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October 11, 2006

Review Team Evaluation Comments
c/o Woodlot Alternatives, Inc.
30 Park Drive
Topsham, ME 04086

RE: Proposal #13, Berkshire Conservation Agent Program

Dear NRD Trustees,

Berkshire Regional Planning Commission (BRPC) provides the following comments in response to the Review Team evaluation of proposal #13 for the Berkshire Conservation Agent Program (BCAP).

Criterion A3 (Sustainable Benefits): The proposal will provide a number of long term sustainable benefits, many of which will **not** require recurring human intervention.

- 1) Terms of Conservation Commission members are staggered by statute (MGL CH 40 section 8c). This allows members educated by BCAP to share their expertise with new members.
- 2) Training materials provided to Conservation Commissions will be passed on to succeeding members and can be maintained for public access on BRPC's webpage dedicated to BCAP.
- 3) Well-trained and supported Conservation Commissions active in enforcement of environmental regulations serve as a deterrence to illegal activities that harm natural resources.
- 4) Facilitating the county wide Conservation Commission Group will establish a self-sustaining group to provide support and networking opportunities for Commission members.
- 5) Once Commissions are trained and supported in their activities permitted under the Conservation Commission Act these Commissions will not need continued training on these tasks (as with any land preservation proposal there may be other human activities needed that are beyond the proposal such as monitoring the land). Assisting Commissions in becoming active in land preservation through preparation of open space and recreation plans; applying for Self-Help and Urban Self-Help funding to acquire and protect conservation and recreation lands; acquisition of development rights on land; adopting local wetland bylaws to protect areas outside of the protection afforded under the Wetlands Protection Act such as upland vernal pools and isolated wetlands; adopting the Scenic Mountain Act to protect steep slopes, water quality and headwater streams will greatly extend natural resource protection and provide permanent or long lasting protection. For example, see Lynn Boyd 2001 study in the supporting documents that showed how bylaws can protect habitat of a number of rare species – a significant increase in benefits can be obtained from this alone given that only two communities have wetland bylaws in Berkshire County.
- 6) Training and support of Conservation Commission members under the Wetlands Protection Act has been shown to lead to increased long term and often permanent natural resource protection (BCAP experience and see Frances Clark 1990 study in supporting documents), through proper identification of resource areas, proper conditioning and monitoring of construction permits, and permanent

protection through deed restrictions and conservation restrictions, and continuing conditions on permits.

The original intent of BCAP was to maximize the use of a trained Conservation Agent by municipalities. It was believed that having the Agent work in numerous towns, and thereby improving the overall quality of Conservation Commission actions in the region, would result in a regional environmental benefit. One component of the overall strategy to maximize the use of the Agent was to keep the Program affordable. Grants have been sought from various sources as a way to keep BCAP affordable. An important point overlooked is that the municipalities have provided a strong financial commitment to BCAP, simply signing onto and using the Program. It must also be understood that most of these small towns have a limited number of “paid” staff.

This grant application was not intended as a means of funding BCAP indefinitely, and it is possible that additional funding will be sought after four years from a variety of sources. However, long term supportive funding through this grant application will allow the Program to continue to operate. The grant will also allow BCAP to grow so that it may become more self-supporting and allow BCAP to assist more communities. Experience has shown that as communities become familiar with the services provided by BCAP they realize the value of the Program and utilize it more frequently, request some of the other services offered by the Program, and recommend it to other communities. In addition, BRPC has been addressing this funding issue and will continue to address it in a variety of ways including holding scoping sessions with participating Commissions to assess impacts of changes to the fee structure, services desired, willingness to pay a yearly user fee; attempting to get state funding for BCAP under the state budget; applying for other grant opportunities; soliciting donations from individuals and environmental organizations; encouraging Commissions to adopt MGL CH 44 section 53g so that they can have funds to access the Program.

Criterion A4 (Magnitude of Ecological Benefits): The proposal has four aspects, only one of which is focused on ensuring adequate review of proposed development projects, which incidentally can easily be shown to provide an increase in ecological benefits in excess of those intended to offset permitted impacts by:

- 1) Tracking wetland resource areas that were not identified by applicants that may not have been identified and protected without review by BCAP. This has occurred in a number of cases to date.
- 2) Many wetland applications submitted to Commissions do not propose proper/adequate and required mitigation for permitted impacts, and these are often approved as submitted by Commissions that are dazzled by the consultant or mystified by the complexity of the regulations. Review by BCAP has been shown to ensure that proper mitigation is required. The increase in ecological benefits can be tracked by comparing the project as proposed with the project as permitted after BCAP review.
- 3) This task also includes assistance with enforcement. Many Commissions do not properly address enforcement issues due to a number of factors, and in many cases simply avoid enforcement. Assistance from BCAP has been shown to empower Commissions and ensure that violations are addressed and resource areas properly restored. Increased benefits can be measured in the square footage of resource area restored.

