STATE OF MAINE
DEPARTMENT OF ENVIRONMENTAL PROTECTION

JOHN ELIAS BALDACCI
GOVERNOR

DAVID P. LITTELL
COMMISSIONER

MEMORANDUM

TO: The Board of Environmental Protection

FROM: John Maclaine, Bureau of Land & Water Quality, Portland

RE: Consent Agreement for Wayne Nelsen, *et al*

DATE: November 5, 2009

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Statute and Rule Reference: The *Protection and Improvement of Waters Act*, 38 M.R.S.A. Section 413, states, in pertinent part, that no person shall directly or indirectly cause soil material to be discharged into waters of the State without a permit from the Department.

The *Erosion and Sedimentation Control Law*, 38 M.R.S.A. Section 420-C, states, in pertinent part, that a person who conducts, or causes to be conducted, an activity that involves filling, displacing or exposing soil or other earthen materials shall take measures to prevent unreasonable erosion of soil or sediment beyond the project site or into a protected natural resource.

The *Stormwater Management Law*, 38 M.R.S.A. 420-D, states that anyone who acts contrary to the terms and conditions of a permit is a violation of the law.

Location: Westbrook

Description: On July 13, 2004, the Department granted approval to Wayne Nelsen and Everett O'Brien in Department Order #L-21694-NJ-A-N to construct a stormwater management system to serve a 22-lot residential subdivision known as Cobb Farm Estates. Various lots within the development were transferred to several business entities, all of which are primarily controlled by Wayne Nelson and all of which are referred to as Wayne Nelson, *et al*. During inspections by Department staff beginning in the summer of 2006, it was noted on almost all occasions that erosion controls were inadequate on site, sediment control structures were not being maintained and erosion control plans were not being followed. Subsequent requests for corrective actions were not heeded resulting in a discharge of sediment to Mill Brook on January 11, 2008. Following a Stop Work Order issued by the City of Westbrook on January 14, 2008, actions were taken on site to correct the erosion and sedimentation control issues.

Environmental Issues: Streams are important habitats for a variety of insects, fish and other species. The water quality of streams plays an important role in the diversity and health of the surrounding ecosystem including but not limited to spawning areas for fish, and a food source for aquatic and terrestrial animals. Sedimentation of a stream can result in the suffocation and mortality of developing fish eggs and larvae and the loss of appropriate spawning habitat. The loss of interstitial spaces can be detrimental to aquatic insect habitat as well.

Department Recommendation: The Department recommends acceptance of this Consent Agreement stipulating that Wayne Nelson, *et al* pay a monetary penalty of $ 8,317.00, which has been paid.

The penalty is based on the Department's penalty policy reflecting the speed and quality of requested corrective actions, the duration of the violation, and that the violation could have been avoided. Inspections of the project by Department staff since the signing of the Consent Agreement by Wayne Nelsen *et al* have revealed that it is currently in compliance with the Erosion and Sedimentation Control Law and Stormwater Management Law.

STATE OF MAINE
DEPARTMENT OF ENVIRONMENTAL PROTECTION

JOHN ELIAS BALDACCI
GOVERNOR

DAVID P. LITTELL
COMMISSIONER

IN THE MATTER OF:

WAYNE NELSEN	)
WESTBROOK, CUMBERLAND, MAINE,	)
	) **ADMINISTRATIVE**
NELSEN & BROWN DEVELOPMENT	)
GROUP, LLC	) **CONSENT**
WESTBROOK, CUMBERLAND, MAINE,	)
	)
DWN ASSET MANAGEMENT, INC.	) **AGREEMENT**
WESTBROOK, CUMBERLAND, MAINE,	)
	)
and	) **(38 M.R.S.A. § 347-A)**
	)
COBB FARM ESTATES, LLC	)
WESTBROOK, CUMBERLAND, MAINE	)
	)
E&S, §413, STORMWATER	)
2008-015-L	)

This Agreement, by and among Wayne Nelsen, Nelsen & Brown Development Group, LLC, DWN Asset Management, Inc., and Cobb Farm Estates, LLC, (hereinafter referred to collectively as Wayne Nelsen, *et al*), the Maine Department of Environmental Protection ("Department"), and the Maine Office of the Attorney General ("AG") 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. A. Nelsen & Brown Development Group, LLC, owned a parcel of land being developed as a residential subdivision known as Cobb Farm Estates on Cobb Farm Drive and Perry Court in Westbrook, Maine as described and recorded in Book 21832 on Page 165 of the Cumberland County Registry of Deeds as of August 1, 2006.

   B. On November 10, 2006, Lot 16 of Cobb Farm Estates was conveyed to DWN Asset Management, Inc. as described and recorded in Book 24565 on Page 256 of the Cumberland County Registry of Deeds. On November 2, 2007, Lot 7 of the subdivision was conveyed to DWN Asset Management, Inc. as described and recorded in Book 25594 on Page 82 of the Cumberland County Registry of Deeds.

