve any compliance issue with Grantor. If this does not resolve the issue, Holder shall follow the appeals process, if any, of said Qualifying Forestry Certification Program. If the issue is still not resolved, Holder may enforce this Conservation Easement as provided in Section 12 hereof.

With respect to the second recommendation, it is critical to Plum Creek that the basic process set forth in Section 5 to resolve disputes over compliance with the forestry standards of the easements be kept intact. Section 5 requires the Holder to work, in the first instance, with the Grantor to resolve issues (the stage at which the vast majority of issues get resolved), then availing itself of any appeal process under the certification system, and then using the general enforcement mechanisms set forth in Section 12. To address LURC's concern about delay, Plum Creek is amenable to putting a one year time limit on the appeals process that would allow the Holder to seek alternative enforcement mechanisms if the appeal process were not progressing in a timely fashion.

[Regarding Audit Summary:]

Agreed. Plum Creek will work with the auditors to develop an audit summary that is provided to the MAT within 120 days of a completed audit.

COMMENTS FILED BY INTERVENORS AND INTERESTED PERSONS

- Appalachian Mountain Club (p. 10)

  First, the amendments propose ensuring that third-party certification does not substitute for the easement holder's final authority to determine easement compliance. Commission- Generated Amendments at 86. The amendments clearly indicate that, while certification may be considered in determining compliance, it should not create a presumption of compliance that must be challenged by the holder. Testimony of Dr. Publicover, 11/20/07 at 7-8. Second, the amendments recognize the need to ensure that the multi-resource management plan sets forth standards of performance that are specific and enforceable. Commission-Generated Amendments at 87; Testimony of Dr. Publicover, 8/31/07 at 22-23. For both of these issues, the development of final, detailed language executing the proposed amendments at the 'second tier' stage will determine whether the intent of the Commission-generated amendments is satisfied.

► Forest Society of Maine (pp. 17-18)

Commission Recommendation (page 86):
Amend language so that certification shall be evidence, but not near-unchallengeable conclusion, that landowner is in compliance with forestry principles and management plan.

FSM Comment:
FSM concurs with this recommendation. FSM believes this can be accomplished through the following changes to the easement: (1) language that makes it clear that the certification process takes into account the forestry principles of the easement and management plan in addition to those of the certification program; (2) language that makes it clear that no presumption of compliance will exist for violations identified by the certification audit process, even if those violations do not preclude certification and certification is ultimately issued; (3) language that makes it clear that any presumption of compliance can be rebutted through the appeals process of the certification program; and (4) language discussed below that permits Holder and/or Third Party to bypass the appeals process of the certification program in urgent circumstances.

Commission Recommendation (page 86):
Decouple Holder enforcement timing from certification appeals process conclusion or set time limit on waiting on appeals process.

FSM Comment:
FSM concurs with this recommendation. FSM believes that this can be accomplished with the following two changes to the easement: (1) placing a one year time limit on the certification appeals process, after which Holder and/or Third Party may bypass the certification appeal; and (2) permitting Holder and/or Third Party to bypass the certification appeals process if Holder and/or Third Party believes in good faith that a violation has occurred or is imminent that is of such significance and urgency as to require an immediate response.

Commission Recommendation (page 86):
Require audit to include review of compliance with Forestry Principles and Management Plan.

FSM Comment:
FSM concurs with this recommendation.

► Forest Ecology Network and RESTORE: The North Woods (pp. 11-13)

FEN-RESTORE recognizes that the staff recommendations represent progress in making the conservation easements meaningful. Throughout these hearings FEN-RESTORE has consistently challenged the so-called conservation easements as ineffective. One of the primary problems with the easements is that, while they refer to laudable goals like "sustainable forestry" and preserving wildlife habitat, they do not offer an effective mechanism to achieve those goals. In essence, the original easements provide that if Plum Creek is certified by SFI, as it was even while it was cutting down deer yards, the holder of the easement must "presume" that Plum Creek is fulfilling these goals and this presumption can only be rebutted on very narrow grounds. Staff grasped this problem with the easements, saying:

> "Staff/consultants believe the current language of the easement in section 5. D. (ii) compels the finding that the landowner is "in full compliance with the Forestry Principles in the Management Plan" so long as certification is granted regardless of whether an audit has, for instance, identified significant nonconformities by the landowner in its implementation of one particular aspect of its Management Plan. In this situation, Plum Creek's proposed language essentially removes any ability of the holder to either attempt to stop continuation of such practices or to take enforcement action." Staff May 20, 2008 Recommendations Page 88 footnote 82.

To address this, staff proposed, and the Commission accepted, several critical improvements to the easements. First, staff would change the third party certification, such as SFI certification, from a "presumption" the holder must make to simply "evidence" that the holder may consider. The summary of the audit must be provided to the Management Advisory Team ("MAT"). The holder of the easement could also remove a third party certification program, such as SFI, as an approved certification program if the holder finds that the program's audit standards or procedures are inadequate....

... While we acknowledge the progress staff has made in putting teeth into the easements, the easements still remain – at their core – industrial forest easements. Even with the proposed amendments, the Concept Plan area remains overwhelmingly zoned only for commercial and residential uses. Not a single new acre would be preserved so it can be restored to its natural state. The great divide within the Concept Plan area remains between those commercial areas dominated by industrial forestry, called "conservation areas," and those areas dominated by residential, resort and retail commercial uses, called "development zones." While protecting industrial forestry can provide a public benefit, it is not equivalent to the preservation and restoration of natural resources necessary to "balance" development.

► Maine Audubon and Natural Resources Council of Maine (p. 39)

Maine Audubon and NRCM generally concur with the positive changes that strengthen the position of the Holder with regard to third party certification. One problem still remains regarding the availability of public audit results. It is proposed that a "summary of audit results" would be provided to the Management Advisory Team "in a timely manner." Such public summary reports are typically 2-3 page documents and would not provide much, if any, meaningful information to the MAT. After the boilerplate language in the summaries, these reports have short bullet lists of "Opportunities for Improvement" and "Good Management Practices" that convey little about what is actually happening in the forest. Of most value to the MAT and the public would be clear descriptions of the strengths and weaknesses of the landowner in implementing the advice of the MAT.

STAFF/CONSULTANT DISCUSSION AND RECOMMENDATIONS

► DISCUSSION

Based on comments received, staff/consultants offer the following analysis:

- Regarding the Commission's June 4th amendments that (1) certification by "shall be evidence, but not near-unchangeable conclusion" of landowner compliance with forestry principles and management plan, and (2) decouple Holder enforcement timing from certification appeals process or sets time limits on waiting:

  Plum Creek and FSM each submitted suggested language that they believe to be consistent with the Commission's amendment. These entities disagree on what should happen if a landowner's property receives certification, but violations or significant compliance problems with the terms of the easement or management plan are noted. Plum Creek's proposes that under these circumstances, there continues to be "a rebuttable presumption that Grantor is in full compliance with said Forestry Principles and the Management Plan." FSM's proposed approach is that "no presumption of compliance will exist for violations identified by the certification audit process, even if those violations do not preclude certification and certification is ultimately issued." Staff/consultants believe that FSM's approach is consistent with the Commission's amendment.[1]

  To the extent the audit process does not reveal a violation of easement or Management Plan terms, staff/consultants believe the language of the easement can create a presumption of landowner compliance with the requirements of the easement and the Management Plan (and not just "evidence" of compliance) so long easement language allows Holder to rebut this presumption by demonstrating that the standards applied through the audit were flawed or otherwise inadequate to determine compliance with the relevant standards of the easement or Management Plan. Staff/consultants recommend a minor revision to the June 4th amendment to clarify this point.

  Both Plum Creek and FSM agree that new language in the easement should: (1) make clear that any presumption of compliance can be rebutted during an audit appeal process (Plum Creek has agreed to remove proposed language that made rebutting this presumption by an appellant near-impossible), and (2) impose a one-year deadline on completion of this resolution process, after which Holder and/or Third Party may bypass it. FSM further suggests that additional language should be added allowing Holder and/or Third Party to bypass the appeals process if "a violation has occurred or is imminent that is of such significance and urgency as to require an immediate response." Staff/consultants recommend these three changes to the Commission *so long as* new language is also included in the easement that addresses the right of the Holder and/or Third Party to detect and address easement violations that it believes to be occurring between audits. The proposed easement continues to be ambiguous on this right. Staff/consultants strongly recommend clarifying language be drafted during the Second Tier process to resolve this ambiguity.

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[1] Staff/consultants here repeat verbatim to the Commission an observation staff/consultants made on this issue in its May 20, 2008 recommendations to the Commission, found at footnote 83:

"Staff/consultants believe the current language of the easement in section 5.D.(ii) *compels* the finding that the landowner is "in full compliance with the Forestry Principles and the Management Plan" so long as certification is granted *regardless* of whether an audit has, for instance, identified significant nonconformities by the landowners in its implementation of one particular aspect of its Management Plan. In this situation, Plum Creek's proposed language essentially removes any ability for the Holder to either attempt to stop continuation of such practices or to take enforcement action."

- Regarding the Commission's June 4th amendment requiring that a summary of audit results be provided to the MAT by the auditors in a timely manner:

  Plum Creek apparently agrees with this amendment, stating that it "will work with the auditors to develop an audit summary that is provided to the MAT within 120 days of a completed audit." It is not clear whether Plum Creek views this as a voluntary action on the part of the landowner ("will work with...") or a mandatory term that must occur, possibly by including this as a performance requirement for any qualifying certification program in the contract for auditing services. It is staff/consultants' understanding that the Commission intended its amendment to be a mandatory requirement.

  MA/NRCM state in their comments that public audit summaries are often unhelpful, because they are: "typically 2-3 page documents and would not provide much, if any, meaningful information to the MAT. After the boilerplate language in the summaries, these reports have short bullet lists of "Opportunities for Improvement" and "Good Management Practices" that convey little about what is actually happening in the forest. Of most value to the MAT and the public would be clear descriptions of the strengths and weaknesses of the landowner in implementing the advice of the MAT."

  Staff/consultants understand the purpose of the Commission's June 4th amendment is to provide meaningful, substantive audit information to the MAT, and believe MA/NRCM's concern can be captured in amended easement language addressing the type of summary information that must be provided to the MAT.

- Regarding the Commission's June 4th amendment requiring a certification audit to include review of the Forestry Principles in the easement and the Management Plan as part of its certification assessment:

  No commenters expressed disagreement with the amendment requiring any certification process to assess whether a landowner is complying with the requirements contained in the easement and the management plan, as well as those of the certification program. Both Plum Creek and FSM suggested implementing language.

► RECOMMENDATIONS

- Regarding the Commission's June 4th amendment addressing the effect of third-party certification:

  Change the amendment to clarify that a third party certification that does not find a violation of an easement or Management Plan term creates a presumption (as opposed to merely "evidence") that no violation exists, and that the Holder may rebut that presumption by demonstrating that the standards applied through the audit were flawed or otherwise inadequate to determine compliance with the relevant standards of the easement or Management Plan.

  Direct staff/consultants to develop, during the Second Tier drafting process, revised easement language addressing all aspects of the impact of third-party certification consistent with each element of the staff/consultant discussion above.

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OFFSET CONSERVATION: BALANCE EASEMENT
TERMS GOVERNING ALLOWED ACTIVITIES:
FOREST MANAGEMENT ACTIVITIES, MULTI-RESOURCE MANAGEMENT PLAN

COMMENTING PARTIES

- ► Petitioner Plum Creek
- ► Intervenors and Interested Persons
  - Appalachian Mountain Club
  - Forest Society of Maine
  - Maine Audubon and Natural Resources Council of Maine

COMMENTS FILED BY THE PETITIONER

(p. 31)

[Regarding eliminating language that is: (a) written for purposes of federal Forest Legacy funding requirements; (b) inconsistent with or needlessly repetitious of language in the easement; (c) irrelevant to purpose of document; and/or (d) prejudicial to ability of Holder and third-party to enforce easement:]

Generally agreed. Plum Creek is willing to delete this language. Plum Creek will also work with staff to identify language changes that are mutually agreeable. Plum Creek's comments with respect to specific easement enforcement recommendations are set forth in various responses below.

Plum Creek recognizes that there may be instances where an activity might not be in compliance with the standards of a the existing Qualified Certification Program where the Holder is satisfied that the Grantor has taken the appropriate remedial steps and thus continued certification is appropriate but which may nonetheless require enforcement (monetary or equitable remedies as appropriate). Plum Creek is amenable to adding language to the Easements to address this enforcement situation.

(pp. 48-50)

[Regarding placement of MAT language:]

The Easements set out the general requirements for the MAT, but leave the details up to the management plan which has been agreed upon with the Holder and cannot be subsequently changed without Holder consent. It is intended that the MAT have the flexibility to change over time and thus it is appropriate to put the details in the management plan, just as the details of the forest management provisions are in the management plan not the easement. Plum Creek notes that Holder can enforce both the Easement and the management plan and that the third party audit will cover both. Plum Creek believes it is therefore preferable to maintain the MAT's flexibility by leaving the detailed provisions relating to the MAT in the management plan.

[Regarding the Commission directive for staff/consultants to determine whether stated "programs and practices" contained in Management Plan are complete listing of programs and practices necessary to ensure conservation values are achieved (particularly wildlife values), and whether the programs and practices contain standards of conduct that can be measured and enforced, and make appropriate recommendations to the Commission:]

The Management Plan reflects the SFI standards and thus contains the programs and practices necessary to ensure that the conservation values are achieved.

The SFI audit process provides standards of conduct that can be measured. The audit details compliance and deviations which must be addressed for certification and certification issues can be enforced by both the Holder and the Third Party Holder. The easements provide that there can be no backsliding from these standards.

COMMENTS FILED BY INTERVENORS AND INTERESTED PERSONS

- Appalachian Mountain Club (p. 10)

  First, the amendments propose ensuring that third-party certification does not substitute for the easement holder's final authority to determine easement compliance. Commission- Generated Amendments at 86. The amendments clearly indicate that, while certification may be considered in determining compliance, it should not create a presumption of

compliance that must be challenged by the holder. Testimony of Dr. Publicover, 11/20/07 at 7-8. Second, the amendments recognize the need to ensure that the multi-resource management plan sets forth standards of performance that are specific and enforceable. Commission-Generated Amendments at 87; Testimony of Dr. Publicover, 8/31/07 at 22-23. For both of these issues, the development of final, detailed language executing the proposed amendments at the 'second tier' stage will determine whether the intent of the Commission-generated amendments is satisfied.

► Forest Society of Maine (p. 18)

Commission Recommendations (page 87):
Eliminate language in the Management Plan that is: (a) written for purposes of federal Forest Legacy funding requirements; (b) inconsistent with or needlessly repetitious of language in the easement; (c) irrelevant to purpose of document; and/or (d) prejudicial to ability of Holder and Third Party to enforce easement.

FSM Comment:
FSM concurs with the goal of this recommendation. Earlier versions of the easement did not include the Multi-Resource Management Plan (MRMP), and instead made reference to the MRMP in Section 5 as a document outside the easement that contained forest management requirements and could only be changed with approval of Holder and Third Party. FSM understands that Plum Creek attached the MRMP to the easement at the request of various governmental review agencies and other parties so as to provide added detail and "transparency" to Plum Creek's management intentions. FSM suggests that the earlier approach be followed, and that the easement be clear that any change to the MRMP must be at least as protective of the conservation values of the Protected Properties as the original MRMP.

► Maine Audubon and Natural Resources Council of Maine (p. 40-41)

While the proposed changes are positive, much depends on the forthcoming staff/consultant recommendations regarding the plan scope (third paragraph in "Amendments" column). The current plan fails to adequately address many essential biodiversity elements. Specifically, the plan should include goals and time-specific, measurable objectives and describe specific management actions to be undertaken to address the items described under 1a-g in Rob Bryan's 11/20/07 pre-filed testimony, and in items 1 and 3-9 of his 8/31/07 pre-filed testimony, submitted on behalf of Maine Audubon and NRCM. As described in that testimony, some of these changes should also be included in the Forestry Principles section of the easement.

A major problem here is that the "management plan" is not a plan at all but rather a loose collection of policies and programs. A management plan should identify the current conditions of the forest, identify a desired future condition, and include measurable objectives, describe actions to reach those objectives, and include a monitoring plan. The current "plan" does none of these. LURC staff/consultants should clearly identify what should be in the easement and management plan. Maine Audubon and NRCM do have recommended or sample forestry biodiversity and conservation easement and management plan contents and substance, and will be able to provide those provisions with comments when LURC staff/consultants reach the drafting stage. Included here as a document entitled "Attachment A, Forest Biodiversity and Conservation Easements" are the points which provide an indication of the level of detail important in the process of developing this baseline and multi-resource management plan documentation. Given the purpose that this now state-mandated conservation is to serve as "publicly beneficial balance" to extraordinary development rights, and as mitigation for adverse impacts and waiver of adjacency, it is will be important for such a process to draft appropriate documentation that fits these public purposes.

STAFF/CONSULTANT DISCUSSION AND RECOMMENDATIONS

► DISCUSSION

Based on comments received, staff/consultants offer the following analysis:

- Regarding the Commission's June amendment to eliminate from the Multi-Resource Management Plan language that is inconsistent, irrelevant, and/or prejudicial:

  Plum Creek and FSM (as potential holder) agree in principle with this amendment. Staff/consultants will submit to the Commission revised Multi-Resource Management Plan language that achieves the purpose of this amendment, as part of its review of final language of any proposed amended Concept Plan.

- Regarding the Commission's June amendment to remove from the Multi-Resource Management Plan language on the Management Advisory Team and place this language in the easement:

  Plum Creek states that it is "preferable to maintain the MAT's flexibility by leaving the detailed provisions relating to the MAT in the management plan." Staff/consultants do not entirely agree with Plum Creek, but understand the concern being raised. Since each landowner (up to ten) will have the opportunity to amend the original Multi-Resource Management Plan with Holder approval, there is some chance that language on MAT operations governed by these Plans becomes vulnerable to inappropriate changes or inconsistency among Plans. Staff/consultants envision that language capturing the governing purposes and rights and core makeup of the MAT will reside in the easement, while language governing operational/administrative matters will reside in the Multi-Resource Management Plan. Staff/consultants will submit to the Commission revised Multi-Resource Management Plan language that achieves the purpose of this amendment, as part of its review of final language of any proposed amended Concept Plan.

- Regarding the Commission's June amendment directing staff/consultants to determine whether stated "programs and practices" contained in the Management Plan are complete listing, and measurable and enforceable:

  The comments on this amendment filed by Plum Creek and MA/NRCM -- the two parties substantively addressing this amendment -- essentially restate the written and oral testimony each provided to the Commission during the hearings on their respective views on the *approach* to forest practices management that a Management Plan should contain. No party or review agency has to date provided to the Commission additional or substitute specific Management Plan language that represents, in its view, complete, measurable and enforceable programs and practices (other than the language provided regarding timber harvesting in special management areas; *see* Tab 19). Thus, comments from parties on this topic present no new information that would cause staff/consultants to reconsider the June 4, 2008 Commission-generated amendments. By recommending no changes to these amendments, staff/consultants understand that the Commission continues to expect staff/consultants to recommend language changes to the Management Plan's stated programs and practices as part of Second Tier drafting should staff/consultants determine that changes are necessary to carry out the Commission's directive.

► RECOMMENDATIONS

No recommended changes to these June 4th Commission-generated amendments.

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OFFSET CONSERVATION: BALANCE EASEMENT
TERMS GOVERNING ALLOWED ACTIVITIES: FOREST MANAGEMENT ACTIVITIES, ADDITIONAL DOCUMENTS ATTACHED TO MANAGEMENT PLAN

COMMENTING PARTIES

- ► Petitioner Plum Creek
- ► Intervenors and Interested Persons
  - Forest Society of Maine

COMMENTS FILED BY THE PETITIONER

(p. 36)

The documents attached to the management plan are parts of that plan and are enforceable. Plum Creek is willing to streamline the management plan with respect to the attachments.

COMMENTS FILED BY INTERVENORS AND INTERESTED PERSONS

- Forest Society of Maine (pp. 18-19)

  Commission Recommendation (page 87):
  Eliminate attached documents (including EAP) and direct staff/consultants to recommend to the Commission whether to incorporate discrete, relevant portions into easement or management plan as enforceable terms and conditions.

