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June 9, 2011

Susan Lessard, Chair
Maine Board of Environmental Protection
17 State House Station
Augusta, ME 04333-0017

Re: Supplemental Evidence, Appeals of DEP # L-16281-4E-EN for Maintenance
Dredging of the Kennebec River, Maine

Dear Chair Lessard,

The Phippsburg Appellants, Dot Kelly, Ed Friedman and Douglas Watts hereby provide their consolidated response to the Board of Environmental Protection's June 3, 2011 letter regarding alleged supplemental evidence in the appeals of the above permit.

Appellants request that the Chair admit the following evidence pursuant to its authority under 38 M.R.S.A § 341-D(4) and DEP Rules, 06-096 CMR ch. 2, § 24.

1. Endangered Species Act documents:

The June 3rd letter finds that supplemental evidence in the appeals include the *1998 Final Recovery Plan for the Shortnose Sturgeon* (Phippsburg Appeal at 14, n. 14; Watts/Friedman Appeal at 4-5 and 4-5, n.2) (hereinafter as "1998 Recovery Plan") and the National Marine Fisheries Service ("NMFS"), *2007 Biological Opinion for Cianbro Constructors, LLC Brewer Module Facility, F/NER/2007/05867*. (Watts/Friedman Appeal at 5, n. 3 and 6, n. 5) (hereinafter as "2007 Cianbro BO"). Appellants respectfully contend that these documents either already are part of the record since they are incorporated into the draft Environmental Assessment submitted as part of the Corps' permit application, or will be part of the record upon completion of the consultation studies required by the federal Endangered Species Act.

Pursuant to the Natural Resources Protection Act ("NRPA") and DEP rules, the applicant has the burden of affirmatively demonstrating compliance with each licensing criterion, 38 M.R.S.A § 480-D, including the obligation to show that a proposed action will not unreasonably impact marine and estuarine fisheries. *Id.* § 480-D(3). The applicant's burden increases when a licensing criterion, such as impacts to endangered marine fish, is in dispute:

An applicant for a license has the burden of proof to affirmatively demonstrate to the Department that each of the licensing criteria in statute or rule has been met... For those matters that are not disputed, the applicant shall present sufficient evidence that the licensing criteria are satisfied. For those matters relating to a licensing criteria that are disputed by evidence the Department determines is

credible, the applicant has the burden of proving by a preponderance of the evidence that the licensing criteria are satisfied.

06-096 CMR ch. 2, § 11(F).

The minimum level of evidence to establish compliance with NRPA criteria (i.e. for non-disputed criteria) is established by DEP rules. For projects that impact coastal wetlands or marine fisheries, as here, NRPA requires the applicant to submit a site characterization report that contains: “*Existing wetland characteristics including water depths, vegetation and fauna.*” 06-096 CMR ch. 310, § 9(B)(2) (emphasis added). *See also* NRPA Tier III application at 36 (requiring site characterization report to be submitted as attachment 9).

In this case, the Corps submitted an incomplete draft Environmental Assessment (“draft EA”) in lieu of attachment 9. (*See* Corps NRPA application at 36.) The draft EA included a section on endangered species in the discussion of existing site conditions (EA at 12-15). This discussion references both the 1997 and 2004 Biological Opinions (“BO”) for shortnose sturgeon. (Draft EA at 13.) Although the draft EA directs the reader to Appendix 5, (entitled “Coordination”), to review those BOs, Appendix 5 is blank. Additionally, the draft EA references a 2011 BO for sturgeon and salmon supposedly contained in Appendix D. (Draft EA at 14). The document, however, contains no Appendix D – in fact, as of June 6, the Corps reports that the 2011 BO is still under review by the National Marine Fisheries Service and that the Environmental Assessment remains incomplete. (*See* John Almeida, Army Corps, email to Dot Kelly, Appellant, June 6, 2011, 7:21 am, attached as Ex. 15.)

The applicant’s omission of the 1997 and 2004 BO’s, and its premature submittal of the application prior to completion of the EA or the 2011 BO, represent categorical failures of its burden to demonstrate that there will be no unreasonable impact to marine fisheries. 38 M.R.S.A § 480-D; 06-096 CMR ch. 2, § 11(F); 06-096 CMR ch. 310, § 9(B)(2). In light of the applicant’s failure to provide a complete analysis of impacts to endangered species, Appellants had no option but to preserve their authority to submit additional comments and evidence related to those species when the EA and BO were complete. (*See, e.g.*, Comments of Friends of Merrymeeting Bay (“FOMB”), at 2 (March 19, 2011)(reserving the right to submit evidence related to the Endangered Species Act), attached as Ex. 16.) FOMB further noted that consultation with NMFS and a BO/take permit were required before permits could issue, and that, as in the past, the BO would likely result in changes to the proposed timing and or dredging methods. (*Id* at 12-13.)

