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VIA EMAIL AND OVERNIGHT MAIL

June 9, 2011

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

RE: U.S. Army Corps of Engineers Kennebec River Dredging Permit
DEP #L-16281-4E-E-N

Dear Chair Lessard:

On behalf of Party-in-Interest Bath Iron Works (BIW), I attach BIW's Opposition to Supplementation of the Record and Motion to Strike.

Sincerely,

Matthew D. Manahan

cc: BEP Service List

STATE OF MAINE
BOARD OF ENVIRONMENTAL PROTECTION

APPEAL IN THE MATTER OF

U.S. ARMY CORPS OF ENGINEERS Bath and Phippsburg, Sagadahoc County MAINTENANCE DREDGING #L-16281-4E-E-N (approval)	NATURAL RESOURCES PROTECTION ACT COASTAL WETLAND ALTERATION WATER QUALITY CERTIFICATION FINDINGS OF FACT AND ORDER

PARTY-IN-INTEREST BATH IRON WORKS'
OPPOSITION TO SUPPLEMENTATION OF THE RECORD
AND
MOTION TO STRIKE

On May 16, 2011, the Board received four appeals of the Department's licensing decision in the matter identified in the caption above. Three of those appeals, all objecting to the order approving the U.S. Army Corps of Engineers' dredging project, contain evidence that is not part of the Department's record associated with the decision on appeal. This supplemental material may not be added to the record now, months after the same appellants commented on the Corps's application (without providing the supplemental material), and after the Department reviewed the application and comments and issued its decision.

The Department's rules make clear that an appellant seeking to supplement the record must do so at the time it files its appeal of the licensing decision. No such request was made by the appellants, ending the analysis there. Further, even if such a request had been made, the non-record evidence incorporated into the appellants' appeal documents does not satisfy the Department's rules governing admission of supplemental evidence.

Party-in-Interest Bath Iron Works ("BIW") requests that the supplemental evidence incorporated by the appellants in their briefs – including the evidence identified in the June 3, 2011 letter from the Board's Executive Analyst, as well as the additional non-record evidence identified below – not be permitted in to the record at this juncture. Additionally, BIW moves

that the references to, and accompanying discussions of, this non-record evidence be stricken from appellants' appeal filings. So that BIW and the Corps are not prejudiced, Board members should receive redacted versions of the appellants' filings.

I. BIW is a Party-in-Interest

The permitting decision being challenged in the three appeals is an order approving emergency maintenance dredging by the Corps of two segments of the federal navigation channel in the Kennebec River. The purpose of the project is to enable the Navy destroyer *U.S.S. SPRUANCE* to safely sail from BIW on September 1, 2011. The Navy has stated that adherence to this deadline is critical to national security and that for the ship to be able to navigate the river safely the channel must be dredged. (Order at 1-2.)

BIW, the builder of the *SPRUANCE*, participated in the Department permitting process for the proposed dredging project. (Letter from R. Floccher, BIW, to R. Green, DEP, regarding Comments to the Army Corps of Engineers' August 2011 Maintenance Dredging of the Kennebec River Submittal (March 25, 2011).) BIW appears here as a party-in-interest because its business interests are directly impacted by the ability of the Navy and BIW to safely navigate Navy ships to and from BIW, generally, and the *SPRUANCE*, particularly.

II. The Department's Rules Do Not Allow Admission of the Non-Record Material Referenced and Discussed by the Appellants in their May 16 Filings.

A. The Department's Rules

"The record for appeals heard by the Board is the administrative record prepared by the Department in its review of the application." DEP Rules, Ch. 2.24(B)(5). Chapter 2 of the Department's rules establishes the limited instances in which the Board may allow a party to supplement the record in support of an administrative appeal of a permitting decision. First, "[i]f the appellant is requesting that supplemental evidence be included in the record and considered

by the Board, such a request, with the proposed supplemental evidence, *must* be submitted with the appeal." *Id.* Ch. 2.24(B)(2). Second, if the appellant makes the required request:

> The Board may allow the record to be supplemented on appeal when it finds that the evidence offered is relevant and material and that:
>
> (a) the person seeking to supplement the record has shown due diligence in bringing the evidence to the attention of the Department at the earliest possible time; or
>
> (b) the evidence is newly discovered and could not, by the exercise of reasonable diligence, have been discovered in time to be presented earlier in the licensing process.