  FSM Comment:
  FSM concurs with the goal of this recommendation. Earlier versions of the easement did not include the EAP and Indicators and Evidence Manual (IEM), and instead relied on these documents being made a part of the Baseline Documentation as specified in Section 8 of the easement. FSM understands that Plum Creek attached the EAP and IEM to the easement at the request of various governmental review agencies and other parties in order to provide added detail and "transparency" to Plum Creek's management intentions. FSM understands that the EAP and IEM, in their entirety, contain language leading to this Commission recommendation. There are, however, sections in these documents that are directly relevant to achieving the purpose of the easements of ensuring that forest management activities are conducted in accordance with sustainable forestry management principles and in a manner consistent with the conservation values of the Protected Properties. FSM would be pleased to work with the Commission staff and consultants, Third Party backup holder, and Plum Creek to identify the key controlling elements of these documents and to ensure that such elements are adequately referenced and included, at least in the Baseline Documentation required by the easements, so as to clearly establish the minimum management standards to which the easements require that all future landowners adhere.

STAFF/CONSULTANT DISCUSSION AND RECOMMENDATIONS

► DISCUSSION

Comments from parties on this topic present no new information that would cause staff/consultants to reconsider the June 4, 2008 Commission-generated amendments.

► RECOMMENDATIONS

No recommended changes to this June 4th Commission-generated amendment.

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OFFSET CONSERVATION: BALANCE EASEMENT
TERMS GOVERNING ALLOWED ACTIVITIES:
PUBLIC ACCESS

COMMENTING PARTIES

- Petitioner Plum Creek
- Intervenors and Interested Persons
  - Native Forest Network

COMMENTS FILED BY THE PETITIONER

(p. 43)

Plum Creek is amenable to taking out the referenced language and replacing it with language that makes it clear that the Holder and thus the public are put on notice that Plum Creek has not taken any steps to make the Protected Property safe and that using Plum Creek's land is inherently dangerous and that the public uses it at its own risk; however, Plum Creek would be liable for its willful or malicious acts. Plum Creek would be willing to add language that has accomplished these objectives that has been found to be acceptable by the state in other conservation easements

COMMENTS FILED BY INTERVENORS AND INTERESTED PERSONS

► Native Forest Network (pp. 7-8)

[Regarding conservation easement pros:]

- Eliminate waiver of Grantor liability regarding public access in easements

STAFF/CONSULTANT DISCUSSION AND RECOMMENDATIONS

► DISCUSSION

As proposed, the easement contains language that purports to eliminate any liability on the part of the Grantor for any injury, loss or damage to users of the property. The opinion of LURC counsel is that this language is legally ineffective, because a conservation easement cannot limit the tort rights of third parties, in this case potential users of the property. The ability of users of the property to pursue tort claims against grantor is controlled by generally applicable law, and cannot lawfully be circumscribed in this property transaction. Therefore, any language in the easement that appears to establish tort liability standards distinct from those provided for in generally applicable law, however that law may be amended in the future, is misleading. Eliminating the second sentence of the proposed easement language ("Any use of the Protected Property by the public is at the public's sole risk and liability, and any use of the Protected Property shall be deemed a waiver of any liability of Grantor, its successors and assigns, for any injury, loss or damage occurring from such use.") is sufficient to cure this problem.

► RECOMMENDATIONS

Based on the discussion above, staff/consultants offer the following recommendations:

- Regarding the Commission's June 4th amendment that eliminates all language in the easement discussing grantor and public liability from public access rights granted in the easement:

  Change the amendment to state that the following language in the easement is acceptable to the Commission:

  Grantor and Holder claim all of the rights and immunities against liability for injury to the public to the fullest extent of the law under Title 14 M.R.S.A. Section 159-A, et seq. as amended and successor provision thereof (Maine Recreational Use Statute), under the Maine Tort Claims Act, and under any other applicable provision of law and equity.

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OFFSET CONSERVATION: BALANCE CONSERVATION EASEMENT
TERMS GOVERNING ALLOWED ACTIVITIES:
BASELINE DOCUMENTATION

COMMENTING PARTIES

- ► Petitioner Plum Creek
- ► Intervenors and Interested Persons
  - Forest Society of Maine
  - Moosehead Region Futures Committee
  - Native Forest Network
- ► Governmental Review Agencies
  - Maine Department of Inland Fisheries and Wildlife and Maine Natural Areas Program

COMMENTS FILED BY THE PETITIONER

(pp. 36-37)

The easements provide: "The parties agree that a Baseline Documentation Report (the "Baseline Documentation") will be completed and agreed to prior to conveyance of this Conservation Easement at Grantor's cost by a natural resource professional who is selected jointly by Grantor and Holder, and who is familiar with the area, reviewed by Holder and Grantor, and acknowledged by them to be an accurate representation of the physical and biological condition of the Protected Property and its physical improvements as of the date of the conveyance of this Conservation Easement. Grantor shall provide, and the Baseline Documentation shall include the most recent SFI certification audit and supporting documentation."

Further, as noted above in our response to recommendation, page 86, the SFI standard requires and the management plan provides for the identification and protection of such sites consistent with a working forest. SFI does not limit itself to the initial catalogue of such sites contained in the Baseline Documentation. It is expected that the baseline documentation will include high public value scenic resources and IFW/MNAP identified areas with high ecological importance.

Plum Creek will clarify that the "baseline" will be periodically updated as new information is discovered. Plum Creek will clarify the purpose of the Baseline Documentation (snapshot of existing conditions on the Protected Property) and that the Baseline Documentation will not be used as a shield to protect subsequently discovered areas appropriately in need of protection.

COMMENTS FILED BY INTERVENORS AND INTERESTED PERSONS

- Forest Society of Maine (p. 19)

  Commission Recommendation (page 88): Redraft language so that baseline documentation must (a) include cataloguing of high public value scenic resources; and (b) include and identify, following consultation with IFW/MNAP, all areas identified by IFW/MNAP in the record as requiring special forest management protection due to their high ecological importance.

  FSM Comment: FSM concurs with the goals of this recommendation. If FSM is determined to be the Holder, FSM would be pleased to offer its expertise in these matters to work with LURC staff and consultants, the Third Party backup holder and Plum Creek in consultation with IFW/MNAP to help develop the baseline documentation required by the easement in a manner that provides appropriate recognition to high value scenic resources and areas requiring special forest management protection.

  Commission Recommendation (page 88): Change language elsewhere in the easement (e.g. section 5.C.(i) to make clear that the limited information contained in the baseline documentation cannot be used by any landowner as a shield against protecting subsequently discovered areas of high ecological importance.

  FSM Comment: FSM concurs with this recommendation.

► Moosehead Region Futures Committee (pp. 9-10)

The MRFC Steering committee supports the request by MDIFW and MNAP that these agencies "be identified as parties to approve the natural resource professional being considered to complete the baseline document and…be able to review and agree to the baseline document prior to easement conveyance" (MDIFW/MNAP testimony, November 20, 2007, page 5).

We strongly agree with the LURC-generated amendment that the easements must allow for protection of areas of high ecological importance identified after completion of baseline documentation (LURC-generated amendments, June 4, 2008, page 88). LURC staff and consultants have acknowledged that the proposed easement lands have not yet been adequately inventoried in this regard (transcript of May 27-28 deliberations, pages 213-214). We further suggest that the easements should specify a formal mechanism whereby non-governmental organizations can submit relevant new data to the easement holder.

► Native Forest Network (p. 7)

[Regarding conservation easement pros:]

- Tightens language regarding baseline documentation of easements

COMMENTS FILED BY GOVERNMENTAL REVIEW AGENCIES

► Maine Department of Inland Fisheries and Wildlife and Maine Natural Areas Program (pp. 10-11)

It is our understanding that MNAP and MDIFW will work cooperatively with the applicant and easement holder to identify Special Management Areas for the baseline documentation. Furthermore, based on future resource survey findings, MNAP and MDIF&W will have the ability to recommend additional Special Management Areas not identified in initial baseline documentation efforts. Site-specific outcome based management plans should be developed for each Special Management Area that incorporate the following:

(A) Baseline documentation, including:
- A map appropriate to the scale of the feature
- Forest stand type maps for forested areas.
- Remote imagery at a sufficient scale (e.g., 5 meter resolution or better) and date of the baseline
- A description of the existing conditions, with particular emphasis on the key ecological values. To the extent practicable, quantitative information is strongly preferred (e.g., forest with 50% spruce, 30% hardwood, 20% mixed; basal area ~110 square feet/acre; Late Successional Index of 8).
- Periodic updates as new information becomes available.

The baseline documentation should be completed prior to the easement appraisal, so that the appraisal may appropriately factor in management constraints and the potential forgone value of standing timber.

STAFF/CONSULTANT DISCUSSION AND RECOMMENDATIONS

► DISCUSSION

Comments from parties on this topic present no new information that would cause staff/consultants to reconsider the June 4, 2008 Commission-generated amendments. Plum Creek expressed either concurrence with or no opposition to these amendments, and FSM, as the party that would develop the baseline if it were to be chosen as the Holder, agreed with the amendments and stated its willingness to work with staff/consultants, the Third Party backup holder, Plum Creek and MDIFW/MNAP in developing the baseline documentation. Comments made by MDIFW/MNAP and supported by MRFC regarding MDIFW/MNAP's involvement in the development of the baseline documentation are not inconsistent with either the Commission's amendment or the comments of Plum Creek and FSM.

► RECOMMENDATIONS

No recommended changes to these June 4th Commission-generated amendments.

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OFFSET CONSERVATION: BALANCE CONSERVATION EASEMENT
TERMS GOVERNING ENFORCEMENT, MODIFICATIONS, AMENDMENTS, AND ASSIGNMENT: ENFORCEMENT

COMMENTING PARTIES

- Petitioner Plum Creek
- Intervenors and Interested Persons
  - Forest Ecology Network and RESTORE: The North Woods
  - Forest Society of Maine
  - Native Forest Network

(pp. 43-45)

[Regarding striking the provision that eliminates ability of Holder to seek and obtain monetary penalties in appropriate situations.]

The easements currently provide: "Holder has the right to enforce this Conservation Easement by proceedings at law and in equity, including the right to prevent any activity on or use of the Protected Property that is in violation of this Conservation Easement (other than those activities expressly authorized hereunder), and to require where reasonably practicable the restoration of any area or feature damaged by such violation to a condition in compliance herewith. Holder shall not be entitled to monetary damages (other than those ordered by a Court in connection with such restoration and/or monetary damages to eliminate economic benefits gained by Grantor from activities in violation of the terms of this Conservation Easement).

The foregoing language provides the Holder with appropriate legal and equitable remedies without exposing the Grantor to punitive damages or speculative, non-economic damages. The language is specifically intended to prevent the Grantor from any kind of economic benefit from a violation of the easement. Monetary damages are allowed if ordered by a court in connection with restoration and to prevent the gaining of economic advantage. Changes to this language are unworkable to Plum Creek.

[Regarding eliminating the provision that shifts the burden to demonstrate practicality of restoration of lands resulting from easement violations from landowner to Holder.]

Plum Creek is willing to clarify that neither party should have the burden of proof. Rather, if the parties could not agree, it would be up to a court to determine whether restoration was an appropriate remedy based on the totality of evidence presented by both parties.

[Regarding striking the provision that eliminates payment of penalty under easement if payment to LURC for same violation; insert language stating that nothing in this easement is intended to supersede, eliminate or otherwise change any obligations on landowner from obligations imposed by applicable state, federal or local laws (e.g., Maine Forest Practices Act).]

Plum Creek's intent was to prevent "double jeopardy" for the same infraction. Nevertheless, to address LURC's concern, Plum Creek is willing to add language such as the following to the easements: "Any penalty for or mitigation of a violation of a regulation of the Maine Land Use Regulation Commission imposed upon the Grantor by the Maine Land Use Regulation Commission shall be offset against penalties or damages (if any) for or mitigation of a violation of the terms of this Conservation Easement, if the activity causing such violation of the Land Use Regulation Commission regulations is also a violation of this Conservation Easement, such that Grantor shall not be penalized or subject to mitigation twice for a single act.

Section 13 of the easements already provides that "Notwithstanding that Third Party has executed this Conservation Easement; nothing herein may be construed as approval of or as a substitute for approval or regulation of any activities under the regulatory jurisdiction of the Maine Land Use Regulation Commission or other State regulatory body. Nothing in this Conservation Easement may be construed to permit an activity otherwise prohibited or restricted by state, local, or federal laws or regulations, with which Grantor shall have a responsibility to comply. Plum Creek will work with Staff to clarify this language to meet LURC's concern

► FEN-RESTORE (p. 13)

… the staff amendments would improve the enforcement provisions so enforcing the terms of the easement becomes more practical. The end result of all these changes is that a significant amount of power shifts from the landowner to the easement holder and the Management Advisory Team run by the IFW. As Chair Harvey succinctly stated during the deliberations, the wording of the easement is changing: "such that the holder becomes clearly in charge. I guess that's what it amounts [to]." DT P 296 L 3-4.

► Forest Society of Maine (pp. 19-20)

Commission Recommendation (page 89):
Strike provision eliminating ability of Holder to seek and obtain monetary penalties in appropriate situations.

FSM Comment:
FSM concurs with this recommendation. FSM recommends that Holder be able to seek monetary damages in connection with the replacement as well as restoration that may be required regarding any damaged area or feature. This change is consistent with FSM's recommendation below that Holder be able to seek the judicial remedy of replacement in addition to restoration of any area or featured damaged in violation of the terms of the conservation easements.

Commission Recommendation (page 89):
Strike provision that shifts burden to demonstrate practicability of restoration of lands resulting from easement violations from landowner to Holder.

FSM Comment:
FSM concurs with the goal of this recommendation. However, FSM wishes to ensure that striking the provision to which LURC is referring does not also eliminate Holder's ability to seek and obtain such restoration (or replacement if that ability is added to the easements). As FSM reads the current easement language, the easements do not place the burden to demonstrate the practicality of restoration of damaged lands or features on the Holder rather than the landowner. Instead, the language provides that Holder has the right to require such restoration where reasonably practicable and does not specify where the burden to so demonstrate rests. The burden to so demonstrate would therefore be allocated by the court in the manner it determined to be required by the laws of Maine and the rules of the court at the time of any such enforcement proceeding. FSM proposes the following two changes to clarify this portion of the easement: (1) language that allows replacement as an alternative to restoration; and (2) language that allows Holder to require such restoration or replacement "to the extent reasonably practicable," rather than requiring such restoration only "where reasonably practicable." FSM believes such changes would clarify that Holder can require the maximum level of restoration or replacement that is reasonably practicable in each instance, rather than allowing Holder to require restoration only where complete restoration is reasonably practicable.

Commission Recommendation (page 89):
Strike provision imposing requirement on losing party to pay prevailing party's attorney fees.

FSM Comment:
FSM concurs with this recommendation.

Commission Recommendation (page 89):

Strike the provision that eliminates payment of penalty under easement if payment to LURC for same violation; insert language stating that nothing in this easement is intended to supersede, eliminate or otherwise change any obligations on landowner from obligations imposed by applicable state, federal or local laws (e.g., Maine Forest Practices Act).

FSM Comment:
FSM concurs in part with this recommendation. FSM recommends that language be added to clarify that Holder does not lose its ability to compel restoration or replacement or to prevent economic gains from violations solely because LURC imposes a penalty for violations of LURC regulations that are also violations of the easement. FSM believes this can be achieved by replacing language that states that such penalties "will be deemed sufficient" with language that states that the cost of any mitigation or penalty required by LURC be "offset against" the cost of the corresponding mitigation or damages to which the Holder might be entitled under the terms of the easement, and that Holder not lose its ability to seek any of the non-monetary judicial remedies to which Holder is entitled. FSM also recommends that, for clarity, this language be moved out of Section 13 relating to Third Party Rights and into Section 12 relating to Holder's Rights in the paragraph outlining Holder's available damages.

FSM further agrees with LURC's recommendation that all easement language should be clear that it is not intended to supersede, eliminate or otherwise change any obligations on the landowner imposed by applicable state, federal or local laws.

► Native Forest Network (p. 7)

[Regarding conservation easement pros:]

- Strikes PC proposed provisions regarding enforcement

STAFF/CONSULTANT/COUNSEL DISCUSSION AND RECOMMENDATIONS

► DISCUSSION

Based on comments received, staff/consultants and Commission counsel offer the following analysis:

- Regarding available monetary remedies for violation of easement terms:

  As proposed, the easement includes language that would prevent Holder from obtaining monetary damages (other than those ordered in connection with required restoration or to eliminate economic benefit). The June 4 amendments struck this provision. Plum Creek has expressed concern in its comments that striking this language would leave it potentially susceptible to "punitive, speculative, non-economic" damages. The opinion of LURC counsel is that the easement's enforcement provisions must be written so that the economic risks to the landowner from committing, or allowing, violations of the easement terms clearly outweigh the potential benefits. This may be accomplished with language that does not leave the landowner vulnerable to an open-ended and disproportionate monetary penalty. The recommendation below would add language to the enforcement provision to allow Holder to seek an award of damages in the case of knowing, intentional or willful violations in an amount equal to twice the economic benefit realized by the landowner from the violation. By tying an award of damages in all cases directly to economic benefit (or required replacement or restoration), the landowner's risks associated with violations will always outweigh the potential benefits, and yet there is no potential for a damage award that is not rationally based on the nature of the violation.

  Additionally, FSM has commented that monetary damages should be allowed in connection with the remedy of replacement, as well as in connection with required restoration. Staff/consultants/counsel concur that this is an appropriate revision that is consistent with the easement's conservation purposes and yet does not create the potential for an unforeseeable or disproportionate award of damages.

- Regarding available equitable (non-monetary) remedies for violation of easement terms:

  As proposed, the easement allowed restoration of an area damaged by a violation to be required "where reasonably practicable". Concerns were raised that this inappropriately shifted the burden to demonstrate "practicality' of restoration to the Holder in an enforcement action, and consequently the June 4 amendment struck the provision. Plum Creek has commented that this language was not intended to shift the burden, and FSM has commented that it does not interpret this language to effect a shift in the burden. However, to clarify the matter, FSM suggests amending the enforcement provision to allow the Holder to seek restoration or replacement "to the extent reasonably practicable", as opposed to only "where reasonably practicable." Staff/consultants/counsel concur that this revision eliminates any potential misunderstanding regarding burden-shifting.

- Regarding attorneys' fees in an enforcement action:

  As proposed, the easement contains language requiring the losing party in an enforcement action to reimburse the prevailing party for its costs and attorneys fees. The June 4 amendment struck this language. In order to conform this provision to the LURC model easement (paragraph 10.A.) and fully ensure the landowner has sufficient disincentive to commit or allow easement violations, the landowner should be required to reimburse Holder's costs and attorneys' fees if a court (or other agreed-upon decision-maker) determines an easement term was violated. This recommendation will cause landowners to resist any temptation to contest in court legitimate claims of violations by the Holder, and provides an important incentive to resolve any violations with the Holder without the need for litigation.

- Regarding the effect of LURC enforcement action on Holder's rights and Grantor's liability for violation of easement terms:

  As proposed, the easement contains language declaring that any penalty for or mitigation of a violation of a LURC standard obtained through a LURC enforcement action shall be deemed a sufficient penalty for or mitigation of any violation. The June 4 amendment struck this provision and added language clarifying that nothing in this easement is intended to supersede, eliminate or otherwise change any obligation of the landowner under any otherwise applicable law. Plum Creek commented that its intent in this language was to eliminate the potential for "double jeopardy" – essentially being subject to duplicative penalties for the same violation. Plum Creek also refers to language in Section 13 of the easement, which generally addresses the effect of the easement with respect to other applicable laws.

  FSM commented that the Holder should not lose its ability to pursue remedies such as restoration or replacement in the event that LURC has taken independent enforcement action the result of which does not provide for those remedies. FSM also suggests that its concerns may be reconciled with Plum Creek's by revising the easement to clarify that the cost of any mitigation or penalty required through LURC enforcement shall be "offset" against the cost of the corresponding mitigation or damages available to the Holder through the easement. Finally, FSM suggests that this language be transferred from Section 13, which governs third party rights, to Section 12, which governs the rights of the Holder. Staff/consultants/counsel concur with the substance of FSM's comments, which appropriately protect the rights of the Holder without exposing the landowner to the prospect of dual enforcement actions that are purely duplicative. The recommendations set forth below make revisions accordingly.