Despite the incomplete nature of the record, DEP issued a permit anyway. As noted above, such premature action categorically violates NRPA – particularly where the applicant has the burden to demonstrate compliance with disputed licensing criteria by a “preponderance of the evidence.” 06-096 CMR ch. 2, § 11(F). Both Applicants and Appellants clearly expected the final administrative record would contain the 2011 BO and associated documents.¹ The agency

¹ Documents related to the 2011 BO include the 1998 Final Recovery Plan for shortnose sturgeon (which is an integral part of the BO) and the related (i.e. cumulative) impacts noted in the

cannot artificially limit the record by issuing a permit decision before the record is complete. Accordingly, because the record as it relates to endangered species is essentially still open, the Chair should admit the 1998 Final Recovery Plan (which will be a necessary and integral element of the pending 2011 BO for sturgeon, see below), and the 2007 Cianbro BO (which discusses related and cumulative impacts).

The real issue this raises is whether DEP issued permits without fully reviewing the record – not whether Appellants have submitted supplemental evidence. A more careful review of the record would show that the 2004 BO, which was expressly incorporated by reference in the draft EA submitted as part of the NRPA application, extensively cited and discussed the 1998 Final Recovery Plan – including the aspects of the Recovery Plan cited in these appeals.² Thus, the 1998 Final Recovery Plan is already part of the record. Where an applicant expressly relies upon a document, or a chain of documents, it may not keep these documents out of the record by omitting them from its application and thereby force opponents to add the document or risk exclusion under the supplemental evidence standards. This approach effectively would put the applicant’s burden upon opponents, and is therefore inappropriate.

In this case, the documents relate to a contested issue – which only increases the burden upon applicants. Both the Phippsburg Appeal and the Watts/Friedman Appeal quoted the 1998 Recovery Plan for its discussion of the severe impacts hydraulic dredging causes to sturgeon. (See Phippsburg Appeal at 14, n.14; Watts/Friedman Appeal at 4-5, n. 2). The 2004 BO cites to the Recovery Plan for the very same point:

The Shortnose Sturgeon Recovery Plan (NOAA Fisheries 1998) identifies habitat degradation or loss (resulting, for example, from dams bridge construction, channel dredging, and pollutant discharges) and mortality (resulting, for example, from impingement of cooling water intake screens, dredging, and incidental capture in other fisheries) as principal threats to the species’ survival.

National Marine Fisheries Service, *Endangered Species Act Biological Opinion Emergency dredging of Federal Navigation Channel, Kennebec River, Maine F/NER/2003/01461*, at 9 (Jan. 13, 2004) attached as Ex. 17.

The 2004 BO alone is sufficient to bring the 1998 Recovery Plan into the record. Additionally, because the 2011 BO must, by law, specifically address the species recovery goals set forth in the 1998 Final Recovery Plan and related and cumulative projects, the 2011 BO will also incorporate the 1998 Recovery Plan and 2007 Cianbro BO. Accordingly, the chair should

National Marine Fisheries Service, *2007 Biological Opinion for Cianbro Constructors, LLC Brewer Module Facility, F/NER/2007/05867*.

² See National Marine Fisheries Service, *Endangered Species Act Biological Opinion Emergency dredging of Federal Navigation Channel, Kennebec River, Maine F/NER/2003/01461*, at 6, 9, 12, 14, 15, 17, and 20 (Jan. 13, 2004). Given that a biological opinion must evaluate impacts to the survival of the species based on the goals set in the species recovery plan, the 2011 BO – when complete – will also, by definition, extensively cite and discuss the 1998 Recovery Plan.

find that the 1998 Final Recovery Plan and the 2007 Cianbro BO are part of the record already. Additionally, the chair should find that the 2011 BO – when complete – must also be added to the record.

2. Evidence presented by the Army Corps of Engineers to the Maine Legislature:

Pursuant to statute and rule, evidence may be added to the record when it “is relevant and material and . . . (2) The evidence is newly discovered and could not, by the exercise of diligence, have been discovered in time to be presented earlier in the licensing process.” 38 M.R.S.A § 341-D(4)(a).

On May 11, 2011 – after the permit had issued – the Corps testified before a work session of the Legislature’s Joint Standing Committee on the Environment and Natural Resources. At that work session

- (1) the Corps provided physical core samples in glass jars for the Committee members to review, which prompted a response from Rep. Parker that the Corps should consider upland disposal (Kelly Appeal at 10 n. 3) and,
- (2) in response to questions from the Committee, the Corps testified that past dredging projects of a similar magnitude typically took three weeks (Phippsburg Appeal at 11, n. 8 and 28).