The remaining three other tasks also provide an increase in ecological benefits in a number of ways. Once Commissions adopt the Scenic Mountain Act the square footage of area afforded new protection by this can be calculated for each municipality. Assisting Commissions in obtaining APRs, conservation and deed restrictions, self help funds to acquire conservation lands can all easily be shown to increase ecological benefits by calculating the acreage protected, and rare species or unique habitat areas that are specifically sought for protection. The countywide conservation group should provide indirect benefits by providing Commissions with an avenue for networking that will allow them to exchange experiences and resources so that each community does not have to recreate the wheel so to speak with each effort to protect resources. For example, Commissions may share bylaws, special conditions, conservation land management plans, etc.

The reason more resources (time) were directed toward technical assistance with WPA permits is that in the past this has been the area of assistance most requested by Commissions. This may be due in part to the fact that this is often the only task of the four that Commissions have funds to cover the cost of this assistance - through their wetland filing fees and MGL CH 44 section 53g. It may also be due to the fact that this work is so time consuming many Commissions do not pursue their other roles. It is conceivable that more Commissions would request assistance with one or more of the other tasks such as land protection and Scenic Mountain Act should these services be provided free of charge due to the availability of grant funding. Should this be the case, with the Trustees consent, funds could be diverted from Task 1 to these other tasks.

Criterion C1 (Relationship of Expected Costs to Expected Benefits): The environmental benefits of BCAP can be extremely high compared to the costs of the Program depending on the assistance requested/provided to Commissions. For example, BCAP is currently working with a community on drafting wetlands bylaws which will reap substantial environmental protection. Only 2 communities in the county currently have local bylaws. Imagine this level of protection multiplied several times over by exchange of bylaws, encouragement of other Commissions to also adopt bylaws through the Conservation Group networking – at minimal cost under the grant. The same can be stated for adoption of the Scenic Mountain Act, protecting critical habitat through APRs, conservation/deed restrictions and easements, and purchasing conservation lands for protection. The cost of Task 1 (WPA permit and enforcement assistance) only appears to be much higher than the cost for the other tasks. This is due to the fact that more time was allocated to this task as it is anticipated that this will be the assistance most requested by Commissions based upon past experience. Actually, the cost to the grant for this work is less per hour than the other tasks because the municipalities will be covering the first \$25 of the fee for this service. The rate for access to a Conservation Agent through BCAP is well below the rate that Commissions would have to meet without the Program, which is generally between \$75-125 / hour for consultants from the area. In addition, the budget submitted did not include \$14,857 contributed by municipalities and \$1,908 contributed by BRPC in the six-month period prior to the application submittal. This would add an additional \$16,765 of matching funds, which would be allowed under the terms of the grant application requirements.

Additional Review Team Comments and Recommendations:

The proposal as submitted covers more than Commission review of permit applications and includes efforts to get Commissions to expand their resource protection endeavors, and to share these efforts with other commissions through networking. With training and assistance with their permitting efforts taking some of the burden off Commission members, it is hoped that more Commissions, once provided with support from BCAP, will be willing to extend their resource protection into other areas such as scenic mountain act, bylaws and open space planning and protection.

BCAP has a strong working relationship with staff at DEP. BRPC and BCAP welcome the suggestion to contact the Circuit Rider Program coordinator, Alice Smith about possible overlap and further suggests investigating ways that the Circuit Rider Program and BCAP can work together, as has been done on a number of occasions already, such as providing DEP with contact information for Commission members; and working together to assist a Commission with a violation.

DEP has made efforts to assist Commissions with their permitting efforts through the Circuit Rider Program, which has had problems with consistent funding (as stated on the Circuit Rider webpage at <http://www.mass.gov/dep/water/compliance/cridr.htm> - the Circuit Rider Program was discontinued in 2002 until 2005 due to budget shortfalls). The Circuit Rider Program staff has a large number of municipalities to cover (100+ for two Circuit Riders). Further limiting the Circuit Rider Program, in the Western Region - in addition to doing all of the Notice of Intent reviews for issuance of file numbers, the two Circuit Riders are now also doing all of the Massachusetts Environmental Policy Act (MEPA) review and Chapter 91 permitting; taking valuable time from their technical assistance and training time with Commissions.