► RECOMMENDATIONS

Based on the discussion above, staff/consultants offer the following recommendations:

- Regarding the Commission's June 4th amendments addressing the available monetary and non-monetary damages, relative burdens in an enforcement action, and payment of attorneys' fees:

  Amend the first paragraph of Section 12 of the easement to read as follows:

  "Holder has the right to enforce this Conservation Easement and all terms, restrictions and covenants herein by proceedings at law and in equity, including the right to prevent any activity on or use of the Protected Property that is in violation of this Conservation Easement (other than those activities expressly authorized hereunder), and to require the replacement or restoration of any area or feature damaged by such violation to a condition in compliance herewith to the extent reasonably practicable. In any action to enforce the terms of this Conservation Easement, monetary damages shall be limited to those ordered in connection with required replacement or restoration, as well as those necessary to eliminate any economic benefit gained by Grantor from activities in violation. However, if the court (or other decision-maker chosen by mutual agreement of the parties) finds that a violation of the terms of this Conservation Easement was knowing, intentional or willful, the court or other agreed-upon decision-maker may award, in addition to damages awarded in connection with required replacement or restoration, monetary damages up to and including twice the economic benefit gained by Grantor from activities in violation. Holder shall provide Grantor with thirty (30) days prior notice of and opportunity to cure any breach, except where emergency circumstances require enforcement action without such delay. Holder may not bring an enforcement action against Grantor for injury to or change in the Protected Property resulting from changes beyond the control or responsibility of Grantor, such as fire, flood, storm, and earth movement, from the actions of parties not under the control of Grantor, or from any prudent action taken by Grantor under emergency conditions to prevent, abate or mitigate significant injury to the Protected Property. If a court (or other decision-maker chosen by mutual consent of the parties) determines that this Conservation Easement has been breached, Grantor will

reimburse Holder for any reasonable costs of enforcement, including any court costs, reasonable attorney's fees, out of pocket costs and any other payments ordered by the Court or decision-maker."

- Regarding the Commission's June 4th amendments addressing both the easement's effect on other laws, and the effect of a prior State enforcement action on a subsequent Holder enforcement action for a violation of the easement's terms, make the following three revisions to the easement:

  Add a new paragraph J to Section 15 to read as follows:

  "J. Nothing in this Conservation Easement is intended to supersede, eliminate or otherwise change any obligation of the Grantor under any applicable law, including but not limited to the obligation to obtain any and all required regulatory approvals for activities permitted under this Conservation Easement's terms."

  Add a new paragraph F to Section 12 to read as follows:

  "F. In the event that LURC or the Maine Forest Service obtains civil penalties or injunctive relief in an enforcement action against Grantor for a violation of a State statute or regulation that is also a violation of this Conservation Easement, the cost of that penalty or injunctive relief shall be offset against the cost of any corresponding award of monetary damages or injunctive relief obtained by Holder through a subsequent enforcement action for the violation of this Conservation Easement caused by the same underlying conduct."

  Strike the second paragraph of Section 13, which reads as follows:

  "Notwithstanding that Third Party has executed this Conservation Easement, nothing herein may be construed as approval of or as a substitute for approval or regulation of any activities under the regulatory jurisdiction of the Maine Land Use Regulation Commission or other state regulatory body. Nothing in this Conservation Easement may be construed to permit an activity otherwise prohibited or restricted by state, local or federal laws or regulations, with which Grantor shall have a responsibility to comply. Any penalty for or mitigation of a violation of a regulation of the Maine Land Use Regulation Commission imposed upon the Grantor by the Maine Land Use Regulation Commission shall be deemed sufficient penalty for or mitigation of a violation of the terms of this Conservation Easement if the activity causing the violation of the Land Use Regulation Commission regulation is also a violation of this Conservation Easement, such that Grantor shall not be penalized or subject to mitigation twice for a single act."

48

OFFSET CONSERVATION: BALANCE CONSERVATION EASEMENT
TERMS GOVERNING ENFORCEMENT, MODIFICATIONS, AMENDMENTS, AND ASSIGNMENT:
MODIFICATION OF EASEMENT BOUNDARIES

COMMENTING PARTIES

- ► Intervenors and Interested Persons
  - Forest Society of Maine

► Forest Society of Maine (p. 21)

Commission Recommendation (page 89):
Redraft the language to eliminate possibility of major land swaps that undermine this Commission's intent for certain eased lands, but still allow for boundary modifications for ease of boundary identification or other narrow administrative purposes.

FSM Comment:
FSM concurs with this recommendation. FSM believes that this can be accomplished by limiting boundary modifications to minor modifications that do not adversely affect the conservation values or materially reduce the acreage of the Protected Property. FSM believes that it is good public policy to permit such minor modifications both for the purpose of creating easily identifiable boundaries, and for the purpose of protecting important conservation values or natural features (such as a wetland or sensitive area that extends a short distance out of the Protected Property) that may be compromised by the location of the initial boundary. FSM believes that the requirement of Holder and LURC approval will ensure that any such boundary modification does not undermine the Commission's intent that significant or high-value portions of the Protected Properties not be swapped out of the terms of the conservation easements.

STAFF/CONSULTANT DISCUSSION AND RECOMMENDATIONS

► DISCUSSION

Based on comments received, staff/consultants offer the following analysis:

No party has objected to the Commission's June 4th amendment, and FSM's comments underscore the importance of making the change to the easement envisioned by the amendment.

► RECOMMENDATIONS

No recommended changes to this June 4th Commission-generated amendment.

49

OFFSET CONSERVATION: BALANCE CONSERVATION EASEMENT
TERMS GOVERNING ENFORCEMENT, MODIFICATIONS, AMENDMENTS, AND ASSIGNMENT:
ADDITIONS OF LAND TO BALANCE EASEMENT

COMMENTING PARTIES

- ► Intervenors and Interested Persons
  - Native Forest Network

► Native Forest Network (p. 7)

[Regarding LURC staff/consultant recommendations cons:]

- Eliminates proposed expansion of the "balance" conservation easement into development zones upon buildout, and instead continues to make that land (and potentially more) available for future development after the 30 year life of the plan

STAFF/CONSULTANT DISCUSSION AND RECOMMENDATIONS

► DISCUSSION

Comments from parties on this topic present no new information that would cause staff/consultants to reconsider the June 4, 2008 Commission-generated amendments.

► RECOMMENDATIONS

No recommended change to this June 4th Commission-generated amendments.

50

OFFSET CONSERVATION: BALANCE CONSERVATION EASEMENT
TERMS GOVERNING ENFORCEMENT, MODIFICATIONS, AMENDMENTS, AND ASSIGNMENT:
AMENDMENTS OF EASEMENT

COMMENTING PARTIES

- ► Petitioner Plum Creek
- ► Intervenors and Interested Persons
  - Native Forest Network

COMMENTS FILED BY THE PETITIONER

(pp. 31-32)

To address LURC's concern, Plum [Creek] will add the following language to the easements: "Any legally permissible amendment hereto, and any discretionary consent by Holder contemplated by this Conservation Easement, may be granted only if the Holder has determined in its reasonable discretion, that the proposed amendment or use (i) furthers or is not inconsistent with the purposes of this Conservation Easement, (ii) substantially conforms to the intent of this grant, (iii) meets any applicable conditions expressly stated herein, and (iv) does not materially increase the adverse impact of expressly permitted actions under this Conservation Easement on the conservation values of the Protected Property, and (v) does not materially detract from the conservation values intended for protection under this Conservation Easement. All other amendments shall require the approval of the court in an action in which the Attorney General is made a party, pursuant to 33 M.R.S.A. § 477-A(2) (as the same may be amended from time to time).

COMMENTS FILED BY INTERVENORS AND INTERESTED PERSONS

► Native Forest Network (p. 7)

[Regarding conservation easement pros:]

- Tightens language regarding amendments of easement provisions

STAFF/CONSULTANT DISCUSSION AND RECOMMENDATIONS

► DISCUSSION

Comments from the parties on this topic present no new information that would cause staff/consultants to reconsider the June 4, 2008 Commission-generated amendments. The comments submitted by Plum Creek on this issue demonstrate that it agrees that the degree of latitude set forth in the proposed easement concerning amendments is too open-ended and needs to be narrowed. In drafting new language to subsequently recommend to the Commission, staff/consultants and legal counsel to the Commission will take into consideration, and potentially utilize some or all of the language proposed by Plum Creek in its comments.

► RECOMMENDATIONS

No recommended changes to this June 4th Commission-generated amendment.

51

OFFSET CONSERVATION: BALANCE CONSERVATION EASEMENT
TERMS GOVERNING ENFORCEMENT, MODIFICATIONS, AMENDMENTS, AND ASSIGNMENT: ASSIGNMENT OF HOLDER RIGHTS TO ANOTHER HOLDER

COMMENTING PARTIES

- Petitioner Plum Creek

(p. 38)

As noted above, Plum Creek believes that having a non-governmental entity act as Holder for both easements makes sound public policy. However, Plum Creek must have the ability to consent to whoever the Holder will be, such consent not to be unreasonably withheld. The landowner will have to work with whoever acts in the role of Holder. Plum Creek would reasonably object to any entity that did not have a conservation mission focus, or that did not share the view that the easements are commercial working forest easements based on sustainable forestry principles. Plum Creek would also want to ensure that the holder was a qualified organization as provided in the LURC guidelines and which had the requisite resources, experience and expertise necessary to efficiently carry out the duties of Holder.

STAFF/CONSULTANT DISCUSSION AND RECOMMENDATIONS

► DISCUSSION

Based on comments received, staff/consultants are persuaded that the Grantor has a legitimate stake in what entity might become the Holder upon assignment. The language proposed below would provide oversight by the Grantor (as well as LURC and the Third Party) in the determination of who should be the new Holder, while ensuring that any objection to the proposed new Holder is based on legitimate factors.

► RECOMMENDATIONS

Based on the discussion above, staff/consultants offer the following recommendations:

- Regarding the Commission's June 4th amendment addressing assignment of holder rights to another holder, change the amendment to state that the language presented below is acceptable to the Commission:

"This Conservation Easement is assignable by Holder. The parties hereto agree that the State of Maine is an approved assignee. Assignment of this Conservation Easement to any other entity may only occur after notice to and approval by LURC, the Third Party, and the Grantor, and only to an entity that: (1) satisfies the requirements of Section 170(h)(3) of the Internal Revenue Code of 1986, as amended (or successor provisions thereof) and Section 476(2) of Title 33 of the Maine Revised Statutes Annotated (1999), as amended (or successor provisions thereof); (2) has land conservation as its primary goal or purpose and otherwise has goals and purposes which are consistent with protecting the natural, scenic or open space values of real property, (3) agrees, as a condition of transfer, to monitor, enforce, and otherwise uphold the conservation purposes and terms of this easement; (4) possesses sufficient financial resources and demonstrated experience in monitoring and enforcement of large-acreage easements; and (5) has no potential conflicts of interest with its responsibilities to hold and enforce the easement in a fair and impartial manner, and operates in the public interest and not for the benefit of private individuals or corporations. Grantor may only withhold approval of Holder's proposed assignment of this Conservation Easement upon a showing that the proposed assignee does not satisfy the requirements and qualifications set forth in this paragraph. Judicial review (or review by other decision-maker chosen by mutual consent of the parties) of a decision to withhold approval of assignment shall be *de novo* and without deference to the withholding party."

52

CONSERVATION FRAMEWORK: MOOSEHEAD LEGACY EASEMENT
LOCATION, AMOUNT OF LAND, AND ZONING: LOCATION, SIZE OF EASEMENT

COMMENTING PARTIES

- ► Petitioner Plum Creek
- ► Intervenors and Interested Persons
  - Maine Audubon and Natural Resources Council of Maine
- ► Governmental Review Agencies
  - Bureau of Parks and Lands

COMMENTS FILED BY THE PETITIONER

(p. 53)

"See Plum Creek's earlier response on page 33 above."

Staff/consultant note: Comments by Plum Creek that address this issue are found on page 34, not page 33 of its filing. These comments address the limited question of inclusion and treatment of "lands that are particularly ecologically valuable" in both the Balance and the Legacy easements. These comments were reproduced at Tab 19 in discussion of this same issue in the Balance easement and are not reproduced here to avoid duplication. The Commission should refer to Tab 19 for these comments.

COMMENTS FILED BY INTERVENORS AND INTERESTED PERSONS

Staff/consultant note: Similar to the note above regarding comments by Plum Creek on inclusion and treatment of lands that are particularly ecologically valuable, four intervenors -- GrowSmart Maine, MA/NRCM, Moosehead Region Futures Committee and Native Forest Network -- commented on this matter. These comments were reproduced at Tab 19 in discussion of this same issue in the Balance easement and are not reproduced here to avoid duplication. The Commission should refer to Tab 19 for these comments. Comments filed by intervenors and interested persons not related to this issue are reproduced below.

► Maine Audubon and Natural Resources Council of Maine (pp. 11-13)

Therefore, we propose that all development be removed from Lily Bay, that the total number of development units in the concept plan be reduced by 404 units, and that the land proposed for development in Lily Bay be, instead, added to the balance easement. Likewise, in recognition of the comment made to the Commission by the consultant cited above, we acknowledge that if development is reduced, the amount of regulatorily required conservation may need to be reduced. Therefore, to aid the Commissioners' deliberations, we have identified a parcel of 33,500 acres within the concept plan area that we believe could be removed from the regulatorily required conservation in order to create a package of development and conservation that meets the test of being "publicly beneficial." The map depicting this 33,500 acre parcel is attached as an exhibit. See Exhibit A.

As conservation organizations, it is very difficult for us to propose the removal of any land from the conservation package. Ideally we would like to see it all conserved and would support the continued voluntary conservation of this land through the purchase and sale agreement between Plum Creek and The Nature Conservancy. However, we believe so strongly that development at Lily Bay is not appropriate that we are willing to suggest the removal of this land from the regulatorily required conservation package if necessary to remove all development from Lily Bay.

By protecting the Lily Bay area, our proposal would permanently protect from development a large undeveloped block of matrix forest and wildlife habitat that TNC, IFW, and USFWS have identified as important. It would also connect protected shorefront on the east side of Moosehead Lake northeast to the 100-Mile Wilderness, the Nahmakanta Public Lands Unit, the Debsconeags, and Baxter State Park.

The 33,500 acres on the west side of the lake proposed for removal from the required conservation package were identified by reviewing all available wildlife and natural resource information in the record. A map showing this information is also attached. See Exhibit B. We also considered all available information in the record regarding recreational destinations and use patterns. We sought to identify one contiguous parcel (rather than several smaller parcels) that was, ideally, adjacent to other land owned and managed by Plum Creek with the fewest conflicts with high

value ecological and recreation areas. Finally, we considered the configuration of the land to be proposed in relationship to the balance easement.

In considering the number of acres (33,500), we took into account both the amount of acreage proposed to be developed at Lily Bay in the Commission-generated Amendments (approximately 1,350 acres) and the number of units proposed to be removed from the plan. We believe that the 33,500 acres is on the high end of what might be removed and we would support a Commission determination for some lesser amount.

COMMENTS FILED BY GOVERNMENTAL REVIEW AGENCIES

Staff/consultant note: Similar to the note above regarding comments by Plum Creek and intervenors, three governmental review agencies -- BPL and MDIFW/MNAP -- commented on the inclusion and treatment of lands that are particularly ecologically valuable in the Balance and Legacy easements. These comments were reproduced at Tab 19 in discussion of this same issue in the Balance easement and are not reproduced here to avoid duplication. The Commission should refer to Tab 19 for these comments.

STAFF/CONSULTANT DISCUSSION AND RECOMMENDATIONS

► DISCUSSION

Based on comments received, staff/consultants offer the following analysis:

- Regarding the inclusion and treatment of lands in the Legacy easement that are particularly ecologically valuable:

  See staff/consultant analysis of this issue at Tab 19.

- Regarding the MA/NRCM proposal to (1) remove all development areas from the Lily Bay peninsula and add the acreage of proposed development area to the Balance easement, and (2) remove 33,500 acres of land proposed to be included in the Legacy Easement:

  Staff/consultants are not recommending the elimination of all development areas on the Lily Bay peninsula. Consequently, staff/consultants have not analyzed MA/NRCM's alternative proposal to remove 33,500 acres of land from the Legacy Easement.

► RECOMMENDATIONS

Based on the discussion above, staff/consultants offer the following recommendations:

- Regarding the inclusion and treatment of lands in the Legacy easement that are particularly ecologically valuable (footnote 83 of the Commission's June 4th amendments):

  No change recommended by staff/consultants.

- Regarding all other aspects of the Commission's June 4th amendments regarding location, amount of land, and zoning in the Legacy easement:

  No change recommended by staff/consultants.

53

CONSERVATION FRAMEWORK: MOOSEHEAD LEGACY EASEMENT
PURCHASE TERMS, INCLUDING TIMING OF PURCHASE: PURCHASE PRICE

COMMENTING PARTIES

- ► Intervenors and Interested Persons
  - The Nature Conservancy

NOTE: See also Tab 19 for comments from certain intervenors and interested persons regarding the appropriateness of Plum Creek receiving funds from TNC for placing an easement on (Legacy-delineated) lands while still "counting" or including these lands in the evaluation of whether regulatory criteria have been satisfied. To avoid duplication, these comments were not reproduced here.

► The Nature Conservancy (p. 3)

Public Funding

TNC agrees with the Commission that in light of the Commission's proposed amendments requiring closing on all elements of the Conservation Framework within 45 days of a LURC decision on the concept plan becoming final, seeking public funding for the Legacy Easement is not appropriate. TNC will not seek public funding for the Legacy Easement through the Forest Legacy or Land for Maine's Future Programs.

STAFF/CONSULTANT DISCUSSION AND RECOMMENDATIONS

► DISCUSSION

Based on comments received, staff/consultants offer the following analysis:

- Regarding comments (1) by TNC regarding whether it will or will not seek public funding for the Legacy Easement through the Forest Legacy or Land for Maine's Future Programs, (2) by certain parties objecting to Plum Creek receiving payment for placing an easement on (Legacy-delineated) land that is regulatorily required by the Commission as part of the Concept Plan:

  Staff/consultants direct the Commission to all comments on this matter and staff/consultant discussion of it at Tab 19. The issues here are the same.

► RECOMMENDATIONS

Based on the discussion above, staff/consultants offer the following recommendations:

- Regarding the June 4th Commission-generated amendment on "Purchaser of easement":

  No change recommended by staff/consultants.

- Regarding the June 4th Commission-generated amendment on "Purchase price":

  Staff/consultants recommend that this amendment be changed to read:

  The Commission takes no position on either the existence of a purchase price or the amount thereof. The Commission finds that financial terms attendant to Plum Creek encumbering this land with an easement as presented in the record are not legally relevant to the Commission's decision on Zoning Petition ZP 707.

54

CONSERVATION FRAMEWORK: MOOSEHEAD LEGACY EASEMENT

PURCHASE TERMS, INCLUDING TIMING OF PURCHASE: TIMING OF SALE OF EASEMENT

COMMENTING PARTIES

- ► Petitioner Plum Creek
- ► Intervenors and Interested Persons
  - The Nature Conservancy

COMMENTS FILED BY THE PETITIONER

(p. 53)

Plum Creek is amenable to amending the Conservation Framework to provide that the Legacy Easement will be purchased by TNC within the timeframe recommended by Staff.

COMMENTS FILED BY INTERVENORS AND INTERESTED PERSONS

► The Nature Conservancy (pp. 1-2)

Amendments to Balance Easement and Conservation Framework

TNC is generally supportive of the proposed amendments to the Balance Easement and Conservation Framework. TNC is happy to work with the applicant and Commission staff to address the recommended amendments. TNC is prepared to work with the applicant to revise the Purchase and Sale Agreement consistent with the proposed amendments, including closing on the entire Conservation Framework no later than 45 days after a Commission-approved Concept Plan becomes final, after all appeals, if any, have been exhausted.

STAFF/CONSULTANT DISCUSSION AND RECOMMENDATIONS

► DISCUSSION

Comments from parties on this topic present no new information that would cause staff/consultants to reconsider the June 4, 2008 Commission-generated amendments.

► RECOMMENDATIONS

No recommended changes to this June 4th Commission-generated amendment.

