

**REBUTTAL TESTIMONY BY KEN SPALDING  
REGARDING ZP 707  
PLUM CREEK PETITION FOR REZONING MOOSEHEAD REGION**

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

September 28, 2007

**Addressing the testimony of a number of witnesses, specifically including:**

- **Pre-filed testimony of John Daigle, Ph.D. submitted on August 31, 2007**
- **Pre-filed testimony of Don Kleiner, submitted August 31, 2007**
- **Pre-filed testimony of John Rust, submitted August 31, 2007 and Sept 14, 2007**
- **Pre-filed testimony of Stephen Cole, submitted August 31, 2007**
- **Pre-filed testimony of Robert Meyers, submitted August 31, 2007**

**INTRODUCTION**

My name is Ken Spalding. I live in Wayne, Maine.

For more than 35 years my professional and volunteer work has been primarily focused on land conservation and outdoor recreation in Maine. I have conducted land surveying and deed research and served as the first executive director for Friends of Bigelow in the campaign to establish the Bigelow Preserve. I worked in conservation for the State of Maine for 29 years, including as a planner and Assistant Resource Administrator for the Bureau of Public Lands and as Assistant to the Commissioner and Coordinator of Legislative Affairs in the Maine Department of Conservation, including serving as staff for a number of task forces and legislative study committees related to Maine land conservation. For sixteen years I was director of the Maine Conservation Corps. For the past five years I have served as Maine Woods Project Coordinator for RESTORE: The North Woods.

I have also served in many capacities as a volunteer, including on LURC's Citizens Advisory Board, committees for Baxter State Park and the Maine Bureau of Parks and Lands and on the boards and chairing committees for the Maine Appalachian Trail Club, Natural Resources Council of Maine, Maine Group of the Sierra Club, Kennebec Land Trust, Friends of Baxter State Park, and Friends of Bigelow.

Additional and more detailed information on my background is attached to my testimony submitted on August 31, 2007, which includes a resume, and on September 14, 2007.

**INCORRECT ASSUMPTIONS**

The assumptions, statements, conclusions and/or opinions expressed in the testimony of a number of witnesses are predicated on easements described in the proposed concept plan as accomplishing things that they either do not, or are unlikely to, accomplish. I will address some of these witnesses' testimony individually, but a number of the incorrect assumptions include the following.

- A. Incorrect assumption: the easements will preclude development. They won't. It does appear that large-scale subdivision for residential development and associated land sales will not likely occur on the mitigation lands as long as the "Balance Easement remains in effect. However, there are so many reserved rights and exceptions that very significant development can occur within the easement area. In addition to the specifically allowed activities, the easements give the landowner(s) the right to conduct any development activities that in its discretion it "deems useful or expedient in connection with" any of the other allowed activities.
- B. Incorrect assumption: the easements give the public the right of access to the easement lands. They don't. The working forest easements express the "Grantor's intent and objective to allow non-commercial, non-motorized public access...for traditional, low-intensity recreational uses." They further state "daytime, pedestrian use of the Protected Property by the public shall be permitted." The language goes on to give the landowner(s) broad authority to control, limit, temporarily prohibit and charge for this daytime, pedestrian public use.
- C. Incorrect assumption: recreational uses such as hunting, fishing and hiking are guaranteed on the land in the future. They are not. Although it is unlikely that all daytime pedestrian public access will be cut-off, it is easy to envision that specific uses would be prohibited and all access would be severely restricted. Just as one example the landowner could decide to establish a sizable no-hunting buffer around the development zones for the safety of the new homeowners and clients of the resorts. Recreational uses and access could also be severely limited by the landowner exercising its reserved right to deny access to roads on the property and to charge fees for the use of the land.
- D. Incorrect assumption: the easement will provide an economic benefit to guides and other commercial users of the property because the property will be available for their use. The easements specifically provide the right to the landowner to allow, or not allow, "in its sole discretion, traditional uses of the Protected Property by commercial guides, by customers of commercial sporting camps, and by non-profit camping and educational and scientific institutions." In other words, the current or any future landowner could unilaterally decide to prohibit, or selectively permit, the above commercial and or non-profit use of the land, at the landowner's sole discretion.
- E. Incorrect assumption: the proposed trail easements will actually result in trails that will be available and useable by the public. This is possible, but for many reasons outlined in my August 31, 2007, testimony, it is unlikely that a hiking trail useable by the general public will be established and maintained.

