

**TESTIMONY OF C. DIANE BORETOS, P.W.S.
REGARDING ZP 707
PLUM CREEK PETITION FOR REZONING
MOOSEHEAD REGION**

**PRESENTED TO THE
MAINE LAND USE REGULATION COMMISSION**

August 22, 2007

1. I hold a Bachelor of Science degree from the University of Massachusetts at Amherst. I am certified as a Professional Wetland Scientist (# 0001088) through the Society of Wetland Scientists certification program. I am also certified in the Habitat Evaluation Procedure (HEP) through the U.S. Fish and Wildlife Service.
2. I am employed as the principal wetland biologist of Call of the Wild Consulting and Environmental Services in Sangerville, Maine. I have been active in the field of wetland and wildlife biology since 1981.
3. My prior employment includes a 6-year term as an environmental analyst for the Massachusetts Department of Environmental Protection Division of Wetlands and Waterways, Southeast Regional Office, and an 8-year term as conservation staff for several municipalities. As an environmental analyst, municipal staff agent and as principal biologist with Call of the Wild Consulting I have provided expert testimony on wetland and wildlife issues related to development projects ranging from single family dwellings to trans-state gas lines.
4. Since 2005, I have been conducting wildlife tracking programs in the Moosehead Lake region. The species I have tracked in this region include Canada lynx (*Lynx canadensis*), gray wolf (*Canis lupus lycaon*), and American marten (*Martes americana*).
5. I have reviewed the original Plum Creek application to LURC and portions of the revised application, including two Natural Resource Evaluations prepared by Woodlot Alternatives.
6. I also reviewed the following information in preparing my testimony.

The Federal Register/Vol.70, No. 216/Wednesday, November 9, 2005/Proposed Rules

Concept Plan for Plum Creek's Land in the Moosehead Lake Region, April 2007

Questions and Answers regarding the Critical Habitat Proposal for Canada Lynx, U.S. Fish and Wildlife Service 2006

Canada Lynx, Species fact sheet, Maine Department of Inland Fisheries and Wildlife, 2003.
A final report of Canada Lynx (*Lynx canadensis*), snow-tracking surveys in the Western Mountains (North), Central Mountains and the Western Foothills (North) Ecoregions in 2005, Allen Starr, Jennifer Vashon, and Shannon Crowley. Maine Department of Inland Fisheries and Wildlife. June 2005.

Maine's Endangered and Threatened Wildlife, Mark McCullough, Charlie Todd, Beth Swartz, Phillip de Maynadier, Heather Givens. Maine Department of Inland Fisheries and Wildlife. 2003.

Maine Amphibians and Reptiles, edited by Malcolm Hunter, Aram J.K. Calhoun, and Mark McCullough. University of Maine Press. 1999.

7. Plum Creek has not met its burden of proof in demonstrating that it can and will protect the natural resources of the Moosehead Lake region. Plum Creek's habitat evaluations, prepared by Woodlot Alternatives, were good landscape-scale, preliminary surveys. However, these evaluations only focused on identifying the presence of a few specific bird species, deer yards, and wading and waterfowl habitat. In addition, the field surveys were only done during one season and on 1-2 day visits. Significant wildlife habitat features such as significant corridors for large roaming mammals (e.g., Canada lynx, gray wolf, mountain lion, black bear and mustelids) have not been addressed. Moosehead Lake is approximately 28 miles in length on its north/south axis. Because of Moosehead Lake's location in the landscape, when the Lake is frozen, it may be part of a significant east/west wildlife corridor. Lakes are often used as corridors by mammals because of where they are in relation to other habitats and because of the ease of travel on them. Ridges such as Blue Ridge and Misery Ridge are frequently used as corridors by wild canines and felines. The development near riparian habitat associated with Long Pond and Indian Pond will adversely impact waterfowl and passerine utilization of these areas, as well as of those mammals that use riparian areas as corridors (e.g., river otter, mink). The human disturbance factor associated with the proposed residential and commercial development on both the east and west side of Moosehead Lake and the increased potential for vehicle mortality all along Route 6/15 and the Lily Bay Road will have an adverse impact on wildlife utilizing these corridors in both the short and long term. In addition, the development on both sides of Moosehead Lake represents actual loss of significant corridor features. The project and its associated adverse impacts may become a significant barrier for wildlife travel on approximately 58 miles of Moosehead Lake's shoreline.

8. Significant wildlife habitat features such as heron rookeries, passerine breeding/rearing habitat, denning sites for black bear and bobcat have not been addressed by Plum Creek. Vernal pools within the areas proposed for development are obligate habitats for species such as moles, salamanders and many species of invertebrates. These areas have not been thoroughly addressed in the habitat evaluations.

