



STATE OF MAINE
DEPARTMENT OF ENVIRONMENTAL PROTECTION

JOHN ELIAS BALDACCI
GOVERNOR

DAVID P. LITTELL
COMMISSIONER

MEMORANDUM

TO: The Board of Environmental Protection
FROM: Valerie Derosier, Bureau of Land & Water Quality, Augusta
RE: Consent Agreement for Michael and Constance Kain
DATE: August 5, 2010

Statute and Rule Reference: *The Site Location of Development Act* (Site Law), 38 M.R.S.A. § 483-A states, in pertinent part, that a person undertaking an activity on a parcel of land affected by an order or permit issued by the Department may not act contrary to that order or permit.

The Natural Resources Protection Act, 38 M.R.S. § 480-C, prohibits soil disturbance, removal of vegetation and construction of permanent structures in and adjacent to a coastal wetland without first obtaining a permit from the Department.

Location: Prospect, Maine

Description: On June 7, 1990, the Department granted a permit under the Site Location of Development Act to Fredda Wolf in Department Order #L-015239-86-A-N (the permit) to subdivide 134 acres of land into 40 lots to be developed as single family house sites. Michael C. Kain and Constance P. Kain own Lot 37 in this subdivision. In the permit decision, lot clearing was limited to 9,000 square feet with no cutting allowed within 250 feet of the Marsh River. Pathways to the river were allowed provided the Department and the Department of Inland Fisheries and Wildlife (MDIFW) approved of the location and width.

On August 10 and 24, 2009, inspections of the Kains' property revealed that trees were cut and other vegetation was removed which created a cleared opening measuring approximately one acre in size. Within 250 feet of the Marsh River, vegetation was removed from an area approximately 20,000 square feet in size, some of which was located within 100 feet of Marsh River. Beyond 250 feet from Marsh River, the Kains cleared vegetation from an area around their house measuring approximately 20,000 square feet in size. In addition, the Kains constructed a pathway with a set of stairs from the top of the bank associated with Marsh River to the upland edge of the coastal wetland measuring approximately 75 feet long and three feet wide. The Kains did not first obtain approval for the stairs from either the department or MDIFW.

Environmental Issues: Water quality in a coastal wetland can be affected by large disturbed and non-forested areas within its watershed. Riparian buffers protect water courses from the impacts of thermal pollution, provide wildlife corridors and feeding, nesting and roosting habitat for shorebirds and tidal waterfowl, provide visual and aesthetic appeal along Maine's coast and provide nutrient sinks for phosphorus and other pollutants which can degrade the water quality of these aquatic systems.

Department Recommendation: The Department recommends acceptance of this Consent Agreement stipulating that Michael and Constance Kain pay a monetary penalty of \$4,480.00, half of which has been paid. The agreement stipulates that the other half will be paid on or before January 1, 2011. A restoration plan was submitted by the Kains and approved by the Department to remove the stairs, stabilize the disturbed soils on site, and restore the vegetation on the lot such that no more than 9,000 square feet is cleared for development. The restoration is to be completed no later than June 30, 2010 and is to be monitored by a certified professional through the spring of 2014. There are provisions for the replacement of the planted vegetation should it cease to thrive. The penalty is based on the Department's penalty policy reflecting the size of the violation, knowledge of the violator, and that the violation could have been avoided.



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IN THE MATTER OF:

MICHAEL C. KAIN & CONSTANCE P. KAIN) ADMINISTRATIVE CONSENT
PROSPECT, WALDO, MAINE) AGREEMENT
NRPA, SITE) (38 M.R.S.A. § 347-A)
2009-111-L)

This Agreement by and among Michael C. Kain, Constance P. Kain, the Maine Department of Environmental Protection ("Department"), and the Maine Office of the Attorney General is entered into pursuant to the laws concerning the Department's Organization and Powers, 38 M.R.S.A. § 347-A(1).