   C. On December 21, 2007, Lots 2, 3, 4, 5, 6, 8, 10, 11, 13, 15, 19 and 20 of Cobb Farm Estates were conveyed to Cobb Farm Estates, LLC as described and recorded in Book 25702 on Page 119 of the Cumberland County Registry of Deeds.

2. A. Nelsen & Brown Development Group, LLC was a Maine Limited Liability Company, with a mailing address of P.O. Box 4510, Portland, Maine, which was cancelled on

December 27, 2007. D & W Homebuilders, Inc. was the Manager of Nelsen & Brown Development Group, LLC. Wayne Nelsen is the President of D & W Homebuilders, Inc.

B. DWN Asset Management, Inc. is a Maine corporation authorized to conduct business in Maine; its mailing address is 22 Monument Square, Portland, Maine. Donalene Nelsen is the President, and Wayne Nelsen is the Treasurer of DWN Asset Management, Inc.

C. Cobb Farm Estates, LLC is a Maine Limited Liability Company authorized to conduct business in Maine; its mailing address is P.O. Box 4510, Portland, Maine. D & W Homebuilders, Inc. is the Manager of Cobb Farm Estates, LLC. Wayne Nelsen is the President of D & W Homebuilders, Inc.

3. The property described in Paragraph 1 of this Agreement abuts a portion of Mill Brook which is a river, stream or brook as defined by the *Natural Resources Protection Act*, 38 M.R.S.A. § 480-B(9), and waters of the State as defined by the *Protection and Improvement of Waters Act*, 38 M.R.S.A. § 361-A(7).

4. On July 13, 2004, the Department granted approval to Wayne Nelsen and Everett O'Brien in Department Order #L-21694-NJ-A-N to construct a stormwater management system to serve a 22-lot residential subdivision known as Cobb Farm Estates on the property described in Paragraph 1 of this Agreement, subject to a series of standard and special conditions which includes the following:

   A. Standard Condition #1of the Standard Conditions of Approval for Department Order #L-L-21694-NJ-A-N states: "The granting of this permit 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 these plans, proposals, and supporting documents is subject to review and approval prior to implementation."

   B. Standard Condition #8 of the Standard Conditions of Approval for Department Order #L-L-21694-NJ-A-N states: "The components of the stormwater management system must be adequately maintained to ensure reasonable operation of the system."

   C. Special Condition #2 for Department Order #L- L-21694-NJ-A-N states in pertinent part: "In addition to any specific erosion control measures described in this or previous orders, the applicant shall take all necessary actions to ensure that their activities or those of their agents do not result in noticeable erosion of soils…on the site during the construction and operation of the project covered by this approval."

5. On August 1st and September 7th, 2006, inspections of the property described in Paragraph 1 of this Agreement by Department staff revealed that erosion control devices on the site were severely lacking for the amount of exposed soil on the site. The majority of the subdivision to the cul-de-sac contained exposed soil. The erosion control plan submitted with Stormwater

Management permit #L-21694-NJ-A-N had not been followed and silt fence that was installed was not maintained or keyed in correctly.

6. On September 28th, 2006, the Department issued a Letter of Warning to Wayne Nelsen regarding the violations described in Paragraph 5 of this Agreement requesting that corrective actions be taken to bring the site into compliance with its erosion and sedimentation control plan.

7. On October 26th, 2006, Department staff inspected the property described in Paragraph 1 of this Agreement and found that erosion control was still inadequate. Staff observed that silt fence was in disrepair and not keyed into the soil; exposed soil had not been adequately seeded or stabilized.

8. On October 30th, 2006, a Notice of Violation was issued to Wayne Nelsen and Everett O'Brien regarding the violations of Department Order #L-21694-NJ-A-N described in Paragraphs 5 and 7 of this Agreement in accordance with 38 M.R.S.A. § 347-A(1)(B).

9. On November 6th, 2006, Department staff was advised by Everett O'Brien that he had sold his portion of the property described in Paragraph 1 of this Agreement to Nelsen & Brown Development Group, LLC in January, 2006.

10. On April 12th, October 18th, and October 31st, 2007, Department staff inspected the property described in Paragraph 1 and found each time that erosion control was lacking in many areas and the areas where erosion control had been used were not maintained. On October 31, 2007, staff sent a letter containing a detailed list of all areas of concern to Wayne Nelsen and requested immediate corrective action be taken.