F. Incorrect assumption: the so-called “Moosehead Legacy” easement has the same status as the “Balance Easement” as part of the proposed concept plan. It does not. Testimony frequently mentions the combined acreage of the conservation “Balance Easement” and the “Legacy Easement” as if they are equivalent parts of the concept plan. Some testimony even states that the combined acreage is being offered in exchange for approval of the proposed development zones. The 266,000-acre “Legacy Easement” is not part of the required conservation balance being offered (90,000 acres). It is presented in the petition as a public benefit that the company has agreed to pursue with the potential holder if, and only if, LURC approves the proposed concept plan. If LURC approves the proposed concept plan, the agency will have no authority over what subsequently happens with the “Legacy Easement.” The easement could be changed or abandoned after the concept plan is in place. Besides having the same and additional flaws as the “Balance Easement,” the “Legacy” easement has conditions and expectations that could very well preclude it from happening. The easement purchase, with a price of nearly \$10 million, must be completed within five years of LURC approval of the proposed concept plan. A primary source of anticipated funding for the project is public money from the Forest Legacy Program. The serious flaws in the easement make it highly uncertain that the State and the USDA Forest Service would approve an application for funding from the Forest Legacy Program.

These and other relevant points related to this rebuttal are further explained in the pre-filed testimony of Ken Spalding related to trails and recreation submitted on August 31, 2007, and the pre-filed testimonies of Howard Lake and Ken Spalding related to conservation and the proposed easements submitted on September 14, 2007.

## **SPECIFIC COMMENTS**

It has not been possible to chronicle every instance of incorrect assumptions about the easements or where I disagree with conclusions drawn in the time that has been allowed for preparing rebuttal testimony. So I will mention only examples taken from a number of witnesses’ testimony. That a given piece of testimony is not addressed should in no way be interpreted as concurrence with that testimony.

### **Pre-filed testimony of John Daigle, Ph.D. submitted on August 31, 2007**

Page 2, Plum Creek Concept Plan.

Dr. Daigle’s testimony says the proposed concept plan requests that approximately 20,000 acres be rezoned to allow for development. In other places in the testimony he uses the figure of 20,500 acres. The concept plan that accompanies the application for rezoning uses the rounded figures of 22,000 acres to be placed within development zones and 20,500 that would actually be subject to development due to internal zones offering protection. All of it would be subject to subdivision and sale and otherwise not subject to any intended public use. The appropriate figure to use in considering impact on recreation would seem to be 22,000 acres.

The testimony states that Plum Creek and The Nature Conservancy (TNC) have signed a purchase and sale agreement for an easement on 266,000 acres in addition to the “Balance Easement” and that “Continued public recreation access is guaranteed

by the easement's terms." In assessing the impact of the proposed concept plan to determine if it has any undue adverse impact on existing uses and to understand the impact on outdoor recreation activities such as hunting, fishing, boating, hiking and camping, it is important to keep several things in mind:

1. The potential 266,000-acre TNC easement referred to above (and elsewhere referred to as the proposed "Legacy Easement") is not part of the proposed conservation balance and is not an enforceable portion of the proposed concept plan [see F above]. It should not be used in measuring the impact of the proposed concept plan on recreational or other existing resources.
2. Although the quoted statement as worded above about guaranteed recreation access is not incorrect by itself, many natural inferences drawn from it would be incorrect. It is important to understand what limitations may be placed on recreation access under the terms of the easements [see B, C and D above]. The only permitted public access under the easements is daytime pedestrian access. No individual type of recreation use is guaranteed. All recreation uses can be severely restricted by limiting them to specific areas and by rules that limit how they are conducted. The landowner can charge fees for any and all uses of the property. Permitting motorized use, including any use of roads on the property is explicitly left exclusively to the discretion of the landowner.
3. The public has an existing common law right of pedestrian access to ponds that are naturally 10 acres or more for the purposes of fishing or hunting waterfowl.