Although the Circuit Rider Program provides training and technical assistance under the WPA, the technical

assistance provided must be general in nature and not project specific due to the fact that DEP is the appeal agency for wetland permits. In addition, the Circuit Rider program does not provide training and assistance to Commissions in the other tasks proposed in this grant application. Although the Circuit Riders can provide training and assistance on some of the same topics provided by BCAP some key differences are:

- 1) BCAP can represent Commissions at site visits to review resource area delineations (a proper delineation is key to resource protection): DEP cannot because they are the appeal agency and staff is time limited
- 2) BCAP can give specific and detailed guidance and recommendations on an application: Circuit Riders cannot because DEP is the appeal agency, and their outreach time is limited due to other duties and the number of municipalities covered.
- 3) BCAP can attend Commission hearings on applications and represent Commissions at the hearings and site visits: Circuit Riders have extremely limited time and can only provide general guidance
- 4) BCAP can give assistance with all enforcement issues including buffer zone only violations: DEP generally only gets involved with large or egregious violations involving alteration of resource areas and not buffer only violations
- 5) BCAP can provide training and assistance with local bylaws, the scenic mountain act, open space planning and protection: DEP Circuit Riders do not.
- 6) BCAP staff is available evenings and weekends as often needed by Commissions: Circuit Riders are more constrained on availability.
- 7) BCAP can readily expand should the need arise due to an increase in communities requesting assistance by utilizing staff at BRPC or hiring another Conservation Agent; DEP cannot

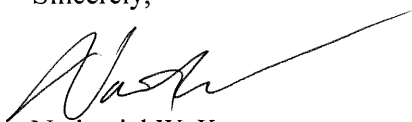
Regarding comments related to a no-bid contract, a complete and exhaustive hiring process was followed which met all of the requirements of the Uniform Procurement Act when staffing the Berkshire Conservation Agent Program. An open solicitation was posted for public response. A consultant selection committee was formed consisting of representatives from several municipalities. Several consultant responses were received. Several consultants were interviewed. A similar process would be followed should the need arise to add a second Agent due to an increase in use of the Program. In addition, agreements between the Conservation Agent and BRPC prohibit any consulting by the Agent outside of the work performed by BCAP; limits BCAP work to only municipalities in Berkshire County; and has a set fee schedule that cannot be raised by the Agent as it could by a consultant – which has not been raised since the Program was begun in 2002. This was done in an effort to ensure that the Agent will have adequate time to perform the duties required under BCAP; ensure that Commissions feel comfortable that the Agent does not have any conflicts of interest as the Agent does not work for permit applicants and present projects before Commissions; to keep the fee low enough that Commissions will be able to afford access to a Conservation Agent; and to ensure that the Agent does not use BCAP as a means to grow a private consulting business. These measures were suggested by the Agent chosen to staff the Program as a way to maintain the integrity of the Program. The reference from BRPC's website refers to the contract between the Conservation Commission and BRPC that allows BRPC to provide Conservation Agent services to the municipality. A strength of BCAP is its flexibility. The deadlines that Conservation Commissions have to respond to various filings would likely pass if a full procurement process had to be conducted to hire a consultant for each and every filing. Massachusetts General Laws, Chapter 30B, The Uniform Procurement Act, [Section 1. (b)(3)] specifies that the Uniform Procurement Act does not apply to "an intergovernmental agreement subject to the provisions of section four A of chapter forty." MGL Chapter 40 Section 4 specifies and defines governmental units and includes regional planning agencies as a governmental unit. BRPC is fully confident that the procurement process used is completely compliant with applicable laws. BRPC would not, however, object to an independent evaluation by the Trustees if the Trustees so desire.

Although the majority of the program is to be accomplished by one person the proposal was designed and budgeted for a 35 hour 50 week per year schedule, which can easily be accomplished by a single person. Should the Program grow in requests for assistance beyond this BRPC may hire a second Agent, limit the number of contracts it maintains with Commissions, or limit the duties of the Agent to specific tasks that

have the most environmental benefits. Performance goals are outlined in the monitoring and contingency plan sections of the proposal for each task. Monitoring information will be available for review by the Trustees and the public in general. In addition, the success of the Program will be evident by the continued use by Commissions of the services it provides. Billing records for each municipality clearly itemizes all work activities performed by the Agent and can also be used to monitor the Program. To date after 4 years of operation there have been no formal complaints regarding the services provided by the Program and the number of municipalities utilizing the service continues to grow. BCAP has worked with a number of Commissions on ways to maintain a strong public image that protects the environment while allowing development and economic growth that is both ecologically friendly and legally permitted. A primary focus of BCAP is to implement the Wetlands Protection Act. This is an existing state law. One of the most common complaints other BRPC staff hear from developers is the uneven and unpredictable application of environmental laws. This uneven and unpredictable application can lead to an unnecessarily long permit approval process. To a developer time is money. Inasmuch as BCAP can expedite a permitting process it should not be viewed as anti-development. Written reviews provided to Commissions on permit applications clearly reference applicable sections of the wetland regulations whenever a recommendation is offered. This ensures that all projects are treated equally and in accordance with the regulations, as well, as providing the Commission and applicant with the relevant sections of the regulations that apply to each application.

BRPC appreciates the opportunity to provide these public comments.

Sincerely,

A handwritten signature in black ink, appearing to read 'Nathaniel W. Karns', written over a horizontal line.

Nathaniel W. Karns
Executive Director