55

CONSERVATION FRAMEWORK: MOOSEHEAD LEGACY EASEMENT

PURCHASE TERMS, INCLUDING TIMING OF PURCHASE: ABILITY OF SUBDIVISION AND OTHER DEVELOPMENT PERMITTING TO GO FORWARD ABSENT SALE OF EASEMENT TO TNC

COMMENTING PARTIES

- Petitioner Plum Creek

(p. 53)

Plum Creek is willing to amend the Conservation Framework to require that the Legacy Easement be sold and recorded within the timeframe requested by the Commission. With no contingencies to closing other than resolution of outstanding appeals, Plum Creek believes that LURC can and should process applications during the pendency of any appeal.

STAFF/CONSULTANT DISCUSSION AND RECOMMENDATIONS

► DISCUSSION

Comments from parties on this topic present no new information that would cause staff/consultants to reconsider the June 4, 2008 Commission-generated amendments. Plum Creek's statement that "LURC can and should process applications during the pendency of any appeal" is not a matter to be decided on by Commission as part of its review of Zoning Petition ZP 707.

► RECOMMENDATIONS

No recommended changes to this June 4th Commission-generated amendment.

56

CONSERVATION FRAMEWORK: THE ROACHES PROPERTY
LOCATION, AMOUNT OF LAND, AND ZONING: INCLUSION IN P-RP SUBDISTRICT

COMMENTING PARTIES

- ► Intervenors and Interested Persons
  - Appalachian Mountain Club

► Appalachian Mountain Club (p. 13)

… the proposed amendments remove the Roaches Property from the Concept Plan Area and its M-GNM zone, and subject that land to the traditional M-GN subdistrict, as it may be amended from time to time. Commission-Generated Amendments at 104. As noted in AMC's Post-Hearing Brief, AMC supports this change as it will facilitate the protection and use of the Roaches Property's unique primitive recreation resources.

STAFF/CONSULTANT DISCUSSION AND RECOMMENDATIONS

► DISCUSSION

Comments from parties on this topic present no new information that would cause staff/consultants to reconsider the June 4, 2008 Commission-generated amendments.

► RECOMMENDATIONS

No recommended changes to this June 4th Commission-generated amendment.

57

CONSERVATION FRAMEWORK: THE ROACHES PROPERTY
PURCHASE TERMS, INCLUDING TIMING OF PURCHASE
PURCHASER, PURCHASE PRICE, & TIMING OF SALE OF PROPERTY TO TNC AND ASSIGNMENT TO AMC; CONDITIONS ON SALE

COMMENTING PARTIES

► Petitioner Plum Creek

NOTE: See also Tab 19 for comments from certain intervenors and interested persons regarding the appropriateness of Plum Creek receiving funds from AMC for the purchase of the Roaches property while still "counting" or including the Roaches property in the evaluation of whether regulatory criteria have been satisfied. To avoid duplication, these comments were not reproduced again here.

(p. 33)

To address LURC's concern, Plum Creek is amenable to amending the Conservation Framework to provide that the transfer of the Roaches Property to AMC and the recording of the AMC document would occur simultaneously with the transfer of the Balance and Legacy Conservation easements. Plum Creek would require that AMC reach agreement on the form and substance of the conservation easement referenced in (b) above with LURC by a date certain in September of 2008.

STAFF/CONSULTANT DISCUSSION AND RECOMMENDATIONS

► DISCUSSION

Based on comments received, staff/consultants offer the following analysis:

- Regarding the comment by Plum Creek on page 57.2 that "...Plum Creek would require that AMC reach agreement on the form and substance of the conservation easement reference in (b) above with LURC by a date certain in September of 2008":

  Staff/consultants believe there is neither the need nor the opportunity for AMC to "reach agreement" with the Commission "by a date certain in September of 2008." However, staff/consultants do believe it is reasonable for Plum Creek to expect that (1) the Commission will set forth amendments at its September deliberations (by either leaving its June amendments unchanged or adopting changes) that state the elements the Commission will require in the AMC easement, and (2) that shortly thereafter AMC will state to the Commission in writing whether it is prepared to draft and accept an easement consistent with these amendments. The actual language of the easement would then be drafted after the September deliberations for subsequent presentation to the Commission as part of its final review of the proposed Concept Plan.

- Regarding comments by certain parties objecting to Plum Creek receiving payment for the sale of the Roaches property (or placing an easement on land in the case of the Legacy easement) that is regulatorily required by the Commission as part of the Concept Plan:

  Staff/consultants direct the Commission to all comments on this matter and staff/consultant discussion of it at Tab 19. The issues here are the same.

► RECOMMENDATIONS

Based on the discussion above, staff/consultants offer the following recommendations:

- Regarding the June 4th Commission-generated amendment on "Purchaser of Roaches property":

  No change recommended by staff/consultants.

- Regarding the June 4th Commission-generated amendment on "Purchase price":

  Staff/consultants recommend that this amendment be changed to read:

  The Commission takes no position on either the existence of a purchase price or the amount thereof. The Commission finds that financial terms attendant to the transfer of this land from Plum Creek to AMC as presented in the record are not legally relevant to the Commission's decision on Zoning Petition ZP 707.

58

CONSERVATION FRAMEWORK: THE ROACHES PROPERTY
PURCHASE TERMS, INCLUDING TIMING OF PURCHASE: ABILITY OF SUBDIVISION AND OTHER DEVELOPMENT PERMITTING TO GO FORWARD ABSENT SALE OF PROPERTY TO TNC AND ASSIGNMENT TO AMC

COMMENTING PARTIES

► Petitioner Plum Creek

(p. 53)

With no contingencies to closing other than resolution of outstanding appeals, Plum Creek believes that LURC can and should process applications during the pendency of any appeal.

STAFF/CONSULTANT DISCUSSION AND RECOMMENDATIONS

► DISCUSSION

Comments from parties on this topic present no new information that would cause staff/consultants to reconsider the June 4, 2008 Commission-generated amendments. Plum Creek's statement that "LURC can and should process applications during the pendency of any appeal" is not a matter to be decided on by Commission as part of its review of Zoning Petition ZP 707.

► RECOMMENDATIONS

No recommended changes to this June 4th Commission-generated amendment.

59

CONSERVATION FRAMEWORK: THE ROACHES PROPERTY
POST-SALE RESTRICTIONS ON USE OF THE ROACHES PROPERTY: POST-SALE RESTRICTIONS ON USE OF PROPERTY BY AMC AND ANY SUBSEQUENT OWNER(S)

COMMENTING PARTIES

- ► Petitioner Plum Creek
- ► Intervenors and Interested Persons
  - Appalachian Mountain Club
  - Maine Professional Guides Association
  - Native Forest Network
- ► Governmental Review Agencies
  - Bureau of Parks and Lands

COMMENTS FILED BY THE PETITIONER

(p. 33)

To address LURC's concern, Plum Creek is amenable to amending the Conservation Framework to provide that the transfer of the Roaches Property to AMC and the recording of the AMC document would occur simultaneously with the transfer of the Balance and Legacy Conservation easements. Plum Creek would require that AMC reach agreement on the form and substance of the conservation easement referenced in (b) above with LURC by a date certain in September of 2008.

COMMENTS FILED BY INTERVENORS AND INTERESTED PERSONS

► Appalachian Mountain Club (pp. 14-21)

AMC WILL ACCEPT THE IMPOSITION OF A CONSERVATION EASEMENT ON THE ROACHES PROPERTY THAT EMBODIES THE INTENT OF THE COMMISSION'S FOOTNOTE 95.

AMC joined the Conservation Framework with the express intent to further conservation of the region and purchase a critical conservation tract that provides for an unparalleled ecological and recreational corridor in the 100 Mile Wilderness. The Roaches Property has been a high priority for conservation to AMC and the State for many years.

AMC is fully committed to manage the Roaches Property in line with both the Commission's intent and AMC's public testimony: to offer primitive backcountry recreational experiences, and guarantee permanent public non-motorized access. AMC does not intend to engage in commercial or industrial operations on the property beyond that necessary to support recreation and forestry uses. Most importantly, AMC does not intend to sell all or any portion of the property for residential use or kingdom lots. After purchasing the Property, AMC had intended to encumber the land with conservation easements to restrict these types of activities permanently, as it recently did on the Katahdin Ironworks parcel.[9] Although relinquishing the financial benefit of selling such easements presents additional costs that AMC had not anticipated,[10] nevertheless, if the Commission believes that an immediate donation of an easement on the Roaches Property is required to secure its protection, AMC will accept that outcome.

The Roaches Property's primary value in the context of the Concept Plan is to reduce the adverse impact on primitive recreation uses and resources presented by the increased development to a point where those impacts are no longer "undue." LURC Standards § 10.08; AMC's Post Hearing Brief at 30-34, 39. AMC understands that the Commission also deems the conservation easement necessary to provide adequate and permanent protection for lakeshores. In total, AMC understands the following to be the principal aims of the Roaches Conservation Easement:

1) Provide public non-motorized access and eliminate the risk of privatization of the landscape;
2) Protect the scenic integrity of the lakes and shorefront resources;

[9] Having testified at the hearings with the expectation of obtaining the Roaches Property unencumbered, AMC only *indirectly* enunciated its intention to pursue the sale of conservation easements. Graff Testimony, 12/12/07, vol. II at 31:25-32:23 (noting that, similar to the KIW easement protecting an ecological reserve area, there is a potential to create an ecological reserve on the Roaches Property but that will not be finally determined until after the land planning process); 109:14-19 (noting that AMC was contemplating imposing an easement that would make adequate provision for traditional sporting camp uses).

[10] Selling the easement rights, as was done at KIW, would enable AMC to remain fiscally conservative in managing its non-cash assets so that it can best accomplish its charitable conservation mission. AMC's intent was to commit the proceeds derived from such easement sales to further AMC's conservation and recreation programs in Maine.

3) Provide opportunity for diverse yet compatible recreation facilities, ranging from traditional commercial sporting camps to primitive backcountry sites;
4) Preserve the remote backcountry experience by protecting these recreational resources from negative impacts of motorized recreation and commercial, industrial and residential development;
5) Allow uses and structures necessary to facilitate the principal recreation and forestry uses of the property.

AMC shares the Commission's commitment to these goals for the Roaches Property.

AMC understands that the Commission's intent is to permit on the Roaches Property the uses and activities that AMC testified to in the public hearings, and the Commission's staff have put significant thought into outlining proposed conservation easement terms to make that possible. However, in the absence of having a full resource assessment available for the Roaches Property (a task AMC expects to undertake once it owns the parcel)[11], the consideration of specific easement terms is made more difficult. Nevertheless, AMC has begun to give thought to the express terms of a Roaches Conservation Easement as outlined in the five bullet points in Footnote 95 on page 107 of the Commission-Generated Amendments.

AMC Endorses the Easement Terms Proposed in the First Three Bullets in Footnote 95.
Of those bullet points identifying general provisions of the Roaches Conservation Easement, AMC is in full agreement with the first three in principle. As noted above, in the absence of a thorough resource inventory identifying the key locations where tighter restrictions may best benefit the purposes of the easement, it is difficult to commit to detailed restrictions on the land. Nevertheless, AMC is confident that, assuming satisfactory easement details can be agreed upon, it can acquire the Roaches Property subject to a conservation easement with the following basic terms:

Bullet #1.
AMC is in total accord with the requirement that the entire Roaches Property be open to non-motorized public access and agrees that the Property should be protected and managed for primitive, non-motorized backcountry recreation. Of course, the ITS snowmobile trail and segment of ATV trail circumnavigating First Roach Pond would remain open to public access under the terms included in the original Conservation Framework PSA.

Bullet #2.
AMC agrees with the requirement that all residential, industrial and commercial use and development be prohibited on the Roaches Property except for (1) development and maintenance of non-motorized trails, primitive campsites and shelters, selfservice cabins, backcountry huts, and sporting camps, (2) forestry, and (3) structures and uses associated with these recreational and forestry uses. In particular, AMC would need to reserve the right to construct structures associated with building and maintaining trails (for example, equipment storage facilities and seasonal trail crew and volunteer facilities) and other backcountry recreational infrastructure, and also the right to extract gravel for road and trail maintenance.[12] AMC believes that the permitting requirements of the M-GN subdistrict will adequately protect the values of the property whenever these uses are proposed.[13]

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[11] *See, e.g.,* Graff Testimony, 12/12/07 vol. II at 80:15 – 81:7 (explaining AMC's planning process to identify resources prior to making management decisions); at 133:6-11 (explaining that AMC needs to do a management plan before making any guarantees on specific land management issues.)

[12] Under the Conservation Framework PSA, Plum Creek reserved the right (with some limits) to extract gravel from an existing gravel pit on the property. Because the conservation easement may not impede this right, it may be more suitable to exclude that pit from the easement area. Such details may be the subject of final language negotiations.

[13] Under Chpt. 10.27,C (M-GN subdistrict regulations) some of these uses are permissible without a LURC permit (forest management, primitive recreation and trails); uses with slightly greater impacts are permissible subject to LURC standards (gravel pits under 5 acres, land management roads); and the more intensive of these uses require a permit and the corresponding LURC oversight (*i.e.,* commercial sporting camps, backcountry huts, gravel pits greater than 5-acres).

Bullet #3.
AMC also endorses the goal of protecting the remote backcountry experience, including protection of scenic values, from harvesting and other activities on trails and public waters by imposition of buffers or other appropriate protective mechanisms. AMC does note, however, that many of these protections are more appropriately designed *following* completion of the resource inventory and management plan.

AMC Has Substantial Concerns Regarding the Easement Terms Proposed in the Last Two Bullets in Footnote 95.
Bullet # 4 proposes elimination of all subdivisions of the Roaches Property, with a limited exception to allow for a possible land-swap between AMC and BPL as mentioned during the hearings. Bullet #5 proposes a prohibition on sale of the Roaches Property to any buyer "who does not have the demonstrated capability and stated intent to manage the parcel consistent with the purposes of the easement and its restrictions." Because these closely-related items impose burdens on AMC that may impede its management flexibility without correspondingly increasing the conservation value of the easement, AMC respectfully requests the Commission to reconsider whether they must be imposed, and whether the intent of these provisions can be accomplished through alternative means.

Bullet #4.
AMC requests that the Commission consider limiting, rather than eliminating, subdivision of the Roaches Property. In addition to providing for future land trades with BPL and *de minimus* boundary adjustments, any easement should allow for limited subdivision of the parcel to preserve some flexibility in AMC's ability to maximize the forestry and recreation values of the property. Notably, the LURC Model Easement language anticipates the possibility of limited subdivisions. LURC Model Easement – Rev 2004 at ¶ 1 (providing for subdivisions that are either (a) specific in number of lots or exact locations, or (b) subject to holder approval.)

Without some ability to sell portions of the land, AMC's long-term management flexibility is hampered. By way of an example of flexibility to further forestry values of the land, AMC in the future may wish to convey timber rights on a portion of the property to a timber management organization. Such a sale or lease typically would be considered a prohibited "subdivision" unless the easement language expressly noted such an exception. Some forms of subdivision also provide flexibility to ensure the preservation of the Property's recreation values. If, in the distant and very unlikely future, AMC should decide to cease operating sporting camps, the world of buyers willing to pay for a 30,000-acre sporting camp property are infinitesimally small. In contrast, if AMC were able to offer 500 acres together with a commercial sporting camp, that would be a more marketable asset. Without the ability to make either of these sales over the long term, AMC's flexibility to maximize the recreation and forestry values of this land could put at risk the values that the Commission now seeks to protect.

Of course, in any instance, the restrictions and obligations of the conservation easement will remain appurtenant to the subdivided parcel. Because public non-motorized recreational access will be guaranteed and residential use will be prohibited, the risks of privatization associated with 'kingdom lots' will not materialize with these types of subdivision. As proposed in the LURC Model Easement, imposing a conservative maximum number of permissible subdivisions or requiring holder approval of any division eases the enforcement concerns arising from multiple owners. The five principal conservation values to be furthered by the Roaches Conservation Easement are not hampered by a limited number of subdivisions where the lots will remain subject to the terms of the easement.

Bullet #5.
Lastly, AMC questions the need for and workability of restricting the qualities of a future purchaser of the Roaches Property, regardless of whether the sale is of a subdivided parcel or the Property as a whole. Any concerns that address issues not covered in the easement terms proposed within the first three bullets of Footnote 95 should be expressly articulated and embodied in the easement in objective terms (whether restrictive or affirmative covenants) to obviate the need for this requirement.

This provision relates closely to the provision to prohibit subdivisions. If it is permitted for AMC to convey a portion of the Property – for example, 500 acres associated with a sporting camp, or 10,000 acres on which the timber rights are leased to a timber company – then the management capacity or intent of the entity acquiring those interests will presumably differ in important ways from the capacity or intent of AMC. Should AMC be in a position to sell or lease some of the land for a commercial sporting camp or forestry operations, this provision would unduly hamper its ability to do so.

Further, AMC has substantial concerns about how the terms in the fifth bullet would be implemented. It is unclear who would determine the suitability of a potential buyer – would LURC approval of the purchaser's "capability" and "intent" to manage the land be required as a term of the easement? Whether an entity has the "stated intent to manage" the land beyond compliance with the terms of the easement is a very subjective analysis. AMC questions whether an easement containing prohibitions on transfer that turn on such subjective considerations as the intent of the transferee may constitute an unreasonable restraint on alienation that may be unenforceable. *Low v. Spellman*, 629 A.2d 57, 59 (Me.1993) (restraints on alienation must be reasonable in the circumstances of the case). Note that the LURC Model Easement does not include any provision regulating the character of potential purchasers of the fee interest in the land.[14]

Any future purchaser – despite their good or bad intentions – will acquire the land subject to the easement and will be legally bound to carry out its terms.[15] The restrictive covenants that will be imposed through the conservation easement (particularly the prohibitions on residential use and commercial activities), together with affirmative covenants to allow public nonmotorized access and maintain protection of recreational and lakeshore resources, are adequate to meet the five principal goals of the Roaches Property, as outlined above.

Under the first three of the proposed easement terms, the only possible purchasers are those with forestry or recreational interests (not putative kingdom lot owners), and the risks associated with sales can be further reduced by imposing a conservative limitation on the number of allowed subdivisions. With well-drafted easement language, the risk that a sale of all or a part of the Roaches Property will degrade that Property's contribution to reducing the adverse effects on recreation generated by development under the Concept Plan is insignificant.

For these reasons, AMC respectfully requests the Commission to decline to impose a complete prohibition on subdivision of the parcel and decline to impose a subjective requirement that the property only be sold to entities with certain 'intent.' Instead of those restrictions, AMC requests the Commission to impose a limit on the number of permissible subdivisions and articulate objective easement provisions should the Commission deem any further terms to be necessary to satisfy the LURC Standards.

► Maine Professional Guides Association (p. 4)

We support assuring public access to the Roach Ponds parcel by codifying that right. However, if LURC plans to protect one activity from adverse impact, then it should at the very least protect all current activities, as it is these that will be adversely impacted. This should include the recreating public, as well as licensed guided ("commercial guides" so called) who assist the public in these activities.

We reiterate our prior comments in testimony that the AMC's stated intent to limit motor vehicle access on such a large acreage is an extreme hardship on many public recreational activities currently enjoyed there. Loss of vehicle access is

[14] In contrast, the LURC Model Easement's requirement for approval by the Third-Party for assignment of the *Holder's* rights to a new holder serves to maintain compliance with *objective* statutory requirements for conservation easement holders. LURC Model Easement – Rev 2004 at ¶ 12.E.

[15] The holder, with the Attorney General as back-up, will have enforcement authority should a future purchaser be lax in its compliance. 33 M.R.S.A. § 478(1).

a detriment to those who currently use the area for hunting, fishing, trapping, wildlife and scenery viewing, and motorized recreation including snowmobiling, atv riding and motorboating. LURC's recommendations add protection for only some recreational activities, ie., non-motorized.

In addition, LURC should be aware that providing public access for "hunting" should be clarified and expanded to include all hunting as currently taking place (within the law), including the current practices of baiting and hounding as provided for in State laws and rules.

► Native Forest Network (p. 7)

[Regarding general concept plan pros:]

- Ensures that Roaches property will be used for primitive recreation only. (Why can't they suggest this for entire plan area?)