#### Page 2-3 Methodology.

Dr. Daigle's testimony says "Current trends in the Plan Area include the acquisition by individuals of so-called "Kingdom Lots." And that "Some of the new land owners have eliminated public access, others have denied access for traditional uses such as hunting or motorized access." No evidence is presented to substantiate that this is occurring in the Plan Area or that it can be considered a "trend." If there were evidence to show that this was occurring and is a trend, rather than just being a perception, it would be important to compare the protection for recreational use proposed in the "Balance Easement" to what is happening on these other parcels. Except for the possibility of a complete prohibition of all public access, it does not appear that the proposed "Balance Easement" offers much more protection than what so-called "Kingdom Lots" afford.

#### Page 3. Overall Assessment of the Plan.

The assessment states that the development will displace some primitive recreation activity options, but concludes that the impact is not adverse because of the large relative size of the area that won't be placed into development zones, claiming "preservation of significant amounts of the entire area." Preservation is a term that does not fit with what the easement provides [see A above]. The statement also presumably relies on using the potential "Legacy Easement" as part of the area that LURC can count on in making its decision on approval or denial of the application.

The testimony further states "While there is no question that the Plan changes the potential opportunities for primitive recreational use in these areas, it is also worth

noting that absent the Plan's approval, some development and corresponding change in recreation use would still likely occur." This is hardly an assessment that leads to a conclusion that there will be no undue adverse impact on existing uses. Significantly, the testimony pays little attention to the types or quantity of primitive recreation that may be displaced by the development, except to say that it will be taken care of by the potential for transferring those uses to the undeveloped portion of the plan area.

Page 4.

Section 1 claims that most of the proposed development is "near existing development or travel corridors, but some of which is presently used for primitive recreation." No definition is provided for what "near" means. Certainly it isn't the same as LURC's definition for "adjacency" as typically required in development rezoning applications. Nor is there an analysis that quantifies how many acres the "some" refers to as being presently used for primitive recreation. Is it 21,500 of the 22,000 acres requested for development zoning? The testimony continues, "In exchange, the Plan sets forth an unprecedented 356,000 acres of land for permanent conservation and recreation access." This is clearly an incorrect statement. The "Balance Easement" is for 90,000 acres. This is the area being proposed for permanent conservation "in exchange" for the development. The Commission cannot legally consider the other 266,000 acres to be part of the conservation balance. [see F above]

Section 2 again mistakenly asserts that the "Legacy Easement" is part of the "exchange for the development."

Despite the unsubstantiated statement here to the contrary, the proposed concept plan does not encourage diversified, non-intensive, nonexclusive uses of recreational resources. The limited permitting of daytime pedestrian public access certainly does little to nothing to encourage these uses. In fact, the reserved rights for many types of development activity on the easement lands would discourage such use. Indeed, there are many elements of the easements that could be used to exclude public use, including:

- the right of the landowner to create restrictive rules
- the right of the landowner to charge the public for use
- the right of the landowner to temporarily prohibit access
- the right of the landowner to selectively prohibit or authorize use by commercial guides, clients of sporting camps, nonprofit camping groups and educational and scientific institutions
- the location of balance lands adjacent to development lands
- the potential for effectively closing off access to easement lands that are split by development land
- the right of the landowner to subdivide the easement land into parcels as small as 5,000 acres
- the location of the hiking trail corridor and terms of this trail easement that would fit well with exclusive use by the proposed resorts but would discourage public use
- the general terms of the hiking trail easement that make it unworkable for development, maintenance and public use, such as the corridor being 15 feet wide with no restrictions on the landowner uses even within the corridor and the ability of the landowner to require that the trail be moved (see Ken Spalding pre-filed testimony of August 31, 2007 for more detail).

Page 5.

Section 4. The policy statement listed is to “Consider traditional sporting camps as recreational and cultural resources, worthy of protection from incompatible development and land uses.” To suggest, as the testimony does, that somehow sporting camps close to the propose development zones are protected from incompatible development and land uses because they “will likely have access to broad market of visitor (sic)” does not make sense. Clearly, this policy is not adhered to by the plan.

The testimony statement that “The large conservation zone will help protect access to many areas of interest to their guests” is also wrong. The easements specifically identify the guests of sporting camps as people to whom the landowner can deny access.

Section 5. The testimony again claims that the plan limits most development to existing corridors of intensive use. This would require a very liberal definition to be true, but no definition or criteria for arriving at this conclusion are provided. The testimony claims that the easement area provides a net increase in recreational activity, but there is no evidence to support this and a reading of the easement suggests a contrary conclusion.