Id. Ch. 2.24(B)(5).

The burden rests with the party seeking to supplement the record both to request addition of the supplemental material and to demonstrate why, under the standards in Chapter 2, the supplemental material should be admitted into the record.

B. The Appellants Made a Strategic Decision to Ignore the Department's Rules and Not Request Admission of the Supplemental Evidence – This Strategy Should Not be Rewarded.

The Rules unambiguously require an appellant seeking to supplement the record to follow a specific procedure. Such an appellant must (1) request admission of the supplemental evidence (2) at the time it files its appeal and (3) at that time it also must provide copies the additional evidence along with its appeal. *Id.* Ch. 2.24(B)(2). While ignorance of the Rules would not justify their violation, none of the appellants here has any claim of ignorance. The first appeal, filed by the Town of Phippsburg *et al.*, was submitted by legal counsel. This same counsel represents Dot Kelly; Kelly filed the second appeal. (Kelly filed two appeals, one that she signed and submitted and another that her attorney signed and submitted on her behalf.) The third appeal was filed by Ed Friedman and Doug Watts. Both individuals have participated in appeals before the Board on prior occasions. Further, Friedman is chair of Friends of

Merrymeeting Bay ("FOMB"), an organization represented by legal counsel and an appellant in the first appeal noted above. The coordination among those filing all three appeals is apparent. *See, e.g.*, Town of Phippsburg *et al.*, at 1 (identifying Dot Kelly as one of the appellants); *id.* n.30 (incorporating portion of Friedman/Watts Appeal by reference); Friedman/Watts Appeal at 6[1] (incorporating by reference comments made by the Town of Phippsburg).

Aware of the rules governing admission of supplemental evidence, the appellants decided not to follow the required regulatory process. They simply worked the material into their appeal documents without acknowledging it was not part of the record or asking for its admission. The inquiry into whether to admit this additional material should begin and end here.

Admission of this supplemental material despite this intentional violation of the rules would reward the appellants' strategic decision. In addition to the fact that the Department never had the benefit of the material during its decision making process or the opportunity to scrutinize the appellants' characterization of this material, at this juncture response briefs are due June 17. Just one week before June 17 the Chair will rule on admission of the supplemental evidence. In the intervening week, parties filing responses will not have time to track down all the supplemental evidence (some of which has not been produced), review and respond to that material, and identify any appropriate rebuttal evidence. Nor, as the appellants are aware, is there room to extend the briefing schedule. *See, e.g.*, Cover Letter to Friedman/Watts Appeal (May 14, 2011) ("We request the Board rule upon this appeal as quickly as possible because of the expedited schedule for the activity we are requesting be reviewed."). The appeal must be heard before the dredging begins in August. As a result, admission of the supplemental evidence

[1] The pages in the Friedman/Watts Appeal are not numbered. For reference purposes, consistent with the Executive Analyst's June 3, 2011 letter, BIW has numbered the pages for reference purposes.

at this late date will prejudice parties wishing to respond and reward appellants' strategic decision to not follow the rules.

C. Even if the Appellants had Requested the Admission of Supplemental Evidence, the Material Does Not Satisfy the Board's Test for Admissibility.

The non-record material falls into one of three general categories: (1) reports and other materials in existence prior to the public comment period on the Corps's application, (2) statements made to the Environment and Natural Resources Committee of the Maine Legislature in May 2011, and (3) testing coordinated by Dot Kelly.[2] The appellants have not demonstrated why, consistent with the applicable rules, the record should be supplemented with these materials.[3] Nor is there justification for doing so.

With regard to the first category of material, that material existed prior to the comment period and was easily discoverable, often through internet searches, as the appellants' citations reveal. The appellants have not shown diligence in bringing this material to light, nor is the material newly discovered. As a result, neither prong of DEP Rules, Ch. 2.24(B)(5), is satisfied.