COMMENTS FILED BY GOVERNMENTAL REVIEW AGENCIES

► Bureau of Parks and Lands (pp. 5-6)

Roaches Backcountry Easement

BPL agrees to hold this easement. We view it as a natural extension of BPL's existing AMC/KIW easement. LURC should direct LURC staff to oversee the drafting, consistent with the explicit backcountry spirit of LURC direction to date. BPL urges reasonable accommodation under the easement of staff housing, renewable power generation for the parcel's use, and other associated needs.

BPL in negotiations will request deed permission for the public in a passenger vehicle to cross the parcel along the road to Nahmakanta, and requests LURC support of the same.

LURC should also direct staff to negotiate monitoring resources for BPL for this parcel. The value of the public crossing might be a consideration in the calculation of BPL "benefit" for monitoring. Yet more significantly, BPL benefit might accrue through a grant of free timber management/hauling crossing rights.

Importantly, BPL is sensitive to the potential tensions that BPL finds itself in when it holds an easement over a land owner, may be placed in a position of compliance/enforcement, yet must simultaneously negotiate abutter issues such as timber management crossing rights. These tensions are manageable and best dealt with though disclosure and recognition of tension points.

STAFF/CONSULTANT DISCUSSION AND RECOMMENDATIONS

► DISCUSSION

Based on comments received, staff/consultants offer the following analysis:

- Regarding the comment by Plum Creek on page 59.2 that "...Plum Creek would require that AMC reach agreement on the form and substance of the conservation easement reference in (b) above with LURC by a date certain in September of 2008":

  See staff/consultant analysis at Tab 57.

- Regarding comments by AMC concerning the provisions it is prepared to include in an easement:

  On page 107, footnote 95 of the Commission's June 4th Amendments, there are listed five bulleted "specific conservation easement measures" that the Commission believed should be included in an easement executed by AMC. In its comments, AMC endorses the first three measures listed in footnote 95, while opposing the requirements in the last two bullets.

  Regarding the first 3 bullets, staff/consultants have no problems with the general comments made by AMC regarding its view of these three measures, but staff/consultants have not yet been presented with language (by AMC or by the proposed holder, BPL) that would establish these restrictions. Thus, staff/consultants cannot comment on whether the actual language proposed by AMC and/or BPL will adequately reflect the Commission's intent here. Staff expects that a draft of this language will be developed after the September deliberations should Plum Creek and other implementing parties agree with the Commission's amendments.

  Regarding AMC's objections to the last two easement measures in the Commission's footnote 95 amendments and its request that the Commissioner "reconsider whether they must be imposed and whether the intent of these provisions can be accomplished through alternative means", staff/consultants offer the following thoughts to the Commission:

  Staff/consultants' understanding is that in its May 2008 deliberations the Commission preliminarily concluded that Concept Plan approval depended, in part, on the owner of the Roaches property ensuring that the remote backcountry values of that parcel would be fully protected, in order to mitigate for impacts to remote recreation elsewhere in the Concept Plan area caused by Plum Creek's development. Subdivision of the Roaches property and/or sale of the entire parcel or a portion thereof to any willing buyer potentially increases the risk that the property or portions thereof may be owned by entities that may not share these values. AMC's comments offer no language to illustrate how remote backcountry values would be protected, regardless of ownership. For instance, while AMC's comments themselves raise the possibility of the sale of "10,000 acres on which timber rights are leased to a timber company," AMC as yet has proposed no limitations on harvesting practices in the easement to ensure that certain remote backcountry scenic, noise, and other remote values are not lost as a result of legally permissible forest practices on these 10,000 subdivided acres. AMC proposes "a limited number" and a "conservative limitation" on subdivisions, but avoids naming a number.

  Staff/consultants believe it is essential that any easement proposed to the Commission by AMC contain provisions that unquestionably protect these remote backcountry values regardless of current or future owner. It may be possible to draft an easement that contains such protections while still allowing some flexibility for subdivisions and a range of owners.

- Regarding comments by the Maine Professional Guides Association concerning the limitations that AMC intends to imposed on motorized access and certain types of hunting:

  In its May 2008 deliberations the Commission addressed these concerns. As the prospective owner of the Roaches property, AMC will enjoy certain rights to limit uses of its land. As discussed in footnote 94 of the Commission's June 4th amendments, the limitations that AMC intends are consistent with the record evidence before the Commission, which requires securing protections for remote, undeveloped, primitive and non-motorized backcountry recreational opportunities.

- Regarding comments by BPL on its interest in being the holder of the AMC easement, on deeded vehicle access to cross the parcel along the road to Nahmakanta, and on funding for easement monitoring:

  Staff/consultants believe that having BPL hold the AMC easement is appropriate, given the purpose of this easement and the fact that BPL is the holder for AMC's nearby KIW easement. Deeded vehicle access to traverse the northernmost portion of the Roaches property is contemplated by AMC and is not inconsistent with protecting the remote backcountry recreational opportunity of the vast majority of the Roaches property. Ensuring adequate financial resources for effective BPL monitoring is appropriate.

► RECOMMENDATIONS

Based on the discussion above, staff/consultants offer the following recommendations:

- Regarding the terms to be contained in the AMC easement (pursuant to footnote 95 of the Commission's June 4th amendments):

  Change bullet # 3 to read: Protections of remote backcountry experience, including protections of scenic values from harvesting and other activities on trails and water bodies. The protections provided in the easement must be specific, measurable, and non-discretionary, so that effective monitoring and enforcement by the holder of the terms on multiple landownerships is straightforward.

  Change bullet # 4 to read: Subdivisions that might be required to allow a future lands trade with BPL are allowable. In addition, the Commission directs staff/consultants to determine, and propose for Commission approval, the maximum number of allowable subdivisions, unrelated to a future lands trade with BPL, that staff/consultants believe will not lead to a diminution of the remote backcountry values of the entire Roaches Property.

  Eliminate the existing language in bullet # 5.

  Add a new bullet that states: Provisions naming BPL as the holder of the easement and granting full holder authority to BPL.

- Regarding financial resources for the holder to monitor and enforce the easement, add the following amendment:

  AMC and BPL should propose to the Commission (either through separate filings or, if possible, through mutual agreement) the financial, fiduciary and administrative terms and conditions that would govern creation, endowment and administration of a monitoring, stewardship and enforcement fund for the AMC easement. These proposed terms and conditions must be sufficient to ensure that, in perpetuity, proper monitoring, enforcement and stewardship can be fully accomplished on an ongoing basis. Parties will be allowed a reasonable opportunity to comment on these filings.

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ADDITIONAL CONCEPT PLAN ELEMENTS
SNOWMOBILE TRAIL EASEMENTS

COMMENTING PARTIES

- ► Governmental Review Agencies
  - Bureau of Parks and Lands

► Bureau of Parks and Lands (pp. 4-5)

BPL emphatically asks and today repeats for the third time in formal written comments that LURC and Plum Creek record for history that the deeded grant of existing snowmobile trails was an offer by Plum Creek as part of a recreational mitigation package offered voluntarily by the applicant; BPL actively resists any suggestion that permissive recreational trails on private lands should be perceived as an asset that creates regulatory implications. If Plum Creek offered adequate recreational mitigation that did not include snowmobile trails, BPL would not look to assert regulatory rights over permissive recreational trails.

We're serious. If we have to force this through easement language we will do so, but the regulatory record would be our preferred approach to memorialize this understanding, for future policy reasons. (LURC's memorialization of its approach to backcountry recreation in the Concept Plan is equally important. LURC should make clear that Concept Plan applicants have many options to address primitive standards; the approach in this Concept Plan is not the sole allowed approach.)

BPL asks LURC to direct LURC staff to resolve drafting issues with the snowmobile easements, as laid out in earlier BPL written testimony, repeated here ver batim:

- IRS donative language in the draft easement does not conform to a regulatory condition. BPL would be willing to accept a donation of an easement, but not if the applicant claims regulatory review benefit as this applicant has done. The IRS donative language should be struck
- Trail rules and regulations should be subject to "consent" of BPL, not mere comment. This is particularly important following division of lands, such that trails not be subject to varying rules of varying fee owners.
- Language (2A) directing trails toward fragile areas should be struck.
- ATVs for construction purposes should be allowed.
- Language regarding fees and skiing are confusing and not necessary
- Language regarding indemnity is not acceptable
- Language regarding mortgage seems unnecessary.
- The holder should have no burden to pay for trail relocation (Aug 2007 comments.)

Many of these provisions will reduce future costs for BPL, even while BPL will be assuming without resources obvious responsibilities as easement holder. BPL approaches this unfunded responsibility with the clear and previously stated expectation that clubs will continue to have traditional partnership roles on these trails, unchanged by BPL's acceptance of the easement. BPL also states for the record an expectation that statewide snowmobile fee dialog will continue to support BPL's growing administrative roles as easement holder of snowmobile trail easements in the Moosehead region, the Millinocket region, and elsewhere.

As a final qualifying remark, BPL accepts these snowmobile trail easements with the firm request that motorized and sporting interests collaboratively support the proposed Roaches Backcountry easement and its grantor. We look forward to reviewing their comments submitted today in this light. We view our commitments to backcountry and motorized easements and public access for hunting as part of a balance, which shall remain a balance not to be upset by factional tactics. If recreation policy is positioned as "us versus them" between motorized and non-motorized users, then Maine will inevitably face unacceptable lose-lose results.

STAFF/CONSULTANT DISCUSSION AND RECOMMENDATIONS

► DISCUSSION

Based on comments received, staff/consultants offer the following analysis:

- Regarding BPL's request that the Commission "record for history" that "BPL actively resists any suggestion that permissive recreational trails on private lands should be perceived as an asset that creates regulatory implications":

  Staff/consultants assume that should a Concept Plan be approved by the Commission containing the requirement that Plum Creek grant these snowmobile trail easements, language in the approval document will discuss the record evidence regarding the origin of the inclusion of this requirement. Staff/consultant's understanding is that the inclusion of the snowmobile easements in the proposed Concept Plan was not a result of any insistence on their inclusion by BPL, but was proposed by Plum Creek to partially mitigate for any loss of recreational opportunity in the Concept Plan area resulting from its proposed development, which could have been addressed in any number of ways including but not limited to the granting of snowmobile trail easements, and that BPL then endorsed the inclusion of these easements.

- Regarding BPL's request that the Commission "direct LURC staff to resolve drafting issues with the snowmobile easements..."

  Staff/consultants are not in a position to "resolve drafting issues" that exist between Plum Creek and an independent bureau of the Department of Conservation, unless "resolve" is understood to mean that staff/consultants should recommend, at this stage of the proceedings, precisely the legal language that must be in the snowmobile easements, and thus essentially have LURC draft the easement to satisfy BPL's needs as the easement holder. Staff/consultants do not believe that it would be most productive at this time for the Commission to assume primary responsibility for resolution of these issues, and urge the Commission to defer taking charge of the matter. Staff/consultants recommend that the Commission should look first and foremost to BPL and Plum Creek to resolve their differences. Staff/consultants have verbally encouraged both BPL and Plum Creek to meet and try to reach agreement on the exact legal language, and staff/consultants understand that one such meeting has now taken place.

  Therefore, staff/consultants believe that the Commission should *not* grant BPL's request to "direct LURC staff to resolve drafting issues." If at some point in this proceeding it becomes clear to staff/consultants that BPL and Plum Creek have reached impasse in their efforts to agree on all snowmobile easement terms, staff/consultants would be prepared to make a recommendation to the Commission on what staff/consultants believe to be appropriate language. Additionally, staff/consultants recommend that LURC review carefully any language that is agreed upon by BPL and Plum Creek and presented to LURC, to ensure that such language is not inconsistent with the Commission's governing regulatory criteria.

► RECOMMENDATIONS

Based on the discussion above, staff/consultants offer the following recommendations:

- Regarding the Commission's June 4th acceptance of Plum Creek's proposal to donate 84 linear miles of snowmobile trail easements for the ITS 85/86, 88 Snowmobile Right of Way and the ITS 110 Snowmobile Trail Right of Way, with the easements held by the Bureau of Parks and Lands:

  No change recommended by staff/consultants.

- Regarding Commission involvement in drafting and approving of the snowmobile easement language, change the amendment to state:

  In the event that BPL and Plum Creek reach agreement on proposed final easement language, the Commission will review this language to ensure that such language is not inconsistent with the Commission's governing regulatory criteria. In the event that BPL and Plum Creek are unable to reach agreement on proposed final language, the Commission directs staff/consultants to draft final language and present it to the Commission for its review.

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ADDITIONAL CONCEPT PLAN ELEMENTS:
PEAK-TO-PEAK TRAIL EASEMENT

COMMENTING PARTIES

- ► Petitioner Plum Creek
- ► Intervenors and Interested Persons
  - Appalachian Mountain Club
  - Forest Ecology Network and RESTORE: The North Woods
  - Native Forest Network
- ► Governmental Review Agencies
  - Bureau of Parks and Lands

COMMENTS FILED BY THE PETITIONER

(pp. 60-61)

[Regarding the Commission amendment that instead of building, funding or donating a 15-foot-wide easement for the Peak-to-Peak trail, provide BPL with trail easements in equivalent aggregate total square footage (67 miles X 15 feet) (collectively, the Replacement Trails), locate the Replacement Trails in the Moosehead Region in locations agreed upon by BPL, Plum Creek and local recreation interests:]

Agreed. Plum Creek will work with BPL to determine location and design for the trails and timing of the easement grants.

[Regarding providing an interest-free loan to BPL for construction of the Replacement Trails:]

Agreed provided that BPL is legally permitted to become the maker of a note for the Replacement Trails Loan and further provided that BPL, Plum Creek and Moosehead Recreational fund are able to agree on a repayment schedule and loan amount for the Replacement Trails Loan. The Moosehead Recreation Fund charter must require it to repay not less than 20% of the Replacement Trails Loan annually beginning in the year where income is received by the Moosehead Recreation Fund and MRF's charter cannot be amended to change or delete this obligation without Plum Creek's consent.

[Regarding donating to BPL five trailhead parking areas to be used with the Replacement Trails:]

Agreed. Plum Creek will work with BPL to mutually agree upon the location, size and timing associated with the Trailhead Parking Areas.

COMMENTS FILED BY INTERVENORS AND INTERESTED PERSONS

- Appalachian Mountain Club (pp. 10-11)

  The amendments to the former Peak-to-Peak Trail Easement providing flexibility in the location and width of the trail segments will allow for the design and construction of a trail system that meets the recreational opportunities and needs of the region. By requiring that a process and timeline for locating the trail easements, trailheads and parking lots be included in the final Concept Plan, the proposed amendments also help ensure timely follow through on Plum Creek's commitment to provide 67 miles of actual trail. Commission-Generated Amendments at 112-113. The final language detailing these amendments will be necessary to determine the extent to which the Commission's intent will be met. AMC believes that BPL is the appropriate entity to hold the trail easement because providing and managing public outdoor recreation is at the core of its mission. AMC looks forward to being a collaborative partner in working with BPL, Plum Creek, local communities, and other local recreational interests to identify the trail easement locations and priorities.

► Forest Ecology Network and RESTORE: The North Woods (pp. 15-16)

While staff did explain their changes to the "Peak to Peak Trail," from a trail builder's perspective, their explanation does not make sense. Staff acknowledged "... that hiking trails and hiking trail easements are an important mitigating element that becomes part of the recreation mitigation package here..." DT P 439 L 22-24. Staff also recognized that the 15 ft wide trail was too narrow to serve "a regulatory purpose." DT P 439 L 17. The solution staff proposes is to require the same amount of square footage as in the original trail but to give the holder and Plum Creek the "flexibility" to use that same amount of square footage to build a wider trail. The example Ms. Pinette gives on how the holder and Plum Creek might use this flexibility is that they might decide "... that the need does exist for a peak-to-peak-type trail that involves extended overnight hikes..." DT P 440 L 7-9. Now compare that statement to the realities of trail building. Using a minimal corridor of 200 feet (assuming all surrounding land is managed in a way that takes the needs of the trail into account) would only result in a 5 mile trail. A more reasonable corridor of 500' would result in a 2 mile trail. And a 500 foot corridor would still not take into account the need for larger buffers around campsites and special features along the trail. This proposed amendment would make it impossible to accomplish the purpose of the easement to have a "peak to peak" trail and it certainly would not allow the "extended overnight hikes" envisioned by staff.

► Native Forest Network (p. 7)

[Regarding general concept plan pros:]

- Have BPL govern peak-to-peak trails and receive [Plum Creek's] loan

COMMENTS FILED BY GOVERNMENTAL REVIEW AGENCIES

► Bureau of Parks and Lands (p. 8)

Hiking Trail Easements

The LURC amendments create a funding mechanism for hiking trail issues. We ask that LURC declare that designated funds (early loans or other mechanisms) may be used for hiking trail planning, local consultation, design, legal negotiation, and construction.

The acreage of hiking trail easements must be supplemented with a direction to LURC staff to assist BPL in negotiating the terms of the easements. The pending easement language has minimal value irrespective of width or acreage. The trail easements should approach fee control – perhaps might best be fee control – to provide a true buffer and truly protect the investments in trail infrastructure. LURC should direct staff to consider fee transfers rather than easement transfers.

The proposed acreage (15 feet by 67 miles) is relatively small if modest buffers of 200 feet are proposed. There should be no expectation that these newly protected trail corridors will in any way approach the 67 mile Peak-to-Peak concept. The proposed tools will allow protection and enhancement of existing hiking trails on Plum Creek lands, and creation of modest new corridors likely for day hikes or creation of modest new loops.

Creation or support of local non-profits (discussed above) are essential to support ongoing maintenance needs of such trails. BPL struggles to maintain BPL's existing trail networks in the Moosehead region. We are cautious to create new trails without new local partners for trail maintenance.

STAFF/CONSULTANT DISCUSSION AND RECOMMENDATIONS

► DISCUSSION

Based on comments received, staff/consultants offer the following analysis:

- Regarding the Commission amendment that instead of building, funding or donating a 15-foot-wide easement for the Peak-to-Peak trail, provide BPL with trail easements in equivalent aggregate total square footage (67 miles X 15 feet) and locate the Replacement Trails in the Moosehead Region in locations agreed upon by BPL, Plum Creek and local recreation interests:

  Staff/consultants understand the comments made by FEN-RESTORE, and appreciate that the total mileage of trails that are eventually built likely will not reach the 67 miles of "peak-to-peak" trail originally proposed by Plum Creek. While 67 total miles of new trail throughout the Concept Plan area may not be constructed under the Commission's June 4th amendments, staff/consultants do believe that weight of record evidence supports the following: (1) diverse, dispersed hiking opportunities on well-placed, well maintained trails in the Moosehead Lake region are currently not available; (2) additional such hiking opportunities are needed in the area; and (3) hiking trails in "working" forest areas that do not contain meaningful land buffers to shield trail users from visual, noise and other impacts from harvesting are not thought of as useful or desirable by experts in recreational hiking in Maine and northern New England, and thus the 15-foot easement trail proposed by Plum Creek in the Peak-to-Peak trail is not appropriate as mitigation.

  For these reasons, staff/consultants continue to believe that the appropriate combinations of distance, width and location for these hiking trails is best determined by BPL pursuant to the equivalent aggregate total square footage formula (67 miles X 15 feet) contained in the Commission's June 4th amendment. The Commission's June 4th amendment provided BPL with the flexibility needed to exercise its best professional judgment in these matters; BPL has extensive experience in making such determinations, and should do so in consultation with Plum Creek and local recreation interests.

- Regarding an interest-free loan to BPL for construction of the hiking trails:

  Staff/consultants' understanding is that BPL is not statutorily authorized to execute a promissory note. Staff/consultants further understand that the repayment mechanism proposed by Plum Creek in its comments would not involve repayment directly from BPL, but instead from the Moosehead Recreation Fund as monies were deposited into the Fund from lot sales. Below, staff/consultants recommend a "front end" trail funding payment to BPL from Plum Creek of $1,000,000, which is equivalent to the approximate cost that would have been incurred by Plum Creek for the construction of the Peak-to-Peak trail it proposed. This figure is based on reliable record evidence regarding the approximately $12,000 to $20,000 per-mile cost of trail construction in current dollars (a figure that does not include the cost of trail maintenance).[1] Payment of monies up front to BPL (a mechanism agreed to by Plum Creek) will allow BPL to undertake prioritized planning on how to best use these funds, by knowing how much total funding will be available. Staff/consultants also endorse the mechanism proposed by Plum Creek for repayment to it of this $1,000,000 through the Moosehead Recreation Fund.