Section 6. Once again the assessment incorrectly relies on the proposed easement (lumping the “Balance” easement and the potential “Legacy Easement” together again) for guaranteeing traditional recreation and contrasting it with the unsubstantiated claim that the trend is for private landowners to limit public access more than the easement would allow.

Additional information about some existing recreation facilities in and around the proposed concept plan area is provided as an attachment to Dr. Daigle’s August 31, 2007, testimony. The information was gathered by “targeting a few popular areas” primarily to gather information about current use and how the facility might be changed by Plum Creek’s proposed plan. The results are troubling. They seem to verify that the proposed development will have an adverse impact on some existing uses and an un-quantified impact on others. Some facilities are expected to be stressed beyond their capacities, such as Lily Bay State Park, the Rockwood boat landing facility and the Greenville public boat landing. Other facilities are judged to currently have adequate or even excess capacity, and although there is an admission that the proposed development will increase use, there is no attempt to quantify how much increased use may occur or what the resulting impacts may be.

Increased boating near Lily Bay State Park is identified as being of particular concern. “This increased concentration of boaters in the narrow thoroughfare between Lily Bay State Park and Sugar Island becomes a congestion and potential safety concern.” The proposed solution to this potentially serious adverse impact is to deal with it as part of the next FERC hydro-electric re-licensing agreement, presumably shifting responsibility to the dam owner. The report does not say when this re-licensing will occur. The report also raises the issue of increased non-motorized boating attributable to the concept plan in the Lily Bay State Park area having a negative

impact on park users and suggests that park users who want a more pristine environment than will be afforded by the increased use can go to Prong Pond instead of boating on the waters adjacent to the state park.

Dr. Daigle essentially says the impacts of the development resulting from the Plum Creek plan will just have to be dealt with - by various state agencies, the communities, stakeholders such as nonprofits and a recreation club, and other private owners such as Florida Light and Power through the FERC re-licensing process. Some interest on the part of future landowners of the proposed concept plan area is acknowledged in the report when it states that "it is apparent that any satisfactory amelioration of negative impacts will likely require a collaborative effort by public recreation management entities as well as other key stakeholders, including future landowners and resort owners." Specific recommendations are made for additional public expenditures to add new, or to expand existing, public boat landings and parking lots.

Dr. Daigle's testimony generally assumes the quality of recreation experiences, especially more dispersed forms of recreation, will be preserved by the working forest easements. I have addressed the inadequacies of the easements previously. The report admits that hunting and wildlife viewing will be negatively affected. "An examination of deer harvest records in the Wildlife Management Districts within the Concept Plan illustrates many areas are utilized. Some locations used for hunting will obviously be impacted where there is proposed development." "Similarly, it is likely that on portions of the 20,500 acres set aside for development [22,000 acres zoned for development] under the Concept Plan, there will be less opportunity for wildlife watching." The proposed solution to this adverse impact is to displace these uses from the development to the easement areas.

Dr. Daigle's testimony concludes that implementation of the concept plan will result in recreation use increasing in a more "unified and efficient pace." Even if true, this does not seem relevant to the Commission's review of Plum Creek's proposal under the legal criteria of the LURC statute or rules. Additional statements are made in association with this summary, including that failure to implement the plan may result in contraction of land available for traditional and "modern" recreation use, that the plan will make significant positive contributions to the recreation infrastructure and experience in the area, and that the plan will not have an undue adverse impact on recreation in the area. None of these statements are substantiated by the information presented in the testimony.

#### **Pre-filed testimony of Don Kleiner, submitted August 31, 2007**

Mr. Kleiner indicates in at least two places in his testimony that the number one reason that bow hunters support the proposed concept plan is because the easements provide permanent access to 400,000 acres of land. This of course not only overstates even the combined acreage of the two proposed working forest easement, but as discussed in F above, the potential "Legacy Easement" is not part of the conservation mitigation. Only the 90,000 acres of conservation "Balance Easement" is assured of happening through LURC acceptance of the application.

Mr. Kleiner says in his testimony that under the terms of the easement motorized use of the land is at the discretion of the landowner and that without it bow hunters would be relegated to use of the periphery of the land. So Mr. Kleiner acknowledges that despite the perception of large areas of guaranteed access being the primary reason for supporting the proposed plan, that the easements do not guarantee useable access except to a minimal amount of land.