In addition to the non-record material included in the appeals that falls into this first category identified in the Executive Analyst's June 3, 2011 letter, the additional material identified in Attachment B also falls into this category and similarly should not be added to the record.

With regard to the second category, proceedings before the legislative committee, these occurred after the Department issued the Order and have no bearing on the decision under appeal. Those legislative proceedings did not involve new evidence that could not have been

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[2] An annotated copy of the Executive Analyst's June 3, 2011 letter indicating into which of the three categories each piece of supplemental material falls is included as Attachment A.

[3] The appellants should not be allowed to offer after-the-fact justification for supplementing the record. Doing so would deny other parties the opportunity to respond, again prejudicing these parties and rewarding the appellants for not following the rules in the first instance by requesting the admission of supplemental evidence and submitting any supporting argument at the time they filed their appeals.

submitted earlier in the process. The duration of prior dredging projects discussed before the committee is a fact that has been known and discoverable since those prior projects were completed. This fact is not new evidence just by virtue of being discussed before the Legislature. *See* Town of Phippsburg *et al.*, at n.8 & 28 (noting discussion of prior project duration). Nor is the grain size and composition of the sandy material the Corps seeks to dredge new evidence. *See* Kelly Appeal at 10, n.3 (discussing composition of the dredged material). If the appellants had wanted to present evidence on these topics while the record was still open before the Department made its permitting decision, they could have done so. No new evidence relating to the permitting and certification standards reviewed by the Department prior to issuing its order subsequently emerged before the Legislature.

With regard to the third category, sediment "testing" results that Ms. Kelly discusses in her appeal, she states that she did not send the sediment she wanted tested to the lab until March 17, 2011 and therefore did not receive the results until after the Department issued the Order on April 14, 2011. Kelly Appeal at 3, n.2. Ms. Kelly alleges she tested sediment deposited in 2009 as part of a prior dredge project. *Id.* at 3. The fact that she waited until March 2011 to send a sample to the lab does not justify admission of her results after close of the record. Had she acted diligently she would have sent the sample off sometime sooner in the years since 2009. Even if she had collected a sample for the lab in February of this year, at the same time she collected a sample for the Phippsburg public meeting, she might have been able to complete her "testing" before close of the record. *See id.* at 3 (noting sampling she conducted on February 24, 2011). By failing to show due diligence in bringing the evidence to the attention of the Department at the earliest possible time and because the evidence could have discovered earlier

through the exercise of reasonable diligence, the testing results should not be admitted now. DEP Rules, Ch. 2.24(B)(5).

III. Reference to the Non-Record Material and the Associated Discussion Should be Redacted from Appellants' Filings Prior to Distribution to Individual Board Members.

Assuming the supplemental material is not added to the record, this non-record material and accompanying discussion must be redacted before circulation of the appeal documents to Board members. If this does not occur the Corps and BIW will be prejudiced. The effect will be that the Board members will read the impermissible discussion, achieving much of what the appellants intended, but the responding parties will not have the ability to go outside the record in preparing any rebuttal, or even to discuss the same non-record documents relied on by the appellants. This would be grossly unfair.

Accordingly, BIW requests that the non-record portions of the appeals identified in the Executive Analyst's June 3, 2011 letter be redacted. For the same reasons, BIW requests that the additional material identified in Attachment B also be redacted. This additional material includes (a) citations to, and accompanying discussion of, non-record items not identified in the Executive Analyst's letter and (b) expansion of the discussion accompanying non-record material identified in that letter.

IV. Conclusion

The Department's rules establish a process for supplementing the record and standards that must be met for supplementation to occur. In the present instance, the appellants failed to follow the required procedure and the non-record evidence they impermissibly discuss fails to qualify for admission. Accordingly, BIW requests that:

a) The non-record material identified in the Executive Analyst's June 3, 2011 letter and the additional non-record material identified in Attachment B not be added to the record at this late date; and

b) The non-record material and the related discussion be stricken from Appellants' appeal documents by redaction before those documents are provided to individual Board members; to assist the Board, proposed redacted versions of the appeals are attached hereto as Attachment C.