9. Almost the entire proposed development is within the area identified by the U.S. Fish and Wildlife Service under the Federal Endangered Species Act Regulations as

“proposed critical habitat” for Canada lynx, please see the attached map for Unit 1 in the Federal Register. The U.S. Fish and Wildlife Service made the decision to exclude Unit 1, which represents lynx habitat in the State of Maine in the November 2006. This decision is being reviewed as a result of a congressional investigation. Irrespective of the final decision on critical lynx habitat, in my professional opinion, there is a high likelihood that development as proposed will result in a “taking” under the Federal Endangered Species Act.

10. In order to identify significant wildlife corridors within the proposed concept plan, a comprehensive snow-tracking survey should be performed by a qualified biologist, for all of the areas proposed for development, including conducting a tracking survey on a north/south transect for the length of Moosehead Lake. A four-season track and sign survey should also be performed on proposed development areas and adjacent land. Also, a passerine bird species breeding survey should be conducted during the entire length of the breeding season. All of these surveys should identify and map all significant wildlife habitat features. Adverse impacts and/or losses of significant features should be quantified in a detailed wildlife habitat evaluation.

11. All of the proposed development areas and adjacent land should be surveyed for vernal pool habitats using the Department of Environmental Protection ‘s Chapter 335: Significant Wildlife Habitat, Section 9 Regulations. Identified vernal pools should then be reported to the Department of Environmental Protection.

12. The applicant should be required to identify potential stream crossings and/or wetland alterations and directed to file with the Army Corps of Engineers for a permit under the Clean Water Act. This project will need an Army Corps permit and formal review by the U.S. Fish & Wildlife under the Endangered Species Act.

To: "Aga Pinette" agnieszka.pinette@maine.gov

From: "Al Manville" albertsandy@verizon.net Albert_Manville@fws.gov, Resident, West Shore Road Association (WSRA), Somerset Game Sanctuary, Sapling Township, ME 04478, and recent Past President, WSRA

August 16, 2007

ISSUE: Plum Creek's proposal to commercially develop in Somerset Game Sanctuary, Route 6/15 Corridor, Somerset County, Maine.

SUBJECT: Response to questions raised by Aga Pinette, Senior Planner, LURC, on August 7, 2007, to George Bakajza, resident and member of the West Shore Road Association, located within the Somerset Game Sanctuary, Somerset County.

QUESTION 2a: "Are you and/or others signing the petition intending to make a legal argument to LURC that LURC is legally barred by the 1933 law [Chapter 134, An Act Establishing a Game Sanctuary in Piscataquis and Somerset Counties, March 20, 1933, p. 265] from allowing the sanctuary property to be rezoned as requested by Plum Creek because the development there would constitute a de facto "killing" or "destruction" of any "wild animal or bird within the limits"? When will that legal argument be presented to LURC?"

Q. 2a RESPONSE: While I am a Federal wildlife biologist, I am submitting these comments as a private citizen. However, because this proposed development will almost certainly impact State and Federal trust species, LURC needs to be aware of legal wildlife issues that will be raised if they should allow Plum Creek to commercially develop within the Sanctuary.

Plum Creek's preliminary proposal to develop within the Sanctuary at least 125 lots (of which 20 will be shorefront lots), and commercially develop at least 177 acres of forestland is extremely troubling. The development calls for such things as commercial boat launches, retail and convenience stores, gas stations, laundromats, offices, mineral exploration and processing (the Misery Quartzite Unit, Moose River Group of minerals is found within the Sanctuary, a potentially valuable resource), waste-water management facilities, a huge increase in housing, and other uses. If permitted, the development would clearly result in violation of the 1933 statute resulting from the unauthorized "take" of wildlife. The scale of the proposed development alone makes the impacts unavoidable. Since Maine has scant few wildlife preserves designated for wildlife protection, Plum Creek's site selection for development is totally inappropriate.

Recognize that once Plum Creek gets development approval, they'll only again return to LURC requesting further development approval until all their lands are eventually sold or developed into Plum Creek-owned "kingdom estates"/ gated private communities. Their track record in the West is crystal clear on this issue.

In addition to the 1933 statute that protects wildlife from harm, there are 3 Federal statutes, 2 of which would almost certainly be violated if Plum Creek were allowed to extensively develop within the Sanctuary.