**Pre-filed testimony of John Rust, submitted August 31, 2007 and Sept. 14, 2007**  
**Pre-filed testimony of Stephen Cole, submitted August 31, 2007**  
**Pre-filed testimony of Robert Meyers, submitted August 31, 2007**

The testimonies of Mr. Rust, Mr. Cole, Mr. Kleiner and Mr. Meyers supporting the concept plan, appear to be guided in large part by the philosophy that landowners who have shown support for the activities of their organizations should be allowed to do what they want with their land. The support does not appear to be based on the proposed concept plan meeting the criteria set by these intervenors to meet the future needs of their organizations.

Both Mr. Rust and Mr. Cole identify motorized access to the land as crucial for commercial guides as well as important for the public to get to significant resources such as the boat launch on Indian Pond and close to remote ponds. They recognize, however that motorized access is not provided by the easements.

In responding to questions, Mr. Rust makes it clear that it is “absolutely” in the best interests of the Maine Professional Guides that the land ownership not be fragmented, that one large landowner with one consistent policy is more effective. But he clearly understands that there are provisions in the easements that allow the owner to sell parcels of land and “actually fragment it quite a bit,” and that the landowner may allow hunting, but close off road access.

Mr. Rust states, “We have always been an advocate for landowner rights and part of our initial support for Plum Creek’s plan was to support that landowner’s right to do what they saw that they wanted to do with their own property.”

Mr. Meyers also supports the rights of friendly property owners to do what they want with their land and opposes LURC’s requirement of balancing development with conservation. When Mr. Meyers is asked “if there needs to be as an incentive some sort of trade-off for development in exchange for open access,” he responds: “We’re concerned when the government tries to make it a requirement. There’s a strong element of property rights here, and in our opinion they’ve done the right thing. ...but the notion to say, well, if you want to build two house lots in, you have to provide an equal amount of acreage to offset it, we find that a little troubling.”

There also appears to be some misunderstanding about what the easements say and what rights they provide the public and commercial guides.

Mr. Rust appears to mistakenly believe that hunting is a guaranteed right under the terms of the easement [see C above].

In his September 14, 2007, testimony Mr. Rust appears to quote the easements when he says “The Conservation Easements state they are ‘intended to maintain the status quo’,” but this is not a statement found in the proposed easements.

The most significant misunderstanding of the easement relates to the paragraph in the “Public Access Easement” section, which specifically reserves the right of the landowner and future landowners to permit or prohibit use of the property by commercial guides. The paragraph starts with “To the extent allowed by Grantor, in its sole discretion, traditional recreation uses of the Protected Property by commercial guides, by customers of commercial sporting camps, and by non-profit camping and educational and scientific institutions, may be permitted on the Protected Property, provided that they occur in a manner that is consistent with the terms and the purposes of this Conservation Easement.”

Mr. Rust says the Maine Professional Guides Association (MPGA) supports this sentence in both easements. He selectively quotes portions of this sentence, but leaves out the most important qualifying language, “To the extent allowed by the Grantor, in its sole discretion...” and “may be permitted on the Protected Property...” Use of the property by commercial guides may be permitted by the landowner, but it is not required. And the decision to permit it or not, is at the sole discretion of the landowner.

The MPGA proposes that a definition of commercial guiding activities be added to the easements. Mr. Rust asserts that by adding the proposed definition it “assures guides through clear language that all their current activities will be forever allowed by the conservation easement, including all legal forms/methods of guided hunting such as bear baiting.” There is no indication that this language will be added to the easements. Moreover, adding it would not change the language of the easement that allows the landowner to prohibit use of the property by commercial guides.

\_\_\_\_\_/s/Ken Spalding\_\_\_\_\_  
Ken Spalding  
Wayne, Maine

September 28, 2007

COUNTY OF KENNEBEC  
STATE OF MAINE, ss

On this day personally appeared the above Ken Spalding and made oath that the above statements are true and correct to the best of his knowledge, information and belief.

Before me,

\_\_\_\_/s/Diane D. Polky\_\_\_\_\_ Dated: \_\_\_\_\_9/28/07\_\_\_\_\_

Notary Public/Attorney

Print Name: \_\_\_\_\_

Commission expires: \_\_\_\_\_2/22/14\_\_\_\_\_