[1] Though fewer than 67 total miles of trail may be constructed under the formula established in the Commission's June 4th amendments, it is not clear that costs to BPL over a 30-year (or more) period will be less than $1 million. Even with fewer miles of trail actually constructed, BPL will still have significant costs for planning, consultation with the landowner and local community interests, legal acquisition of the easements, ongoing trail maintenance on new trails and trailheads for many years, and potential upgrading and ongoing maintenance by BPL of existing BPL trails in the Moosehead Lake region.

► RECOMMENDATIONS

Based on the discussion above, staff/consultants offer the following recommendations:

- Regarding the four paragraphs of the Commission's June 4th amendments, the amendments would now read:

  Instead of building, funding or donating a 15-foot-wide easement for the Peak-to-Peak trail, Plum Creek must:

  Provide BPL with trail easements in equivalent aggregate total square footage (67 miles X 15 feet) to locate trails of such distance, width and location in the greater Concept Plan area[2] and with sufficient vegetative buffers, as BPL working in conjunction with Plum Creek and local recreation interests determines is necessary to best meet hiking recreation needs in the region (BPL would be the easement holder for all such trails);

  Donate five trailhead parking areas to use in conjunction with above trails, as determined by BPL; and

  Within 45 days of the finalization of the Concept Plan (i.e., Concept Plan approval no longer subject to appeal), Plum Creek will provide a one-time payment to BPL of $1,000,000.00 for use by BPL during the 30-year life of the Concept Plan for planning, local consultation and capacity-building, design, legal negotiation, construction and maintenance of hiking trails, for trailhead parking areas, and for upgrading and maintenance of existing BPL trails, all in the greater Concept Plan area. As part of the articles of incorporation of the Moosehead Recreation Fund (see Tab 63-64), the articles of the Fund shall provide that: (1) Plum Creek shall annually receive the first $200,000 in funds deposited into the Fund; (2) in the event that less than $200,000 is deposited annually into the Fund, Plum Creek shall receive all funds deposited; and (3) this front-end payment to Plum Creek from the Fund shall cease entirely upon receipt by Plum Creek of $1,000,000.00 from the Fund.

  Propose, as part of any amended Concept Plan ready for final Commission action and after consultation with BPL, (1) a process and approximate schedule by which new trail easements and trailhead parking areas in the greater Concept Plan area will be located and granted to BPL and/or existing BPL hiking trails in the greater Concept Plan area will be upgraded or maintained, and (2) a draft final contractual agreement between BPL and Plum Creek describing the terms and conditions for use of $1,000,000.00 to BPL to accomplish the above-described actions, including agreement on a repository and distribution mechanism for funds not yet expended, to ensure that these funds will only be used by BPL for the purpose described in these amendments.

[2] The greater Concept Plan area is comprised of the twenty-nine townships involved in the Concept Plan plus the Towns of Greenville and Jackman.

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ADDITIONAL CONCEPT PLAN ELEMENTS:
VEHICULAR ROAD ACCESS EASEMENTS

COMMENTING PARTIES

- Petitioner Plum Creek
- Governmental Review Agencies
  - Bureau of Parks and Lands

COMMENTS FILED BY THE PETITIONER

(pp. 66-67)

Generally agree to the intent that the road easements should be sequenced tied to actual development being approved since these easements are being granted specifically to mitigate the impact on public recreation that may be caused by development under the Plan. Requiring Plum Creek to grant these easements regardless of whether development occurs is inconsistent with this intent and is not workable for Plum Creek.

Plum Creek will confirm that the easements currently under development have or will be executed.

COMMENTS FILED BY GOVERNMENTAL REVIEW AGENCIES

- Bureau of Parks and Lands (p. 6)

  Road easements

  LURC should direct staff to draft and negotiate the terms of these road easements. BPL has verbally informed counsel to Plum Creek that BPL will accept no road easements with road maintenance responsibilities, or with liability provisions unacceptable to the Attorney General based on established policy and precedent and AG advice. BPL will be interested to read Plum Creek's comments on today's filing deadline on this subject. BPL comments today clearly that without road easements held by some party the Concept Plan will fail to meet recreational impact regulatory standards.

  BPL also asks that LURC direct staff to draft closely allowed fees for road use as prescribed by road easements, to align them procedurally and substantively with allowed fee for recreational access to conservation easement lands, as discussed below. Our recent experiences with use fees on eased roads in the West Branch region makes us cautious to ensure clarity and holder approval for allowed use fees on roads and lands, if only to avoid tension and risk of litigation.

  Previous written BPL comments regarding road easements remain valid. We ask that they be carried forward in their entirety. As one excerpt: "BPL strongly urges LURC to ask the respective Counties to consider whether these roads should become County responsibility. BPL is increasingly becoming the public works department of the north woods, for compelling recreational reasons but with unsustainable fiscal support or structural rationale. If the counties were at the table for discussions of road rights on emerging major roads, broader road rights (full public commercial access) might be appropriate for discussion."

  See additional discussion below regarding Tax Increment Financing.

  See additional discussions above regarding Roaches/Nahmakanta Road Easements.

  See additional discussions below regarding financing options for conservation easement endowments.

STAFF/CONSULTANT DISCUSSION

► DISCUSSION

Based on the comments received, staff/consultants offer the following analysis:

- Sequencing of vehicular access easements:

  As part of its October 2007 revisions to the Concept Plan, Plum Creek proposed to donate to BPL approximately 57 miles of road easements, thereby granting to the public the right of vehicular access to major forest management roads for public recreational use, including use for commercial recreation, such as rafting, outfitters, and traditional outdoor guiding. The easements are part of a recreation mitigation package that recognizes that (a) development will diminish primitive and other traditional recreational opportunities in the vicinity of certain development areas and users of those resources may need to shift to other areas and will need access to do so, and (b) more people will be seeking recreational opportunities as a result of the development. Staff/consultants emphasize our understanding that the vehicular access rights apply to recreational use only, including commercial recreation, but not to other uses, such as travel related to forestry, mineral extraction, or other non-recreational commercial or industrial purposes.

  Because these recreational pressures will appear as the development occurs, the donations of the easements would be sequenced. In the Commission's June 4th amendments, the easements to the roads on the east side of Moosehead Lake would be entirely executed concurrent with LURC approvals of the first 200 residential or resort units on that side of the lake; the easement to 20 Mile Road on the northwest side of the lake would be executed concurrent with approvals of the first 200 units on the west side lake; and the easement to roads on the southwest side of the lake would be executed concurrent with approvals of the second 200 units on the west side of the lake. The Commission-generated amendments also stated that if Plum Creek has not sought approvals for these threshold numbers of units during the term of the Concept Plan, the easements would nevertheless be executed at the end of 30 years. Staff/consultants offered the recommendation leading to the Commission's June amendment after concluding that vehicular road access to some of the key recreational resources within the plan area are an important element to mitigate for potential impacts caused by proposed development. Such easements would provide guaranteed, meaningful access to comparable recreational resources for displaced users.

  Plum Creek agrees to the sequencing set forth in the Commission-generated amendments but not with the provision that, in the absence of the threshold levels of development, the easements would nonetheless be executed at the end of 30 years. Staff/consultants understand that the need for these vehicular access easements is tied to development actually occurring, and that if none occurred, there would be no displacement of existing opportunities or increased population pressures. However, significant development could occur short of the thresholds above (at the extreme, 199 units on the east side and 199 on the west side) without triggering the easements, even though pressures on recreational resources will be evident. Staff/consultants conclude that some contingency for not requiring the easements to be executed is warranted, but that any level of significant development at the end of 30 years, even if below the sequencing thresholds above, should trigger them.

- Terms of easements:

  BPL raises concerns about terms of the proposed vehicular access easements. These include concerns about maintenance responsibilities, liabilities, and allowable fees.

  Staff/consultants believe that the Commission should *not* grant BPL's request to "direct LURC staff to draft and negotiate the terms of these road easements." Staff/consultants do not believe that it would be most productive at this time for the Commission to assume primary responsibility for resolution of these issues and urge the

Commission to defer taking charge of the matter. Staff/consultants recommend that the Commission should look first and foremost to BPL and Plum Creek to resolve the issues. If at some point in this proceeding it becomes clear to staff/consultants that BPL and Plum Creek have reached impasse in their efforts to agree on all vehicular easement terms, staff/consultants would be prepared to make a recommendation to the Commission on what staff/consultants believe to be appropriate language. Additionally, staff/consultants recommend that LURC review carefully any language that is agreed upon by BPL and Plum Creek and presented to LURC, to ensure that such language is not inconsistent with the Commission's governing regulatory criteria.

► RECOMMENDATIONS

Based on the discussion above, staff/consultants offer the following recommendations:

- Regarding sequencing of vehicular access easements:

  Change the June 4th Commission-generated amendments to address the situation in which, *at the end of the 30-year term of the Concept Plan,* Plum Creek (or its successor) has not sought and received LURC approval for at least 200 units on the east side of Moosehead Lake and at least 400 units on the west side of the lake (the thresholds that would trigger execution of all 57 miles of vehicular road access easements), by eliminating the paragraph of the June 4th amendments that begins "If, at the end of the 30-year term of the Concept Plan...." (p. 115) and in its place substitute the following language:

  <u>What happens if fewer than 100 units are approved by the end of 30 years?</u>

  If, at the end of the 30-year term of the Concept Plan, fewer than 100 units on the east side of Moosehead Lake have been approved for development, the obligation to execute vehicular road access easements on the east side of the lake will expire.

  If, at the end of the 30-year term, fewer than 100 units on the west side of Moosehead Lake have been approved for development, the obligation to execute vehicular road access easements on the west side of the lake will expire.

  <u>What happens if more than 100 units are approved by the end of 30 years but the thresholds triggering execution of all the vehicular easements are not reached?</u>

  If, at the end of the 30-year term of the Concept Plan, at least 100 units on the east side of Moosehead Lake have been approved for development, any remaining easements on the east side will nevertheless be executed.

  If, at the end of the 30-year terms of the Concept Plan, at least 100 units on the west side of Moosehead Lake have been approved for development, any remaining easements will nevertheless be executed.

  If, however, Plum Creek (or its successor) seeks such approvals and is denied at the subdivision/development review stage so that these 100-unit thresholds cannot be met at the end of the 30-year term, the easements would not need to be executed.

- Regarding terms of easements:

  In the event that BPL and Plum Creek reach agreement on proposed final easement language, the Commission will review this language to ensure that such language is not inconsistent with the Commission's governing regulatory criteria. In the event that BPL and Plum Creek are unable to reach agreement on proposed final language, the Commission directs staff/consultants to draft final language and present it to the Commission for its review.

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ADDITIONAL CONCEPT PLAN ELEMENTS:
COMMUNITY STEWARDSHIP FUND: PURPOSE AND ORGANIZATION

COMMENTING PARTIES

- ► Petitioner Plum Creek
- ► Intervenors and Interested Persons
  - Appalachian Mountain Club
  - FPL Energy Maine Hydro LLC et al.
  - GrowSmart Maine
  - Maine Professional Guides Association
  - Moosehead Region Futures Committee
- ► Governmental Review Agencies
  - Bureau of Parks and Lands
  - Maine Department of Inland Fisheries and Wildlife and Maine Natural Areas Program
  - Maine State Housing Authority

(pp. 61-65)

a. Moosehead Recreation Fund (MRF). In lieu of creating one CSF, Plum Creek is agreeable to creating the MRF.

i. Purpose and Organization of MRF: .... As requested by LURC, recreation mitigation would include construction and maintenance of BPL and Town of Greenville hiking and biking trails and related amenities, BPL-owned campsites and campgrounds and BPL and Town of Greenville public boat launches in all the Concept Plan area, Rockwood Village or the Town of Greenville as proposed by LURC. Recreational mitigation must also include providing grants to other third parties to mitigate other recreational impacts caused by development of the Concept Plan area. The MRF charter must provide that except as agreed to by Plum Creek, LURC and BPL, the funds exclusive purpose is for mitigation of recreational impacts in the Concept Plan area. It is recognized that not all mitigation will be within the actual Concept Plan boundaries and that municipalities and waterbodies that abut the Concept Plan Area may be impacted by development of the Concept Plan Area.

On the question of board governance: LURC proposes 2 BPL members, (rather than one) this is acceptable to Plum Creek. LURC proposes adding a Town of Beaver Cove representative and this is acceptable to Plum Creek. LURC proposes one representative for all outdoor recreational interests and this is acceptable to Plum Creek. In addition, the following groups must be represented on the Board:

(i) Plum Creek as the mitigation is funded by sales of our property and the mitigation is for a Plum Creek project;
(ii) Dam Owners who own property adjacent to much of the Plan Area as they currently pay to maintain public recreational facilities that may be impacted by development of the Plan Area (for instance, the Kineo dock in Rockwood which may see increased usage) and
(iii) Resort owners group. LURC recommends elimination of the Jackman representative, USFS representative, the Piscataquis representative and the Somerset County representative. These changes are acceptable to Plum Creek. Given the relationship between BPL and recreational amenities in the region, BPL is well suited to administer the MRF, but Plum Creek has concerns about whether BPL as a government agency has the authority to administer funds as directed by an independent board of directors. There must be an acceptable enforcement mechanism in place to assure all parties that the funds will be distributed according to the MRF charter. We recommend as one possibility a contract between Plum Creek and BPL.

b. Affordable Housing Fund (AHF)

i. Purpose and Organization of AHF. In lieu of creating one Community Stewardship Fund, as mitigation for impacts of development of the Concept Plan area, Plum Creek is willing to create the AHF to help subsidize construction of affordable housing in the Greenville-Rockwood region. Plum Creek agrees that MSHA should administer the funds and distribute them to qualifying projects; however, Plum Creek proposes that AHF's charter require that qualifying projects be located in the Concept Plan area and municipalities adjacent to the Concept Plan area.

c. Wildlife and invasive Species Fund (WISF)

i. Purpose and Organization of WISF. In lieu of creating one Community Stewardship Fund, as mitigation for impacts caused by development of the Concept Plan area, Plum Creek is amenable to creating the WISF to help fund loon nesting and other wildlife needs and control any spread of invasive species resulting from the Concept Plan development. Plum Creek agrees that the fund should be administered jointly by IFW, MNAP and Maine DEP and that funds should be distributed to qualifying projects in the judgment of these agencies. Plum Creek proposes that WISF's charter require that qualifying projects be located in the Concept Plan area and municipalities adjacent to the Concept Plan area.

► Appalachian Mountain Club (pp. 11-12)

Division of the Community Stewardship Fund into Three Discrete Funds
AMC approves of the division of the former Community Stewardship Fund into three discrete funds focusing upon (1) recreation, (2) wildlife, and (3) affordable housing. Commission-Generated Amendments at 116-117. Segregating the administration of these funds will minimize time and financial resources spent on allocation decisions between these equally important goals. ...

As to the Moosehead Recreation Fund, AMC approves the proposed description of its purpose to fund construction and maintenance of state and municipal operated hiking and bicycle trails and public boat launches, and state operated campgrounds within the Concept Plan Area. This provides a funding source to support a more diverse array of human-powered recreational activities –on bikes, in canoes, in tents, or walking in flatlands, as well as hiking up mountains as would be provided by the Peak-to-Peak Trail. However, the Commission may wish to give further consideration to the makeup of the fund's governing board. Presently it is proposed to include two representatives of BPL, one representative each from Plum Creek, the Town of Greenville and Rockwood Village, and only one local representative of "outdoor recreational interests." In light of the diversity of outdoor recreational interests to be benefitted by the Fund (hiking, biking, camping, boating), the board should accommodate at least two local representatives of these recreational interests.

► FPL Energy Maine Hydro LLC et al. (pp. 1-2)

Moosehead Recreation Fund

The Commission Amendments eliminate the Moosehead Region Community Stewardship Fund and instead propose three distinct segregated funds, one of which is the Moosehead Recreation Fund ("MRF"). Commission Amendments, p. 116. The purpose of the MRF is limited to funding projects located on land owned by or facilities owned by the Bureau of Public Lands ("BPL") or the Town of Greenville. *Id.* This narrow use of the MRF seems unduly restrictive. The scope of the MRF should be broadened to provide the flexibility to address the public need for access to all lands throughout the Concept Plan area in light of the impact of the Plum Creek development, rather than restricting the potential public benefit to a limited subset of areas.

Additionally, as the Commission Amendments are currently drafted, the Dam Owners have no representation on the governing board of the MRF. One of the purposes of the MRF is to address the need for and the construction and maintenance of access to water bodies. The Dam Owners are the Federal Energy Regulatory Commission ("FERC") licensed owners and/or operators of the major water bodies in the Concept Plan area (i,*e.* Brassua Lake, Moosehead Lake and Indian Pond). Including a representative of the Dam Owners on the governing board of the MRF provides the opportunity to further inform the MRF decision-making process by identifying resources, opportunities and challenges presented by potential MRF funded projects early on and provides an essential, additional perspective regarding the management of recreational activities within the FERC boundaries. Accordingly, the Dam Owners request that the Commission further amend the Concept Plan to broaden the scope of the MRF as discussed above and to provide for Dam Owner representation on the governance board.

► GrowSmart Maine (p. 4)

[Regarding improved smart growth adherence with Principle #3. Create Economic and Land Use Diversity: Mix and Balance of Uses:]

- [Commission-generated amendments] strengthen the 'Community Fund' concept by establishing a long-term and flexible housing, recreation and habitat funding stream.

► Maine Professional Guides Association (pp. 2-3)

We take great offense to this proposed change for several reasons:

1) the original CSF proposal places developing a recreational management plan as its primary mission, as it should. The proposed revision eliminates this plan from the mission, and jumps directly into building hiking and biking trails, campsites and boat launches.

2) The original CSF places administration of funds under a board of directors having fiduciary responsibility to use the funds as it best determines suits its mission. The composition of this board assures that proper priorities will be considered. The proposed revision unnecessarily places these otherwise private funds in control of the State's Department of Conservation.

3) The original CSF was conceived as being composed of representatives from a broad range of local recreational interests and local governing bodies and citizens. This broad and local make up will assure that the needs of recreationists and local economies will be considered. It assures that there will be local buy-in, and that recreational interests will have buy-in. This approach is utilized by the Down East Lakes Land Trust, which successfully involves various local interests in protecting lands depended upon for the local economy, recreational interests and long term conservation. The governing board proposed by LURC's revision provides few or none of those attributes. It offers the involvement of only one landowner, when there might be several ultimately involved. It offers the involvement of only one recreational interest, while we all know there are many.

► Moosehead Region Futures Committee (p. 10)

The LURC-generated amendments indicate that the board of the Moosehead Recreation Fund will include "a local representative of outdoor recreational interests" (LURC-generated amendments, June 4, 2008, page 116). The MRFC Steering Committee believes that this representation of outdoor recreational interests should be expanded to include representatives from a variety of recreational user groups, both motorized (e.g., snowmobilers, ATV enthusiasts, motorized boaters) and non-motorized (e.g., cross-country skiers, hikers, cyclists, paddlers).

We further suggest that a member of the MRFC Steering Committee be included on this board. We believe that our local knowledge would prove to be an asset to the board. Since the submission of the original version of Plum Creek's proposal in 2005, we have advocated for regional planning for nature tourism and recreation, as well as for the funding mechanism that has evolved into the currently proposed Moosehead Recreation Fund.

COMMENTS FILED BY GOVERNMENTAL REVIEW AGENCIES

► Bureau of Parks and Lands (pp. 6-7)

<u>Recreation Management and Land Trusts and the new Moosehead Recreation Fund</u>
BPL recalls long hours of Commission discussion with BPL and others regarding recreation management, far beyond earlier written comments on the subject. The issue is largely unaddressed by the most recent LURC amendments, except to the welcome extent that recreational mitigation is greatly enhanced by addition of various fee and easement lands within the regulatory architecture of the Concept Plan. (See note above in the Snowmobile section regarding the need to memorialize, for precedential interpretation, LURC's approach to defining the adequacy of recreational mitigation.)

That may be sufficient for LURC's approval, yet the issue of mixed expectations on BPL's role we attempt to clarify here.

Importantly, BPL must make clear that we will see few new resources for recreation management in the region (such as on the new easements), thus we should have no expectations of improved recreation management. Yet regardless a vacuum will exist and people will turn to government for a solution.