Both the physical samples and the Corps’ statements are relevant and material because they directly inform issues in dispute: specifically, (1) whether upland disposal is a practicable alternative and (2) the duration and thus magnitude of dredging impacts. Appellants could not, by the exercise of due diligence, have presented this evidence earlier in the licensing process because it did not exist prior to May 11, 2011. Accordingly, it is admissible pursuant to § 341-D(4)(a).³ Moreover, since these are admissions by the applicant, they are admissible as substantive evidence of the facts stated under Maine evidentiary rules. *See* Maine Rules of Evidence § 801(d)(2).

3. Evidence showing the Corps failed to consider less environmentally damaging practicable alternatives, including in situ techniques like those described in Army Corps document AD-A257826.

Although the June 3rd letter contends that the “discussion” about in situ alternatives on page 10, paragraph 2 of the Kelly Appeal is not part of the record, both Kelly and the Phippsburg Commenters submitted comments requesting the Department review in situ techniques in the practicable alternatives review. (*See* Kelly Comments to DEP, March 20, 2011 (“A procedure sometimes called “bar dragging” might accomplish the required result without the extensive dredging and disposal”); Phippsburg Commenters, at 7 (March 30, 2011) (“For example, instead of advance dredging and over-dredging, as is currently proposed, the Corps must consider

³ Appellants note that the Corps’ Public Notice is already part of the record and clearly states that the project will take three to five weeks. (*See* Phippsburg Appeal at 11.)

minimal dredging and alternative sand crest manipulation techniques that knock the wave crests into the adjacent troughs.”); Kelly Comments to Army Corps at 5 (March 30, 2011) (“Another solution the Corps should evaluate – given the rapid reloading of sediment at Doubling Point – is whether a dredge-only technique could enable the Spruance to safely exit the river by knocking the peaks of the Doubling Point sand waves into the troughs, and thus eliminate the need to dispose of 50,000 cy of dredge spoils in August, when the potential for harms to the river, clamflats, endangered species and other resources is greatest. It is my understanding that this approach is used by the USACE on the Mississippi River.”).) Accordingly, it is inaccurate to say that this discussion of in-situ alternatives such as bar dragging or propeller wash is supplemental evidence outside the licensing record. Appellants clearly raised these issues with the Department during licensing.

Second, with regard to document AD-A257826, Kelly submits this document both to demonstrate that in situ alternatives are in-fact practical and have been used elsewhere and to demonstrate that, despite her diligent and repeated attempts to raise this question, the applicant and the Order utterly failed to answer it as required by rule. *See* 06-096, CMR, ch. 2, § 11(f) (applicant has burden of proof to affirmatively demonstrate, “by a preponderance of the evidence,” that it complies with disputed licensing criterion).

Kelly has shown excessive diligence in trying to ensure this issue was addressed. *See* 38 M.R.S.A § 341-D(4)(A)(1) (allowing supplemental evidence when “party seeking to supplement the record has shown due diligence in bringing the evidence to the licensing process at the earliest possible time”); 06-096, CMR, ch. 2, § 24(B)(5)(a) (same). On or before Feb 15 – the day she was informed about the project by DEP and a full two weeks before the Corps even released its Public Notice on March 1st – Kelly commented to DEP that the agencies must review less damaging in-situ alternatives. (*See* Bob Green, DEP, email to Bill Kavanaugh, Army Corps (Feb. 15, 2011 at 4:12 pm) (“I just finished speaking to her and . . . [h]er take on the project is that it is a waste of time and creates an unnecessary impact on people and the environment when there are other less damaging solutions available (example she gave was to drag something along the bottom to knock the crests of the sand waves into their corresponding troughs”) attached as Ex. 18). Kelly raised the issue again at the Feb. 24, 2011 public hearing, (*see* Robert Green, DEP, handwritten notes Feb. 24, 2011, attached as Ex. 19), in her March 20 comments to DEP, and again in her March 30 comments to the Corps and to DEP. (*See* Phippsburg Appeal, Ex. 9).

Given Kelly’s repeated efforts to raise the issue, it does not matter that she did not submit document AD-A257826 until filing her appeal. Under NRPA, the applicant has the burden to affirmatively demonstrate that a less environmentally damaging alternative is not practicable. 06-096 CMR ch. 310, §§ 5(A) and 9(A). Once an alternative is raised, as here, the applicant must respond with credible evidence; it cannot simply brush off the issue and thereby force the burden of proof on interested parties. 06-096 CMR ch. 2, § 11(F). Likewise, the Department cannot ignore issues raised by interested parties. Such an approach turns the burden of proof on its head. Accordingly, where an appellant has shown due diligence in raising a contested issue, and the applicant and Department fail to address the issue with any credible evidence, an appellant must then be afforded the opportunity to submit evidence on appeal showing that the issue was wrongfully and illegally ignored.