The parties agree as follows:

- 1. Michael C. Kain and Constance P. Kain own a parcel of land (Lot 37) on 13 Bay Road in Prospect, Maine as described and recorded in Book 2839 on Page 47 of the Waldo County Registry of Deeds.
2. The property described in Paragraph 1 of this Agreement is adjacent to the Marsh River which is a coastal wetland as defined by the Natural Resources Protection Act, 38 M.R.S.A. § 480-B(2).
3. On June 7, 1990, the Department granted a permit under the Site Location of Development Act to Fredda Wolf in Department Order #L-015239-86-A-N (the permit) to subdivide 134 acres of land into 40 lots to be developed as single family house sites, one of which is the property described in Paragraph 1 of this Agreement. Michael C. Kain and Constance P. Kain own Lot 37 in this subdivision. In the permit decision the Department made certain findings of fact based on representations made in the permit application and the approval was granted subject to a series of standard and special conditions as follows:
A. As reflected in Finding of Fact 4 of the permit, the applicant proposed restrictions limiting lot clearing to 9,000 square feet per lot including lawns, driveways and building sites. The application was approved based upon this proposal.
B. As reflected in Findings of Fact 10 and 12 of the permit, the applicant proposed a 250 foot wide buffer strip along the Marsh River and the application was approved based upon this proposal. In addition, as set forth in Finding of Fact 12, the applicant agreed to convey a management easement to the Department of Inland Fisheries and Wildlife which included the restriction prohibiting alterations to the bufferstrip within 100 feet of the high water mark of the river. Landward of the 100 foot strip, the easement allows for the maintenance and pruning of existing vegetation, and planting of new vegetation, with

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PRESQUE ISLE, MAINE 04769-2094
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restrictions on the amount of trees that can be cut and the size of cleared areas that can be created.

- C. Standard Condition 1 of the Standard Conditions of Approval of the permit states in pertinent part: "This approval is dependent upon and limited to the proposals and plans contained in the application and supporting documents submitted and affirmed to by the applicant. Any variation from the plans, proposals and supporting documents is subject to the review and approval of the Board prior to implementation."
 - D. Special Condition 19 of the permit states: "All buffer strips shall be maintained as proposed."
 - E. Special Condition 20 of the permit states: "Prior to construction of the pathways through the shoreland zone, the applicant shall submit to the Department a plan showing the location and width of the trail or trails, and evidence that IF&W has approved the location and width of the trails."
4. Pursuant to 38 M.R.S.A. § 483-A(2), a person having an interest in, or undertaking an activity on, a parcel of land affected by an order or permit issued by the department may not act contrary to that order or permit.
 5. On August 10 and 24, 2009, inspections of the property described in Paragraph 1 of this Agreement by Department staff revealed that Michael C. Kain and Constance P. Kain cut trees and other vegetation which created a cleared opening measuring approximately one acre in size on Lot 37 in the subdivision described above in Paragraph 3. Within 250 feet of the Marsh River, vegetation was removed from an area approximately 20,000 square feet in size, some of which was located within 100 feet of Marsh River. Beyond 250 feet from Marsh River, Michael C. Kain and Constance P. Kain cleared vegetation from an area around their house measuring approximately 20,000 square feet in size. In addition, Michael C. Kain and Constance P. Kain constructed a pathway with a set of stairs from the top of the bank associated with Marsh River to the upland edge of the coastal wetland measuring approximately 75 feet long and three feet wide. Neither Michael C. Kain nor Constance P. Kain first submitted a plan to the Department or acquired IF&W approval as required by Special Condition 20 of the permit and they failed to obtain a permit from the Department for these activities
 6. The activities described in Paragraph 5 of this Agreement constitute the following violations:
 - A. By failing to maintain the 250 foot wide bufferstrip on Lot 37 depicted in the plans and proposals and approved in Department Order #L-015239-86-A-N, Michael C. Kain and Constance P. Kain violated Standard Condition 1 and Special Condition 19 of Department Order #L-015239-86-A-N and the *Site Location of Development Act*, 38 M.R.S.A. § 483-A.