Regarding any nesting migratory birds protected by the Migratory Bird Treaty Act (MBTA; a strict liability statute where intent to "take" does not have to be shown), there are currently 836 bird species protected in the U.S., many of which reside or migrate through this Sanctuary. Any cutting of active nest trees, destruction of active nests, death or injury to chicks/nestlings/fledglings during the breeding and nesting season represents a "take" under MBTA and would be a criminal violation of the Act. The U.S. Fish and Wildlife Service (USFWS) does not issue "incidental or accidental take permits" under MBTA. There is no provision in the Act nor in the Congressional report language for "incidental take." The permits issued by USFWS for take – e.g., waterfowl hunting licenses (duck stamps), special purpose permits, rehabilitation permits, and scientific collecting permits, would not apply. Development of the scale being proposed by Plum Creek for this Sanctuary would almost certainly result in violation of the Act.

The USFWS's list of 2002 Birds of Conservation Concern (BCC), which is mandated by Congress, identifies those migratory and non-migratory avian species that, without additional conservation actions, are likely to become candidates for listing under the Endangered Species Act of 1973.

Based upon the habitat present within the Sanctuary and birds identified in the Greenville, Maine, Breeding Bird Survey Route, the following BCC species may be present within the Sanctuary: Olive-sided Flycatcher, Wood Thrush (I've identified this species), Chestnut-sided Warbler, Cape May Warbler, Bay-breasted Warbler, and Blackpoll Warbler. Conservation of these species should be a high priority putting Plum Creek's proposed development clearly at odds with these declining species. The proposed conversion of this woodland and wetlands habitat is also inconsistent with the goals of Partners in Flight (PIF) for this physiographic region. PIF is an international consortium of Federal, State, Provincial, private, industry, and conservation organizations that work to protect migratory birds and their habitats.

The Bald and Golden Eagle Protection Act (BGEPA), also a strict liability statute, prohibits the take of both species. Nests for both species cannot be removed anytime during the year whether they are active or inactive. In 2001, Plum Creek was cited for cutting down a tree with a Bald Eagle's nest on Spencer Pond, near Kokadjo, but was not prosecuted under BGEPA by USFWS law enforcement since the agent felt there was no "willful or malicious intent." However, a Spencer Pond Camp co-owner was quoted in the media as saying that Plum Creek's Action reflected a "callous attitude." When he asked Plum Creek to consider not cutting in the immediate future to give the Eagles a chance to rebuilt, "there was no response." Plum Creek's recent record \$57,000 fine involving 18 clearcuts in violation of Maine's Forest Practices Act, and their documented destructive deer-yard cutting practices, raise further troubling concerns.

The Endangered Species Act (ESA) has a much broader definition of "take" than does MBTA. Because there are or have been at least 4 Federally-listed species found in or moving through the Sanctuary, "take" under ESA could be difficult to avoid. If take were discovered by a private citizen, Section 11 of the Statute allows the filing of a citizen lawsuit against Plum Creek, and possibly even against LURC should they permit this development. Because Plum Creek does not possess a Section 10 Habitat Conservation Plan and "takings permit" under ESA for the Sanctuary, they could be liable. Were they in possession of such a permit, very limited take might be authorized.

USFWS special agents would generally visit this Sanctuary only if a Federally-protected "trust species" or Federally "threatened" or "endangered" species had been or was about to be taken. "Trust species" include any of 836 species of migratory birds, their eggs, nests, parts, or actual birds in someone's possession – dead or alive. Applicable Federally-listed species where they are "harassed, harmed, injured, or killed" include the eastern timber wolf, Canada lynx, eastern Mountain lion, and Bald Eagle (the latter in the process of being delisted, but still protected by BGEPA and MBTA) – all which have been documented in the Sanctuary by 2 or more residents. What most garners law Enforcement attention, in addition to willful or malicious intent, would be Plum Creek's lack of cooperation in working with State and Federal Officials to avoid or at least minimize take. The very nature of this proposed development makes this a huge challenge for Plum Creek.

In addition to the clear provisions of the Sanctuary Act, and the penalties of up to \$300 – considerable by 1933 standards, and/or 90 days imprisonment, Maine also provides protections for State-listed species through their List of Threatened and Endangered Species. Included are the State-endangered Peregrine Falcon, Sedge Wren, Grasshopper Sparrow, Golden Eagle, and other avifauna. While I have not documented these species within the immediate boundaries of the Sanctuary, I have seen a breeding pair of Peregrine Falcons on Kineo cliffs and witnessed over-flights of migrating Golden Eagles. The Preserve may provide habitats used by the black racer, box turtle, and other State-endangered species. Threatened species I've actually seen within the Preserve include the Bald Eagle, Harlequin Duck, Upland Sandpiper, and possibly the spotted turtle in Forsythe Brook (that I could not validate). Maine's Inland Fish and Wildlife Division also designates "Important Wading and Water Bird Habitat" within the Sanctuary, located on both sides of Masterman Farm Road. Plum Creek's proposed development would almost certainly violate the State's threatened and endangered Species statute, let alone the Sanctuary law, and the protected designated wading and water bird habitat, resulting in take.