The proposed Moosehead Recreation Fund is one new tool. BPL is asked to administer, with a committee. We have inadequate information on the amount of funds that will be generated. We know that many of the funds Plum Creek will be lending to BPL for hiking trails (below), which BPL will repay to someone (write annual checks to Plum Creek?) through BPL's administration of this new fund. So what funds will be available for grants, and when? And how many entities have expectations of the remaining funds? BPL can assess administrative expenses from the fund?
We expect many parties (local snowmobile clubs) to appropriately ask that they be eligible for grants. We ask that LURC provide as much clarity as possible on expected revenues, and allowed uses. The initial loan amount and terms should be set by LURC to avoid ambiguity. BPL's expectation of covering administrative expenses should be clear. Frankly, though we continue to believe that a new or existing regional institution would be best positioned to administer this fund.

We hesitate to say that the funds will be entirely inadequate for the intended purposes, because we have so little information. ...

The Town of Greenville has orally raised to BPL concerns about the need to support local emergency responders, whose demands will increase with increased recreational use. We hope that other sections of the Concept Plan address emergency response needs in the region, yet if not suggest that a necessary (perhaps dedicated/defined) portion of recreation funds should be set aside to support emergency response.

In closing, an excerpt from earlier BPL testimony: "BPL believes that locally governed recreational management is a key tool to guarantee that the lands are managed in the interests of local users. We are aware that other commenters are looking for a stronger state presence; our key question is whether resources will come to support any BPL role. LURC's guidance and clarity will be important to avoid any mixed expectations on recreational management."

► Maine Department of Inland Fisheries and Wildlife and Maine Natural Areas Program (pp. 11-12)

Moosehead Recreation Fund (page 116)

MDIF&W recommends that our department also hold a seat on the governing board of the Moosehead Recreation Fund as recommended for establishment by the Commission. Providing public access for recreational angling, hunting, trapping, and non-consumptive wildlife related recreation is at the core of MDIF&W's mission.

Wildlife and Invasive Species Fund (page 117)

As development occurs across the project area, the threat of invasive species to our waters, wetlands and the wild land interface between the built environment and the woodlands that surround the area will dramatically increase. We thank the Commissioners for recognizing the threat invasive species have to both the ecological and economic health of the area by designating funds for the prevention of invasive species introduction.
The administering Departments jointly recommend that revenues from this fund initially be made available for public outreach, prevention and management of:

1. the threat of invasive fish introductions
2. the threat of invasive herpetile and invertebrate introductions
3. the threat of invasive aquatic plant introductions
4. the threat of terrestrial plant introductions

The Departments however would like to reserve the right to reassess on an ongoing basis whether other invasive species issues have arisen....

In order to maximize the impact of the limited funds to be generated by the proposed Wildlife and Invasive Species Fund, the Maine Natural Areas Program staff would like to work pro-actively with the Commission to develop an invasive free landscaping plan for each planned sub-division within the project area. This could be accomplished initially through the long-term planning process and then implemented across the remaining development areas. MDIF&W will work to develop homeowner and angler outreach materials that describe threats associated with fish introductions, and pet / aquarium releases, etc.

Given the real threat invasive species pose to the ecological and economic vitality of the region and the scope of work necessary to safeguard public resources from this increased threat, we ask the Commission to work closely with the Departments as they develop a process to determine final monetary allocation across the three designated funds.

► Maine State Housing Authority (p. 1)

As we understand the amendments, Plum Creek would be: required to meet the employee housing needs generated by the resort developments; allowed to move forward with the second phase of the CEI plan; required to meet the demand for employee housing in the long term development plan; and required to create an Affordable Housing Fund administered by MaineHousing.

We appreciate the interest the Commissioners and staff have shown in the issue of affordable housing and your consideration of our analysis and views. We think that the Commissioners have been particularly bold in attempting to address the needs of the many varied interests involved while always insisting that the best interests of the people of Maine be the highest priority. We also would reiterate our appreciation to Plum Creek for making their consultants available to us to discuss their work as we analyzed it.

We endorse the staff amendments. They effectively and practically address the concerns that we have raised about the need for affordable housing resulting from the proposed development. We are willing to accept and undertake the responsibilities of the proposed Affordable Housing Fund.

STAFF/CONSULTANT DISCUSSION AND RECOMMENDATIONS

► DISCUSSION

Based on comments received, staff/consultants offer the following analysis:

- Regarding comments on the Commission's June 4th amendments that created three distinct, segregated funds -- the "Moosehead Recreation Fund" (MRF), the "Affordable Housing Fund" (AHF) and the "Wildlife and Invasive Species Fund" (WISF) -- instead of the proposed "Community Stewardship Fund" (CSF):

  Only one party -- the Maine Professional Guides Association -- expressed strong opposition to this amendment, arguing that "the original CSF proposal places developing a recreation management plan as its primary mission, as it should." Staff/consultants agree that by abandoning the proposal for one fund whose primary proposed purpose was recreational management, the Commission was indeed rejecting the notion, which was not supported by record evidence, of spending scarce funds toward the undefined and untested concept of recreational management in these circumstances -- wherein the land area that would be involved in this *public or quasi-public* recreational management process was now or would likely in the future be owned or managed by multiple *private* parties, and not a single, public entity that is normally charged with recreational management. Instead, the Commission determined that more productive use of the funds destined for the CSF would be to direct these monies to specific funds charged with delivering specific, discrete outcomes for which there was substantial record evidence of need created by the development proposed in the Concept Plan. In the view of staff/consultants, no information has been presented in comments that should change the Commission's previous conclusion.

- Regarding comments concerning the geographic location in which projects supported by each of the three funds could occur:

  Staff/consultants have always understood that the Commission wanted the expenditures from each of the three funds occur only in the Greater Moosehead region. New language in the recommendation section below clarifies what staff/consultants understand to be the Commission's previous approach.

- Regarding comments calling for expanding the types of projects that can be funded by the MRF to those that would support motorized as well as non-motorized recreation:

  Because the staff/consultants are now recommending that the $1,000,000 contribution by Plum Creek to BPL for the development of hiking trails in the area be repaid over time by the MRF (see Tab 61), thus ensuring that a meaningful amount of MRF monies will go to non-motorized recreation projects, staff/consultants believe that it is appropriate to allow projects that support and enhance motorized outdoor recreation (e.g., signage for snowmobile or ATV trails) to be eligible with other named activities for funding.

- Regarding the appropriate administration and membership of the three funds:

  The Commission received no comments critical of the proposed administrators of the AHF or the WISF. BPL comments demonstrated significant reluctance to administer the MRF due to its limited resources and belief that local administration was more appropriate. Given staff/consultants' recommendation to charge BPL with significant and separate responsibility for planning, constructing and maintaining hiking trails, a lead BPL role in the MRF now seems inappropriate.

  Regarding comments received on membership on the MRF, Plum Creek requested a membership slot for itself, the dam owners, and the "resort owners group." The dam owners also requested a membership slot. Staff/consultants

have no objection to one representative of the dam owners on the MRF given their ownership of or regulatory responsibility for a significant portion of shoreline in the area *and given the previous Commission amendment which placed a landowner on the MRF*. Staff/consultants recognize the real or potential conflict of interest involved in having either the dam owner or the landowner have a slot on the MRF, since these entities could have a direct interest in the outcome of funding decisions by the MRF board. The Commission can either choose to remove both of these entities from the MRF board, or leave it to the MRF board to internally work through its conflict of interest policies.

Staff/consultants do not recommend the Plum Creek-requested change from the landowner representation approach contained in the Commission's June 4th amendments, nor do staff/consultants recommend that a member of a presently nonexistent "resort owners group" have a membership position, based upon staff/consultant's recommendation (*see* Tab 64) on how to handle Plum Creek's objection to inclusion of resort units in the funding fee mechanism for these three funds.

Other comments on membership on the MRF suggested a second slot for outdoor recreation interests, to which staff/consultants have no objection. MDIF&W suggested that it be granted a membership slot, commenting that providing public access for recreational angling, hunting, trapping and non-consumptive wildlife related recreation is "at the core" of its mission. Again, staff/consultants have no objection. MRFC suggested that a member of its steering committee be "included on this board." Given the 30-year life of this fund, staff/consultants do not believe it is appropriate to designate a permanent slot for any one particular interest group.

► RECOMMENDATIONS

Based on the discussion above, staff/consultants offer the following recommendations:

- Regarding the MRF set forth in the Commission's June 4th amendments, change the language to read:

  Moosehead Recreation Fund -- to fund construction and maintenance of BPL and Town of Greenville hiking and biking trails and related needs (e.g., signage, trailheads, parking areas), BPL-owned campsites and campgrounds, BPL and Town of Greenville public boat launches, and projects designed to enhance motorized outdoor recreation, all in either Greenville, Jackman or the twenty-nine townships involved in the Concept Plan. The Fund is governed by a board made up of one representative from BPL , one representative of MDIF&W, one representative from FPL Energy Hydro LLC, *et al.*, one representative from each of the following: Town of Greenville, Town of Jackman, Town of Beaver Cove, Rockwood Village, two local representatives of outdoor recreational interests, and one representative from the landowner owning the highest percentage of acreage of Balance and Legacy easement lands, so long as a single landowner owns 50 percent or more of the acreage. The Fund is administered by an entity chosen by the board of the Fund. The Fund shall have the authority to provide grants to third parties for projects consistent with these purposes.

- Regarding the AHF set forth in the Commission's June 4th amendments, change the language to read:

  Affordable Housing Fund -- to help subsidize construction of affordable housing in appropriate locations in the Greenville-Rockwood-Jackman area. Fund is administered by Maine State Housing Authority and distributed to qualifying projects in the judgment of the Maine State Housing Authority.

- Regarding the WISF set forth in the Commission's June 4th amendments, change the language to read:

  Wildlife and Invasive Species Fund – to help fund loon nesting and other wildlife needs and control the spread of invasive species resulting from Concept Plan development. Fund is administered jointly by MDIF&W, MNAP and Maine DEP. Funds are distributed to qualifying projects in the judgment of these agencies, so long as said projects are located within either the Towns of Greenville or Jackman, or the twenty-nine townships involved in the Concept Plan.

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ADDITIONAL CONCEPT PLAN ELEMENTS:
COMMUNITY STEWARDSHIP FUND: FUNDING FOR CSF ACTIVITIES

COMMENTING PARTIES

- ► Petitioner Plum Creek
- ► Intervenors and Interested Persons
  - Appalachian Mountain Club
  - Maine Professional Guides Association
  - Moosehead Region Futures Committee
- ► Governmental Review Agencies
  - Bureau of Parks and Lands
  - Maine Department of Inland Fisheries and Wildlife and Maine Natural Areas Program
  - Maine State Housing Authority

(p. 62)

ii. Funding of MRF:

... As mitigation for impacts of development in the Concept Plan Area, Plum Creek is willing to form and fund the MRF for the purpose of satisfying all recreation mitigation related to the Concept Plan, specifically including repayment of not less than 20.0% of the Replacement Trails Loan annually....

Land adjacent to the Concept Plan is within a Federal Energy Regulatory Commission (FERC) boundary. FERC does not have jurisdiction over LURC proceedings but does have jurisdiction over land owners within the FERC boundary, including FPL. At the direction of FERC, FPL and other dam owners pay to maintain public recreational facilities which may be impacted by development of the Concept Plan area. As a matter of equity to these neighbors, Plum Creek has agreed that if FERC determines that Plum Creek's development in the Concept Plan Area causes a need for improvements, expansions, or construction of additional public access facilities in or adjacent to the Plan Area, then it is reasonable and fair for Plum Creek (rather than the Dam Owners) to mitigate for these recreational impacts.

The community will benefit from Plum Creek's mitigation to recreational impacts even if FERC, rather than LURC, BPL or another agency, requests it. MRF funding for improvements to and expansion and construction of public access facilities must be available to make the mitigation feasible without regard to what agency determines that the mitigation is necessary so long as the mitigation is attributable to development of the Concept Plan area. To determine that MRF funds cannot go to FERC required recreation mitigation would be tantamount to further increasing Plum Creek's recreational mitigation obligations. The MRF charter must provide that recreational needs identified by FERC due to development in the Concept Plan area shall be given equal consideration for funding by the governing board. Plum Creek proposes that 60% of the funds that would have been allocated to the CSF should be allocated to the MRF.

(p. 63)

ii. Funding of AHF. Plum Creek is actively partnering with Coastal Enterprises Inc., (CEI) a Maine nonprofit community development corporation to address issues of affordable workforce housing in the Greenville, Jackman and Rockwood areas of the Concept Plan. Plum Creek has committed both cash and land to CEI. Specifically, Plum Creek has agreed to donate 100 acres to be used by CEI for green, affordable housing in the Moosehead Lake region. Plum Creek has funded $800,000 in a below market interest rate loan to CEI and has agreed to fund an additional $950,000 within 30 days of Concept Plan Approval. (Concept Plan Approval means approval by LURC on terms satisfactory to Plum Creek, resolution of all appeals to Plum Creek's satisfaction and/ or expiration of all appeal periods without appeal.) CEI believes these funds and land will leverage an additional $1.750 million of additional CEI financing. Based upon CEI's track record, they expect that by revolving and recycling these loan funds, they will achieve a total development impact of at least $9 million. Given the foregoing, Plum Creek proposes that 30% of the funds that would have been allocated to the CSF, rather than 45%, should be allocated to the AHF. The mitigation described in this paragraph should be a cap on workforce and affordable housing mitigation for development of the Concept Plan area.

(p. 64)

ii. Funding of WISF. Plum Creek agrees with the Commission's proposal that 10% of the funds that would have been allocated to the CSF should instead be allocated to the WISF

(pp. 64-65)

[Regarding distribution of funds:]

Plum Creek agrees that MRF, AHF and WISF should not be required to distribute all funding received by them in any year and that each fund shall be entitled to carry over funds from year-to-year provided that a decision not to spend money in mitigation in any year cannot be used as a reason to seek additional mitigation from Plum Creek or another owner of any part of the Concept Plan area. Consistent with comments above regarding the Replacement Trails Loan, the charter for the MRF should also provide that to the extent funds are received by MRF, the minimum annual payment on the Replacement Trails Loan shall be made annually. We also agree that the FRF, AHR and WISF charters should allow for amending the initial allocation between the three funds. LURC's consent must be a precondition to reallocating the shares or funds to any of the three funds. Plum Creek agrees that in any year, MRF, AHF and WISF shall have the ability to adjust funds between the three, provided, however, distribution of any MRF funds to AHF or WISF or to any project outside MRF's charter to mitigate for impacts to recreation in the Concept Plan area and municipalities adjacent to the Concept Plan Area shall require Plum Creek's prior consent.

(p.68)

[Regarding inclusion of sale of resort lots in funding mechanism:]

Plum Creek established the Community Stewardship Fund (CSF) to address impacts associated with the entire Concept Plan. The assessment amount allocated across the 975 lots included consideration of resort zones. Accordingly, Plum Creek does not agree with the recommendation that individually owned resort accommodation units be assessed again in the future by this mechanism. Further, resorts have wide varieties of ownership structures for a wide variety of units. For example, what may appear to most as a hotel unit may actually and individually owned condominium which has been placed in a rental pool. The ownership structure of a unit does not have a direct bearing on potential development impact, locally or regionally. However, the resorts will address any issues related to recreation, housing and wildlife issues, based on the specific design and individual character of a particular resort and that is not yet known.

COMMENTS FILED BY INTERVENORS AND INTERESTED PERSONS

- Appalachian Mountain Club (p. 11)

  Division of the Community Stewardship Fund into Three Discrete Funds

  ...AMC also applauds the Commission for prohibiting Plum Creek from tapping into that funding source to satisfy obligations under its agreement with the Dam Owners. AMC Post-Hearing Reply Brief at 4-6 Commission-Generated Amendments at 117.

- Maine Professional Guides Association (pp. 2-3)

  Developing a budget is best left to the CSF Board itself. Setting an arbitrary formula in advance will serve to hamper proper management of the funds in terms of meeting the CSF's mission. In addition, the amounts proposed for recreational management appear much too low. The proposed formula does not appear to consider that there are already many governmental funds and programs available to assist communities and developers to provide affordable housing.

► Moosehead Region Futures Committee (pp. 10-11)

Distribution of funding from sales of residential dwelling / resort accommodation units:

Since the submission of the original version of Plum Creek's proposal in 2005, the MRFC Steering Committee has advocated for the inclusion of affordable housing. However, we believe that funding for affordable housing should be provided by other mechanisms than assessments on sales of residential dwelling / resort accommodation units. We believe that all of the funding from this source will be required to meet increased recreational needs and mitigate adverse impacts on the resources that support nature tourism and recreation. The LURC-generated amendments allocate 45% of funding from housing unit sales to the Affordable Housing Fund, 45% to the Moosehead Recreation Fund, and 10% to the Wildlife and Invasive Species Fund (LURC-generated amendments, June 4, 2008, page 117). Instead, we recommend the following allocation: 75% to the Moosehead Recreation Fund and 25% to a Natural Resource Protection Fund. The latter fund would cover the needs addressed by the LURC-proposed Wildlife and Invasive Species Fund (loon nesting, other wildlife needs, invasive species control) but could also potentially be used to address other natural resource needs (e.g., water quality).

Furthermore, funding from housing unit sales should primarily be directed toward projects in areas most heavily impacted by Plum Creek's development. Most of the impacts on recreation and natural resources will occur in Unorganized Territory, and thus most of the funding should go to projects in Unorganized Territory. The Town of Greenville should not receive a disproportionate amount of available funding.

COMMENTS FILED BY GOVERNMENTAL REVIEW AGENCIES

► Bureau of Parks and Lands (pp. 6-9)

Finally, we remember oral testimony on the importance of local institutions such as land trusts, which today inadequately serve the region. BPL's testimony was that state responsibilities greatly diminish where local non-profit capacity exists. We recommended local institutions, precisely NOT a state-administered fund. At least $100,000 of available funds (indeed a portion of lent early funds, or a new exaction from Plum Creek) should be advanced to an existing regional entity for the purpose of creation of new local non-profit institutions or subsidiaries (a land trust or outdoor club). At least $100,000 of available funds (lent, new, whatever) should be advanced to strengthen existing local non-profit recreation institutions. For motorized recreation, snowmobile clubs are obvious recipients (propose $50,000). For non-motorized recreation, an obvious recipient is the Northern Forest Canoe Trail, Inc., noting testimony about the impact on remote paddling in the region (propose $50,000).

TIFS and Green Infrastructure

There are many stages of the proposed development. We are now at an early stage (Concept Plan). Later stages will involve additional permits, additional mitigation, additional tools brought to the table. BPL has earlier noted the strength of some new tools (enhanced recreational review of resorts and subdivisions). We also note the strength of proposals for MDOT bike paths in the region. We note the demand on BPL for planning resources to comment upon, and coordinate with, various parties on such future stages.

Importantly, though, there is reason to expect that someone will propose to apply Tax Increment Financing tools (TIFs) to future development stages. The Maine Legislature has recently and will in the near future struggle with the use of TIFs in unorganized territories, where economic development and conservation and recreation are clearly linked. TIF revenues may not legally be used today for conservation and recreation unless such goals are an express part of a required mitigation package. We thus ask LURC in its findings to declare recreation management and recreation development as a general mitigation expectation of the Concept Plan, such that future TIF revenues may under current statute be deposited into the Moosehead Recreation Fund for regional use and non-profit and governmental support. I

vaguely remember other language in the TIF statutes about multi-county economic development strategies. LURC should direct staff to review that language as well for possible setting of the stage for effective use of TIF funds. Similar tools can be constructed to assist County government in any new road responsibilities, noting that counties are the dominant expected players in any expected TIFs.

The Commission received testimony on the expected tax benefit to counties under the Concept Plan, with the expected demand for services on BPL with no direct tax expectations by BPL. TIFs can both shelter tax revenues, for county distribution, or be a construct for a tax break for the developer. BPL hopes that future leaders will cry foul along with BPL if County Commissioners in the future provide tax breaks to Concept Plan developers (wind turbines, hotels, whatever) while leaving conservation and recreation stewardship opportunities unattended.

Finally, repeated recent studies have shown the unfunded need for Green Infrastructure, including capital investments in state parks, to enhance rural Maine's economic development potential. Piscataquis County and regional and statewide economic development interests have been leaders in these discussions. Yet oddly the testimony to LURC from such interests on such subjects has been minimal. As resort and wind developments under the Concept Plan lands move forward, we expect more proactive engagement from such interests to leverage opportunities for specific and financially support even further advancement of long-studied and long-stated nature-based tourism goals of the region.