4. Laboratory Test Results of accumulated deposition of dredge spoils on the Kelly shore:

For the same reasons, the Chair should admit the recent laboratory results of accumulated deposition of dredge spoils on the Kelly shore (Kelly Appeal at 3). The sampled materials were deposited after a 2009 dredging by BIW and disposal at the Kennebec Narrows. At the Appellant's request, the Department and Applicant visited the property at that time to view the impacts to the Kelly shoreline. Kelly continued to raise concerns about deposition of dredge spoils on her property in later meetings with the Department in 2010, and in her public comments on this permit application. Kelly even brought samples of the materials to the February 24, 2011 public hearing. (*See Kelly Comments to the Army Corps*, at 2 (March 30, 2011); *Kelly Comments to DEP*, at 14 (March 20, 2011), both in Phippsburg Appeal Ex. 9.)

Pursuant to NRPA, the applicant has an obligation to address impacts to coastal wetlands, including cumulative impacts. 38 M.R.S.A § 480-D; 06-096 CMR ch. 310(5)(D)(1)(d). Despite being aware of this issue for more than a year prior to applying for this permit – including concerns over toxicity of the deposited materials and potential violations of water quality standards (*id.*) – the applicant refused to test the materials or address potential impacts of accumulated deposition of spoils. Out of desperation, Kelly finally arranged for and funded testing herself. Moreover, she did so on March 17, during the public comment period and informed DEP that she intended to add the results to the record. (*See Kelly Comments to the Army Corps*, at 3 (March 30, 2011) (Phippsburg Appeal Ex. 9.)

As noted in the Kelly Appeal, she did not receive the lab test results until after the permit was issued. Therefore, the data should be admitted because (1) the appellant showed excessive diligence in raising this issue over a year before the permit application was even submitted and then continually during the licensing process, (2) it is the applicant's and not the appellant's burden to demonstrate compliance with NRPA standards, (3) when the applicant refused to conduct tests in a timely fashion, the Appellant did so herself in a timely fashion and at her own expense, and (4) the final results were not available until after the permit had issued and therefore could not have been submitted any earlier. The data results are attached as Ex. 20.

5. The Willamette River Report:

The June 3rd letter next contends that the Army Corps of Engineers Report "Prediction of Suspended Sediment Due to Dredging at the Willamette River, 2009 (*see Phippsburg Appeal* at 18, n. 18) is not in the record because "inclusion of a link to a document does not enter a document into the Department's record." Appellants respectfully disagree.

In the era of broadband internet access and embedded hyperlinks, it takes only one click for the Department to link to a supporting document that is properly cited in a comment letter. Since that is now how most of the world does business, it makes no sense for the Department to refuse to admit hyperlinked documents into the record. Moreover, Appellants would have had

no way of knowing that the Department has an anti-hyperlink policy. There is no such policy in rule, or even in the Department's Online Information Sheet, *Public Participation in the Licensing Process* (May 2008).⁴ Such a policy, to be effective, should at a minimum be made available to the interested public.

The report should be admitted because Appellants acted with due diligence and in good faith in timely submitting comments regarding the Willamette River report during the licensing process, and included a hyperlink to download the report, with the full expectation that it would be considered by the Department as part of the record. Regardless, there can be no dispute that the substantive data – the table comparing turbidity from mechanical and hydraulic dredging – is part of the record because Kelly reproduced this data from the Willamette River Report as a table in her comments with a proper citation to the source. (*See Kelly Comments to the Army Corps*, at 12-13 (March 30, 2011) (Phippsburg Appeal Ex. 9.)) Accordingly, at a minimum, the information and the citation must be admitted.

6. EPA Toxicity Report:

Appellant Kelly consents to withdraw the reference to EPA's study of the relation between the particle size of suspended solids and mortality, and the 2003 study of the impact of suspended solids on benthic organisms, including Figure 1. (*See Kelly appeal*, page 11, paragraph 2, sentences 6-7.)

Thank you for the opportunity to address these issues.

Sincerely,



Stephen F. Hinchman, Esq., counsel for
The Phippsburg Appellants and on behalf of
Appellants Dot Kelly, Ed Friedman and Douglas
Watts

Cc: Service List

Attachments: Exhibits 15-21

⁴ Available at <http://www.maine.gov/dep/is-public.htm> (attached as Ex. 21).

Board of Environmental Protection Service List (05-16-11)
Appeal: Army Corps / Kennebec River Dredge, Permit # L-16281-4E-E-N

**Official Copy for Filings (by 4:00 p.m.) to
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