QUESTION 2b: “If this is your legal position, could you please further comment on whether any development by Plum Creek in the sanctuary is legal, and if some development by Plum Creek would be allowed, whether the issue is one of scale and related to a point at which development is established?”

Q. 2b RESPONSE: I will defer to attorneys who are familiar with Chapter 134 and similar statutes for their opinions on the legality of Plum Creek’s proposed development. However, the Federal and State statutes protecting wildlife – listed above, are legally binding. Once LURC advises Plum Creek’s counsel of these issues, Plum Creek will have legally been put on notice. Any future violations of the statutes

where Plum Creek has failed to “avoid or minimize take” and/or where their intent has been shown to be “willful and malicious,” could be construed as felony violations rather than misdemeanors by Federal and State law enforcement agents, based on their investigative and prosecutorial discretion, and in the case of Federal statutes, based on determinations made by Department of Justice prosecutors.

For example, the felony penalty under MBTA for individuals is \$250,000 per incident and for organizations such as Plum Creek, \$500,000 per incident, and/or 2 years in jail. Misdemeanors can result in fines for individuals and organizations of up to \$15,000 per incident and/or 6 months in jail.

The very degree of the proposed development within this Sanctuary will almost certainly completely change the character of the Preserve – and the surrounding area, destroying habitat and wildlife in the process.

Based on Plum Creek’s track record in the West, whether they get approval for the entire Sanctuary proposal or approval for only a limited amount of development, once they get a foot in the door, Plum Creek – and other developers, will be requesting more development permits from LURC. While well known in the West, that information also became available when a Plum Creek representative let slip to several bystanders at the August 11-12, 2007, Forest Heritage Days booth in Greenville that Plum Creek will ask for much more development once the land is rezoned by LURC.

Until zoning and planning laws and ordinances are changed either by the State Legislature, and/or by the County Commissions to put breaks on uncontrolled growth, Plum Creek will continue to push for mega-development until they get their way. In Seeley Lake, Montana, ostensibly through the Missoula County Commission, local zoning ordinances are now being put into place that stipulate how land Plum Creek wants to sell can be developed. The Commission has identified critical habitat (not unlike the Sanctuary) and in these areas Plum Creek cannot develop, or can only develop at a density that is not conducive to profitable land sale (e.g., 1 building/160 acres).

Other areas are zoned for higher density where the habitat is not as critical or where homes fit into an existing plan for development (e.g., Rockwood, Greenville, and Jackman). Instead of maximizing profit, Plum Creek in Montana has now been compelled by local ordinances to play ball and negotiate in good faith. Maine desperately needs similar ordinances.

QUESTION 2c: “Further, if you do intend to make the legal argument that any further development in the sanctuary is prohibited, how should LURC think about the legality of existing residential development which has occurred in the sanctuary by others and subsequent to passage of the 1933 law?”

Q. 2c RESPONSE: Again, I cannot speak to the legal precedence and will have to defer to counsel for comment. However, most of the development within our Road Association took place back in the 1960s, but occurred only along the shoreline and only in a very limited way (i.e., 40 seasonal camps in total). The likelihood of any violations of Chapter 134 was minimal. Even today with camp upgrades and 3 new camps on existing lots, violations of the statute have been minimal – e.g., occasional amphibian deaths. The single lane, seasonal dirt roads into the Association camps and the 15 mph speed limits have helped minimize impacts to wildlife within the Sanctuary.

We make a point of encouraging all our Association members and their guests to obey the local laws, including the speed limits. That will all change if roads within the Sanctuary are widened and paved, traffic greatly increases, speed limits are increased, roads receive year-round use, and commercial development is allowed to occur as proposed under Plum Creek's plan.

Our Road Association has been consistent in opposing development of more than 1 or 2 camps. In 2003 at a meeting I chaired, the Road Association unanimously opposed the Watson/Loon Enterprises permit development application in Lamb's Cove. LURC, unfortunately, approved the application.

What Plum Creek is initially proposing would easily quadruple the number of camps in our area and it would increase several-hundred-fold the number of year-round residences. Such unprecedented expansion of residential development, and the potential negative impacts from the proposed commercial development within the Sanctuary are incalculable.