► Maine Department of Inland Fisheries and Wildlife and Maine Natural Areas Program (pp. 11-12)

Projected revenues from the sale of homes to be dedicated to the Wildlife and Invasive Species Fund is estimated at an annual average of $15,000 with the understanding that it will take a number of years to generate even this level of funding. In order to provide context for the Commission, funding at this level, based on existing MDEP monitoring experience, would pay for only a single boat ramp monitor 3 days a week from mid-May through mid-October in a given year. The Maine DEP currently distributes funds throughout the state to assist with the boat ramp monitoring, but has received far more requests for funds than current budgets support.

► Maine State Housing Authority (p. 1)

We endorse the staff amendments. They effectively and practically address the concerns that we have raised about the need for affordable housing resulting from the proposed development. We are willing to accept and undertake the responsibilities of the proposed Affordable Housing Fund.

STAFF/CONSULTANT DISCUSSION AND RECOMMENDATIONS

► DISCUSSION

Based on comments received, staff/consultants offer the following analysis:

- Regarding comments on (1) whether funding from the Moosehead Recreation Fund (MRF) should be allocated to fulfilling Plum Creek's responsibilities to FPL, (2) whether a certain amount of "first-in" MRF receipts from lot sales should be directed to Plum Creek, to reimburse it for its grant to BPL to construct hiking trails, and (3) whether the Commission should adopt additional amendments that otherwise restrict or direct where monies in the three funds may be used:

  Plum Creek has argued that the Commission's June 4th *per se* prohibition on the Moosehead Recreation Fund providing funding to FPL to cover expenses incurred from additional public use of its facilities (as a result of the Plum Creek development) makes no sense, since the additional expense will be solely caused by additional public recreation use of certain water bodies on which FPL happens to have FERC-required public recreation obligations. Thus, any funds that went to FPL from the MRF would be based on a legal obligation from FERC to meet increased public use of public facilities. Staff/consultants believe this argument has merit. However, the Commission is reminded that its June 4th amendment on this issue was occasioned by Plum's Creek's earlier proposal in which the MRF would first have to use its monies, to an unlimited degree, to meet all obligations that Plum Creek incurred to FPL, regardless of the magnitude of these costs or the relative benefit to the public vs. other needy recreation projects. Staff/consultants now believe that changing the Commission's amendment to require the MRF to provide compensatory monies to FPL for development-caused burdens on FPL that are imposed by FERC is reasonable, but only so long as no more than 20% of MRF funds are used for this purpose in any one year (and with aggregation allowed to provide sufficient lump-sum funding of a costly project), and so long as an absolute cap of $300,000 in total funding is imposed, to ensure that the MRF's funding abilities are not overwhelmed with FPL-related projects in the short or long-term.

  Plum Creek has stated that it should receive a "repayment of not less than 20% of the Replacement Trails Loan annually" as an interest-free repayment of the $1,000,000 up-front payment it would provide to BPL for the planning, construction and/or maintenance of hiking trails in the Concept Plan area. Staff/consultants understand this to mean that (1) Plum Creek shall annually receive the first $200,000 in funds deposited into the MRF; (2) in the event that less than $200,000 is deposited annually into the MRF, Plum Creek shall receive all funds deposited; and (3) this front-end payment to Plum Creek from the MRF shall cease entirely upon receipt by Plum Creek of $1,000,000.00 from the Fund. Staff/consultants agree with this comment, given the record evidence that additional hiking opportunities are needed in the area. For further discussion of this matter, see Tab 61 regarding the amendments to the Peak-to-Peak hiking trail.

  BPL has suggested that the MRF (1) allocate $100,000 to "an existing regional entity for the purpose of creation of new local non-profit institutions...", that (2) "For motorized recreation, snowmobile clubs are obvious recipients (propose $50,000)", and (3) "For non-motorized recreation, an obvious recipient is the Northern Forest Canoe Trail...(propose $50,000). If BPL's statements are merely intended to illustrate potential unmet recreation needs in the Concept Plan area for which MRF monies could be usefully directed, staff/consultants have no opinion on BPL's statements, as the record on these needs has not been developed in this proceeding. Thus, staff/consultants do not believe it would be appropriate for the Commission by amendment to the Concept Plan to direct how the MRF should allocate its funds beyond the front-end repayment for hiking trails noted above.

- Regarding comments addressing the percentage distribution of monies from lot sales that was set forth in the Commission's June 4th amendments (Moosehead Recreation Fund - 45%, the Affordable Housing Fund - 45%, and the Wildlife and Invasive Species Fund - 10%):

  A few commenters have argued that the MRF and the WISF should have more of a percentage distribution going to these two funds, and less to the AHF. These arguments seemingly have been based on either anticipated unmet needs of the MRF and the WISF or the asserted (but not demonstrated) availability of alternative and sufficient funds for affordable housing. Staff/consultants restate here the reason why the formula adopted by the Commission on June 4th was originally recommended by staff/consultants.

  First, as originally proposed, the Community Stewardship fund was to allocate 50% of its funding for recreation enhancement, and 50% to meet local community needs. Record evidence demonstrated unanimous agreement that (a) affordable housing was the principal community need that would arise from, and be only partially otherwise met by other provisions in the Concept Plan (i.e., the Plum Creek loan and grant of land to CEI), and (b) the gap between the projected need for housing and the available resources was significant, according to the expert testimony of the Maine State Housing Authority. Thus, a Commission amendment that allocated 50% of the funds to the MRF and 50% to the AHF would have been entirely consistent with applying record evidence to the original concept of funding community needs under the Community Stewardship Fund. In addition, record evidence also demonstrated that a more modest need will exist for monies to deal with specified wildlife mitigation (e.g., loon nests) and invasive species education and monitoring. Thus, the 45% / 45% / 10% allocation was recommended by staff/consultants and adopted by the Commission. While certain parties expressed opinions as to the monies one fund or another should receive, no new, substantial information has been presented in the comments to cause staff/consultants to recommend a different allocation formula based on record evidence.

- Regarding comments on use of carry-over of unused monies and redistribution between funds:

  Plum Creek has stated that there should be three further conditions beyond those stated in the Commission's June 4th amendments on the abilities of the three funds to carry-over unspent funds and to re-allocate monies between the funds: (1) that the front-end payment Plum Creek for the hiking trails funds provided to BPL must be made until those payments are complete; (2) with LURC's consent, a reallocation of the percentage each fund receives should be permitted over time; and (3) a redistribution of funds in any year from the MRF to either the AHF or the WISF should require the consent of Plum Creek.

  Staff/consultants agree with the first comment.

  Staff/consultants conditionally agree with the second comment, as follows: The allocation formula was established based on record evidence of the needs created by Plum Creek's development. Staff/consultants understand that each of these funds will likely be able to productively use more money to meet each fund's purpose than will be generated by lot sales. However, should it develop over the course of time that, on an ongoing basis, one or two of the funds is receiving more monies than required to meet the need for which it was established, reallocation of the funding formula by LURC seems appropriate.

  Regarding Plum Creek's third comment, staff/consultants disagree. Decisions on whether MRF monies are redistributed to another fund should be made by the board of the fund and not by one member thereof.

- Regarding comments by Plum Creek in opposition to inclusion of lot sale assessment for resort accommodation units that are individually owned in the funding mechanism:

  Staff/consultants understand that resorts have wide varieties of ownership structures for which a flat formula of 2% the lot sale price and ½ % of a resale price may be inappropriate. Plum Creek suggests that it does not object if the Commission amendments require the resorts to "address any issues related to recreation, housing and wildlife

issues, based on the specific design and individual character of a particular resort," but that this impact is "not yet known."

Staff/consultants revised recommendation, below, requires the resort developer as part of the long-term development plan to demonstrate to the Commission that the resort will address, financially or otherwise, the recreation, housing and wildlife impacts created by the resort development.

► RECOMMENDATIONS

Based on the discussion above, staff/consultants offer the following recommendations:

- Regarding the Commission's June 4th amendment concerning the prohibition on funding to FPL, change amendment to state:

  The articles of incorporation of the MRF shall provide that: (1) the MRF is required to financially assist FPL (or a successor owner of FPL lands on Brassua Lake, Indian Pond and Moosehead Lake) but only for those obligations legally required of FPL as ordered by the Federal Energy Regulatory Commission to address additional public recreation uses of certain water bodies caused by development in the Concept Plan development areas; and (2) in no case shall the MRF requirement to pay FPL or its successor exceed (a) on an annual basis, a sum of money that represents 20% of those MRF revenues obtained from lot sales in any one year (with aggregation of annual sums allowed to provide sufficient one-time funding for a costly project), and (b) on an absolute total basis, $300,000 in 2009 dollars.

- Regarding the Commission's June 4th amendment on distribution of lot sale monies to the three funds on the stated percentage basis, no change to June 4th amendment except to add the following sentences at the end of the bullet that states:

  From the MRF, Plum Creek shall annually receive the first $200,000 in funds deposited into the MRF. In the event that less than $200,000 is deposited annually into the MRF, Plum Creek shall receive all funds deposited. This front-end payment to Plum Creek from the MRF shall cease entirely upon receipt by Plum Creek of $1,000,000.00 from the Fund.

- Regarding the Commission's June 4th amendment on direction to the staff/consultants and legal counsel to develop language on fund reservation and donation to another fund, add a third clause to this bullet that states:

  (3) petition LURC to change the funding allocation between the three funds based on a showing that on an ongoing basis, one or two of the funds is receiving more monies than required to meet the need for which it was established.

- Regarding the Commission's June 4th amendment on inclusion of individually-owned resort accommodation units in the assessment of a fee under certain circumstances, change the language to read as follows:

  The long-term development plan for a resort must include either: (1) a showing that the resort and all activities associated therewith will not contribute to the recreation, affordable housing and wildlife needs of the Moosehead Lake region beyond the boundaries of the development zone containing the resort, or (2) an enforceable plan, financial and/or otherwise, whereby the resort will address the recreation, affordable housing and wildlife needs that will arise beyond the boundaries of the resort zone as a result of the resort and all activities associated therewith. Such a plan could include an appropriate level of annual contribution to one or more of the three funds.

65

ADDITIONAL CONCEPT PLAN ELEMENTS
LAND DONATIONS TO BPL

COMMENTING PARTIES

- ► Governmental Review Agencies
  - Bureau of Parks and Lands

► Bureau of Parks and Lands (pp. 1-3)

[See previous presentation on general limits of BPL capacities at Tab 21.]

STAFF/CONSULTANT DISCUSSION AND RECOMMENDATIONS

► DISCUSSION

Based on comments received, staff/consultants offer the following analysis:

No party other than BPL addressed this Commission amendment at all, and BPL addressed it only indirectly in its introductory presentation, when describing the multiple responsibilities BPL was being asked to assume in implementation of the Concept Plan. BPL stated neither support nor opposition to the opportunity to acquire these 50 acres.

► RECOMMENDATIONS

No recommended changes to these June 4th Commission-generated amendments.

66

ADDITIONAL CONCEPT PLAN ELEMENTS:
AFFORDABLE HOUSING

COMMENTING PARTIES

- ► Petitioner Plum Creek
- ► Governmental Review Agencies
  - Maine State Housing Authority

COMMENTS FILED BY THE PETITIONER

(p. 64)

ii. Funding of AHF. Plum Creek is actively partnering with Coastal Enterprises Inc., (CEI) a Maine nonprofit community development corporation to address issues of affordable workforce housing in the Greenville, Jackman and Rockwood areas of the Concept Plan. Plum Creek has committed both cash and land to CEI. Specifically, Plum Creek has agreed to donate 100 acres to be used by CEI for green, affordable housing in the Moosehead Lake region. Plum Creek has funded $800,000 in a below market interest rate loan to CEI and has agreed to fund an additional $950,000 within 30 days of Concept Plan Approval. (Concept Plan Approval means approval by LURC on terms satisfactory to Plum Creek, resolution of all appeals to Plum Creek's satisfaction and/ or expiration of all appeal periods without appeal.) CEI believes these funds and land will leverage an additional $1.750 million of additional CEI financing. Based upon CEI's track record, they expect that by revolving and recycling these loan funds, they will achieve a total development impact of at least $9 million. Given the foregoing, Plum Creek proposes that 30% of the funds that would have been allocated to the CSF, rather than 45%, should be allocated to the AHF. The mitigation described in this paragraph should be a cap on workforce and affordable housing mitigation for development of the Concept Plan area.

COMMENTS FILED BY GOVERNMENTAL REVIEW AGENCIES

- Maine State Housing Authority (p. 1)

  As we understand the amendments, Plum Creek would be: required to meet the employee housing needs generated by the resort developments; allowed to move forward with the second phase of the CEI plan; required to meet the demand for employee housing in the long term development plan; and required to create an Affordable Housing Fund administered by MaineHousing.

  We appreciate the interest the Commissioners and staff have shown in the issue of affordable housing and your consideration of our analysis and views. We think that the Commissioners have been particularly bold in attempting to address the needs of the many varied interests involved while always insisting that the best interests of the people of Maine be the highest priority. We also would reiterate our appreciation to Plum Creek for making their consultants available to us to discuss their work as we analyzed it.

  We endorse the staff amendments. They effectively and practically address the concerns that we have raised about the need for affordable housing resulting from the proposed development. We are willing to accept and undertake the responsibilities of the proposed Affordable Housing Fund.

STAFF/CONSULTANT DISCUSSION AND RECOMMENDATIONS

► DISCUSSION

Based on comments received, staff/consultants offer the following analysis:

- Regarding the Commission's first two amendments to Affordable Housing:

  No comments were received on these two amendments.

- Regarding the Commission's third amendment to Affordable Housing, requiring a demonstration of adequate employee housing on-site or off-site as part of long-term development plans for resorts:

  It is not clear whether Plum Creek's comment that "the mitigation described in this paragraph should be a cap on workforce and affordable housing mitigation for development of the Concept Plan area" is intended as an objection to the Commission's third amendment. Staff/consultants are unaware of any new record information that should cause the Commission to revise or eliminate this third amendment. In fact, the record is clear and uncontested that implementation of the arrangements with CEI and the use by the Maine State Housing Authority of funds in the Affordable Housing Fund will not be sufficient to meet the projected affordable housing needs created by Plum Creek's development activities under the Concept Plan.

- Regarding the Commission's fourth amendment to Affordable Housing (creation of and funding for the Affordable Housing Fund):

  See Tabs 63 and 64, wherein both comments to the Commission's amendments creating an Affordable Housing Fund, and staff/consultant discussion and recommendations thereto, are presented.

► RECOMMENDATIONS

No recommended changes to these June 4th Commission-generated amendments.

67

CONCEPT PLAN IMPLEMENTATION MECHANISMS: CONCEPT PLAN AMENDMENT

AMENDMENT FOLLOWING SALE OF LOTS

COMMENTING PARTIES

- ► Petitioner Plum Creek
- ► Intervenors and Interested Persons
  - Native Forest Network

COMMENTS FILED BY THE PETITIONER

(p. 65)

Plum Creek proposes the following language, “Plum Creek will retain the exclusive ability on behalf of landowners in the Concept Plan area to consent to amendments to the Concept Plan (Reserved Right). The Commission agrees to permit Plum Creek, in its discretion, to assign the Reserved Right to a single entity comprised of one or more owners of the Concept Plan area. An assignment of Reserved Right is effective only when a fully executed copy is delivered to the Commission.”

COMMENTS FILED BY INTERVENORS AND INTERESTED PERSONS

► Native Forest Network (p. 7)

[Regarding general concept plan pros:]

- Minimizes power of homeowners associations to influence allowed activities

STAFF/CONSULTANT DISCUSSION AND RECOMMENDATIONS

► DISCUSSION

Comments from parties on this topic present no new information that would cause staff/consultants to reconsider the June 4, 2008 Commission-generated amendments. Staff/consultants view the development of language detailing assignments and terms of assignment as a second tier drafting issue.

► RECOMMENDATIONS

No recommended changes to this June 4th Commission-generated amendment.

68

CONCEPT PLAN IMPLEMENTATION MECHANISMS:
COVENANTS, CONDITIONS AND RESTRICTIONS APPLICABLE TO SUBDIVISIONS

COMMENTING PARTIES

- ► Petitioner Plum Creek
- ► Intervenors and Interested Persons
  - Native Forest Network

(p. 71)

[Regarding scenic impacts]

On page 126 it is recommended that there are elements uniquely appropriate to be included in the CCRs and therefore need not also be restated verbatim in Chapter 10 addendum. These should be required elements of the CCRs for each subdivision. One of these elements is Section 2.2.12, Minimizing Visibility of Structures on Non-Shorefront Lots (described in footnote 106, page 126). It is recommended that it is not necessary to include this separately in the Chapter 10 addendum, but given its relevance to minimizing scenic impacts, it should be a required element of the CCRs. Plum Creek agrees, however, it's inclusion will not by itself by able to be considered "no less protective than the Chapter 10 provision". These elements (footnote 106, page 126) are complimentary to, and not a substitute for, what is recommended to be included in Chapter 10. There should not be a requirement to duplicate, or mirror, chapter 10 in the CCRs simply to qualify as "no less protective. Plum Creek recommends that the language in the recommendation be modified to indicate compatibility with, not equability with, Chapter 10 provisions.

[Regarding homeowner association modifying CCRs]

We agree that certain CCR provisions may function like conditions to LURC approval. Those select provisions should be identified and agreed upon and any subsequent material alterations to those provisions—including repeal—should be subject to LURC's prior approval. On the other hand, many of the CCR terms will not be tantamount to LURC conditions and the associations should be free to modify or revoke those provisions without LURC's prior approval. Consider that CCRs cover a vast array of topics—from what constitutes a common expense, to voting procedures, and remedies of the association in the event of default. Technological changes, changes in custom and changes in laws are a few examples of external changes that might make changes to the CCRs necessary or prudent. LURC should not be burdened with considering every change to CCRs and the association members should be free to make changes to terms not material to LURC if the association chooses to do so. It should be relatively straightforward for LURC and Plum Creek to identify the specific instances where LURC's prior approval is needed as opposed to those changes that they do not need or want to be involved with.

(p. 72)

[Regarding liability for violations]

We assume that the proposal to hold homeowners associations liable for violations on common property within the subdivision is intended to apply to section 2 of the CCRs regarding protective covenants. We agree that the association should be responsible for enforcing the protective covenants, complying with other specifically enumerated obligations--like the inspection and reporting obligations set for in the sample CCRs Section 2.2.11-- and for violations of the CCRs on the common areas that the association causes (for instance, if the association causes a violation of 2.1.9 by planting an invasive species on common area). As to privately owned areas, homeowners associations should be responsible only for the good faith enforcement of the CCRs. Short of a violation of this duty of good faith enforcement, the association should not be liable for any violations of CCRs occurring on privately owned lands.

(p. 72)

[Regarding minimum required CCR elements]

Agreed, subject to agreement on the list.

► Native Forest Network (p. 7)

[Regarding general concept plan pros:]

- Minimizes power of homeowners associations to influence allowed activities (p 119, 123-124)
- LURC has say in approval of land inspector (p 123) (although they need to add ability of Public to voluntarily offer this service and submit their findings in addition to land inspector, see NFN PHB "alternative vision")

STAFF/CONSULTANT DISCUSSION

► DISCUSSION

Based on comments received, staff/consultants offer the following analysis:

- Regarding scenic impact standards as a required element of the CCRs:

  Staff/consultants agree with Plum Creek that provisions in the CCRs are complementary to, and not a substitute for, scenic impact standards that may become required elements of the Chapter 10 addendum and that it is not necessary to include such required elements in the CCRs.

- Regarding homeowner associations modifying CCRs:

  Staff/consultants agree that LURC should not be burdened with considering changes to the CCRs that association members may choose to make that are not material to LURC. Staff/consultants view the identification of CCR provisions requiring LURC's approval prior to modification as a second tier issue.

- Regarding inspection and reporting:

  To the extent members of the public observe violations of LURC standards arising from development within the Concept Plan area, they may report those violations to LURC, just as they may do so today through the jurisdiction. Staff/consultants do not believe this needs to be addressed in the Concept Plan language.

► RECOMMENDATIONS

No recommended changes to these June 4th Commission-generated amendments.