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- B. By constructing a pathway through the shoreland zone without first submitting to the Department a plan showing the location and width of the trail and evidence that IF&W approved the location of the trail, Michael C. Kain and Constance P. Kain violated Special Condition 20 of Department Order #L-015239-86-A-N and the *Site Location of Development Act*, 38 M.R.S.A. § 483-A.
 - C. By clearing more than 9,000 square feet of area for a building site contrary to the plans and proposals approved in Department Order #L-015239-86-A-N, Michael C. Kain and Constance P. Kain violated Standard Condition 1 of Department Order #L-015239-86-A-N and the *Site Location of Development Act*, 38 M.R.S.A. § 483-A.
 - D. By constructing a permanent structure, namely stairs, within 75 feet of the upland edge of a coastal wetland without first obtaining a permit from the Department, Michael C. Kain and Constance P. Kain violated the *Natural Resources Protection Act*, 38 M.R.S.A. § 480-C.
7. On September 21, 2009, the Department issued a Notice of Violation to Michael C. Kain and Constance P. Kain regarding the violations described in Paragraphs 5 and 6 of this Agreement in accordance with 38 M.R.S.A. § 347-A(1)(B).
 8. On January 25, 2010, Michael C. and Constance P. Kain submitted a restoration plan to the Department to remove the set of stairs, stabilize the disturbed soils on site, re-establish the 250 bufferstrip and restore vegetation on the lot such that no more than 9,000 square feet is cleared for development in accordance with the Bowden Point Declaration of Property Restrictions and Establishment of Lot Owners Association and in accordance with the standard and special conditions of Department Order #L-015239-86-A-N on the property described in Paragraph 1 of this Agreement. The restoration plan, prepared by John E. Mills, MLF #898 is entitled "Michael and Connie Kain Property, 13 Bay Road, Lot 37 Bowden Point Subdivision, Prospect, Maine" and is dated December 30, 2009 and as amended on January 22, 2010. All restoration will be completed in accordance with this plan, which has been approved by the Department.
 9. The Department has regulatory authority over the activities described herein.
 10. Pursuant to 38 M.R.S.A. §§ 341-D(6)(C) and 347-A(1)(A)(1), administrative consent agreements must be approved by the Board of Environmental Protection (the "Board") which is part of the Department.
 11. This Agreement shall become effective only if it is approved by the Board and the Office of the Attorney General.

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2009-111-L)	

12. To resolve the violations referred to in Paragraphs 5 and 6 of this Agreement, Michael C. Kain and Constance P. Kain agree to:

- A. Pay the Treasurer, State of Maine, in accordance with the following, the sum of Four Thousand Four Hundred Eighty dollars (\$4,480.00) as a civil monetary penalty:
 - i. Upon signing the Agreement, pay the sum of Two Thousand Two Hundred Forty dollars (\$2240.00).
 - ii. No later than January 1, 2011, pay the sum of Two Thousand Two Hundred Forty dollars (\$2240.00).
- B. Pay to the Treasurer, State of Maine, upon demand by the Department, the sum of one hundred dollars (\$100.00) per day per violation for the violation of any provision of this Agreement.

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13. The Department and the Office of the Attorney General grant a release of their causes of action against Michael C. Kain and Constance P. Kain for the specific violations listed in Paragraphs 5 and 6 of this Agreement on the express condition that all actions listed in Paragraph 12 of this Agreement are completed in accordance with the express terms and conditions of this Agreement. The release shall not become effective until this condition is satisfied.

IN WITNESS WHEREOF the parties hereto have executed this Agreement consisting of four (4) pages.

MICHAEL C. KAIN

Michael C. Kain DATE: May 19, 2010
MICHAEL C. KAIN

CONSTANCE P. KAIN

Constance P. Kain DATE: May 19, 2010
CONSTANCE P. KAIN

BOARD OF ENVIRONMENTAL PROTECTION

BY: _____ DATE: _____
SUSAN M. LESSARD, CHAIR

MAINE OFFICE OF THE ATTORNEY GENERAL

BY: _____ DATE: _____
MARGARET A. BENSINGER, ASSISTANT ATTORNEY GENERAL