11. On January 11th, 2008, an inspection by Department staff revealed that none of the corrective actions requested by staff had been taken. Erosion control was still inadequate or non-existent in many places. Soil was moving from non-stabilized areas to drainage swales and continuing off site. Silt fences and check dams had not been maintained and silt fence was down in many areas. Check dams had been filled with sediment, and therefore were not working properly. A discharge of sediment was noted coming directly out of the detention pond ultimately flowing into Mill Brook. A plume of sediment was observed for about 30 feet downstream of where the drainage entered Mill Brook.

12. On January 14th, 2008, the Department issued a second Notice of Violation to Wayne Nelsen regarding the violations described in Paragraphs 10 and 11 of this Agreement in accordance with 38 M.R.S.A. § 347-A(1)(B).

13. On January 29th, 2008, the City of Westbrook issued a Stop Work Order for the property described in Paragraph 1 until the property was in compliance with winter Best Management

Practices ("BMP's"), Department Order #L-21694-NJ-A-N, and the *Erosion and Sedimentation Control Law,* 38 M.R.S.A. § 420-C.

14. On February 1st, 2008, an inspection by Department staff revealed that the requested actions to comply with winter BMP's had been completed and soil erosion had been controlled.

15. The activities described in Paragraphs 5, 7, 10 and 11 of this Agreement constitute the following violations:

    A. By failing to follow the plans submitted and approved in Department Order #L-21694-NJ-A-N, Wayne Nelsen, *et al* violated Standard Condition 1 and 8 and Special Condition 2 of Department Order #L-21694-NJ-A-N and the *Stormwater Management Law*, 38 M.R.S.A. § 420-D.

    B. By conducting or causing to be conducted an activity that involves filling, displacing or exposing soil or other earthen materials without taking measures to prevent unreasonable erosion of soil or sediment beyond the project site or into a protected natural resources, Wayne Nelsen, *et al* violated the *Erosion and Sedimentation Control Law*, 38 M.R.S.A. § 420-C.

    C. By discharging a pollutant, namely soil, to waters of the state without first obtaining a permit from the Department, Wayne Nelsen, *et al* violated the *Protection and Improvement of Waters Act*, 38 M.R.S.A. § 413.

16. On February 1st, 2008, Department staff inspected the property described in Paragraph 1 of this Agreement and determined that the project was in substantial compliance with the erosion control plan submitted and approved in Department Order #L-21694-NJ-A-N. Additional points of concern identified by the Department had been corrected as needed. All requested winter BMP's have been completed to the satisfaction of Department staff.

17. The parties agree that they have been duly notified of violations contained within this Agreement.

18. The Department has regulatory authority over the activities described herein.

19. 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 ("Board"), which is part of the Department.

20. This Agreement shall become effective only if approved by the Board and the Office of the Attorney General.

21. To resolve the violations referred to in Paragraphs 5, 7, 10, 11 and 15 of this Agreement, Wayne Nelsen, *et al* agree to pay the Treasurer, State of Maine, in accordance with the following, the sum of Eight Thousand Three Hundred Seventeen dollars ($8,317.00) as a civil monetary penalty:

    A. Upon signing the Agreement, pay the sum of Two-thousand seventy-nine dollars and 25 cents ($2079.25).

    B. No later than May 2, 2009 pay the sum of Two-thousand seventy-nine dollars and 25 cents ($2079.25).

    C. No later than June 2, 2009 pay the sum of Two-thousand seventy-nine dollars and 25 cents ($2079.25).

    D. No later than July 2, 2009 pay the final installment in the sum of Two-thousand seventy-nine dollars and 25 cents ($2079.25).

    E. 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.

22. The Department and Office of the Attorney General grant a release of their causes of action against Wayne Nelsen, *et al* for the specific violations listed in Paragraphs 5, 7, 10, 11 and 15 of this Agreement on the express condition that all actions listed in Paragraph 21 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 THE MATTER OF:

WAYNE NELSEN, *ET AL*	)	**ADMINISTRATIVE CONSENT**
WESTBROOK, CUMBERLAND, MAINE	)	**AGREEMENT**
E&S, §413, STORMWATER	)	**(38 M.R.S.A. § 347-A)**
2008-015-L	)	

IN WITNESS WHEREOF the parties hereto have executed this Agreement consisting of SIX (6) pages.

WAYNE NELSEN

_____ DATE: 4-1-2009
WAYNE NELSEN, PERMITTEE

NELSEN & BROWN DEVELOPMENT GROUP, LLC

BY: _____ DATE: 4-1-2009
WAYNE NELSEN, PRESIDENT

DWN ASSET MANAGEMENT, INC.

BY: _____ DATE: 4-1-2009
WAYNE NELSEN, TREASURER

COBB FARM ESTATES, LLC

BY: _____ DATE: 4-1-2009
WAYNE NELSEN, MANAGER

BOARD OF ENVIRONMENTAL PROTECTION

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

MAINE OFFICE OF THE ATTORNEY GENERAL

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