Federal Register

Wednesday,
November 9, 2005

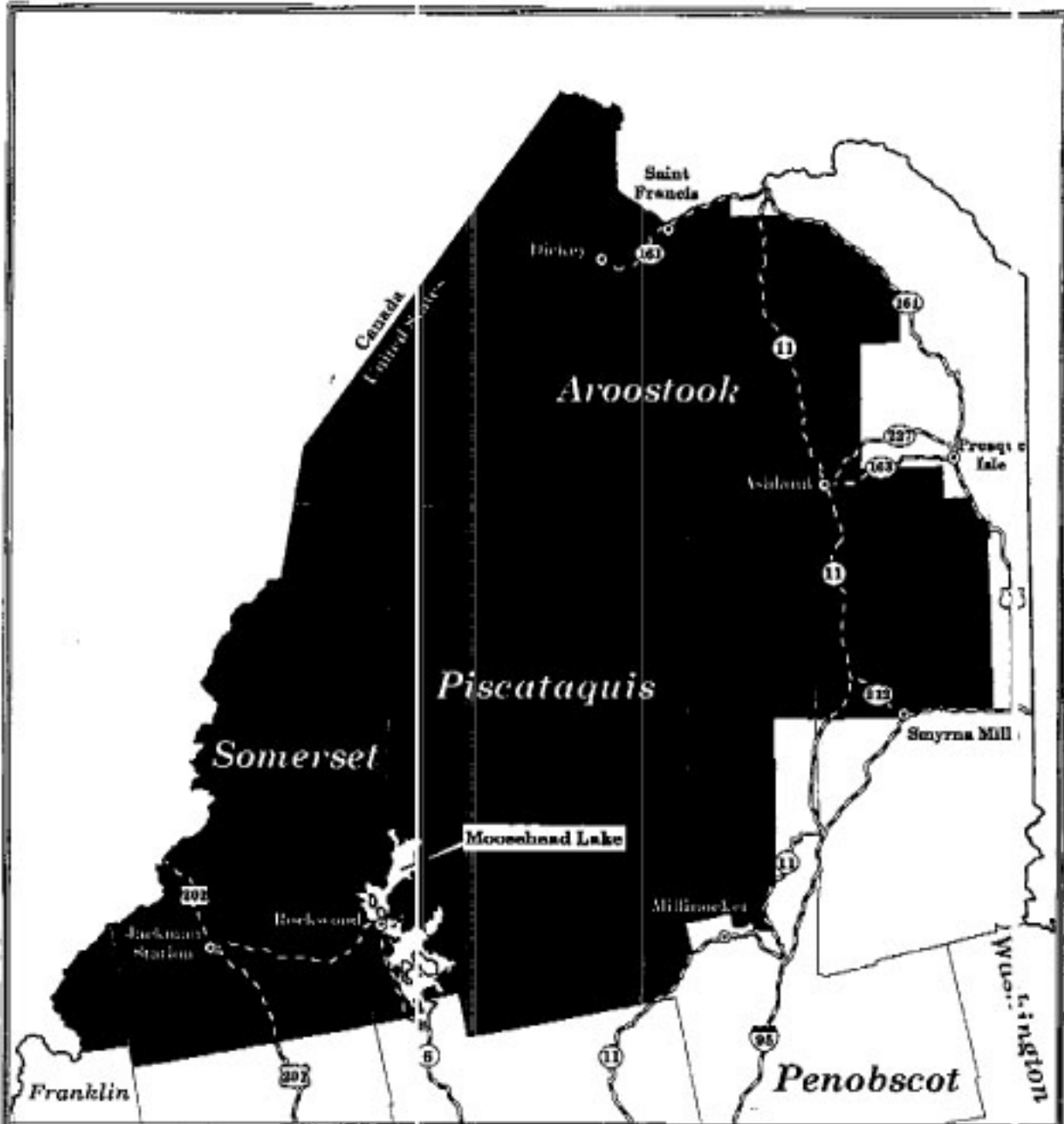
Part V

Department of the Interior

Fish and Wildlife Service

50 CFR Part 17

**Endangered and Threatened Wildlife and
Plants; Proposed Designation of Critical
Habitat for the Contiguous United States
Distinct Population Segment of the
Canada Lynx; Proposed Rule**



Map Features

- | | | | |
|--|---------------------------------------|--|-------------|
| | Proposed Canada Lynx Critical Habitat | | Major Roads |
| | State Boundary | | Cities |
| | County Boundaries | | |



Map Location



Map1: Unit 1 (Maine)

202 CODE 4310-05-C