Dated: June 9, 2011

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Nicholas D. Livesay

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Attorneys for Party-in-Interest
Bath Iron Works

ATTACHMENT A

Attachment A - Annotated Letter

STATE OF MAINE
DEPARTMENT OF ENVIRONMENTAL PROTECTION

PAUL R. LEPAGE
GOVERNOR

Susan M. Lessard
Chair
Cynthia S. Bertocci
Executive Analyst

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June 3, 2011

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Bowdoinham, ME 04008

RE: Appeals in the Matter of: Department Order #L-16281-4E-E-N Issued to U.S. Army Corps of Engineers for Maintenance Dredging of the Kennebec River, Bath and Phippsburg

Dear Parties:

On May 16, 2011 the Board received four appeals of the Department's licensing decision in the above referenced matter. The appeals were filed by the following persons:

- U. S. Army Corps of Engineers
- Town of Phippsburg, Phippsburg Shellfish Conservation Commission, Phippsburg Land Trust, Kennebec Estuary Land Trust, Friends of Merrymeeting Bay, Bob Cummings, Lawrence Pye, Dean Doyle, Dot Kelly, Captain Ethan DeBery, and Laura Sewall (hereafter Town of Phippsburg et al.) represented by Stephen Hinchman, Esq.
- Dot Kelly
- Doug Watts and Ed Friedman

While none of the appellants requested to supplement the record, the appeals contain evidence and documents that are not part of the Department's record in this matter. The additional evidence submitted with the appeals is as follows:

Category

Appeal by Dot Kelly:

[3] • Page 3, paragraph 2, sentence 4: "Recent testing of the remaining muck shows that it has a high water content, elevated levels of lead and chromium, and over 33% silt and clay." This information and related information in footnote 2 are not part of the record.

[2] • Page 10, paragraph 1, sentences 3 and 4 beginning: "Also, utilizing a Maine based clamshell dredge and scow to remove targeted sand crests…" and continuing through paragraph 2, and footnote 3. These statements cite evidence presented to the Legislature's Joint Standing Committee on Environment and Natural Resources at a hearing in May 2011. The permit was issued on April 14, 2011.

[1] • Page 10, paragraph 2. This discussion and the cited document US Army Corps' document AD-A257826 are not part of the licensing record.

[1] • Page 11, paragraph 2, beginning at sentence 6 with: "See http://water.epa.gov/sciteh/datait/tools/warsss/sabs.cfm" through to the end of the paragraph including Figure 1 discussing the toxicity of suspended sediments.

Appeal by Town of Phippsburg et al.

[2] • Page 11, last sentence and footnote 8. "Overall the project as proposed by the Corps will require three to five weeks of dredging beginning August 1st" to the extent they include information presented at a Legislative work session on May 11, 2011; after the date the license was issued.

[1] • Page 14, last sentence and footnote 14. "Despite its admission that mechanical dredging will reduce impacts to the endangered shortnose sturgeon in August, the Corps still prefers a hopper dredge." The 1998 Final Recovery Plan for the Shortnosed Sturgeon is not in the licensing record.

[1] • Page 18, footnote 18: While Ms. Kelly's comments to the DEP and Army Corps are in the record, the cited report "Prediction of Suspended Sediment Due to Dredging at the Willamette River, 2009" is not. The inclusion of a link to a document does not enter a document into the Department's record.

[2] • Page 28, first full paragraph, second sentence: "Moreover, the Corps recently stated in a work session before the Legislature that in the past dredging of this magnitude took a minimum of two weeks at Doubling Point and one week at North Sugarloaf Island." The May Legislative session occurred after issuance of the permit.

Category

Appeal by Doug Watts and Ed Friedman

[1] • Page 4-5, Section II.A. Impacts on Atlantic and Shortnosed Sturgeon. Paragraph 1. Quote beginning, "The 1998 Final Recovery Plan for shortnosed sturgeon states…" and footnote 2. The U.S. Department of Commerce, National Oceanic and Atmospheric Administration, National Marine Fisheries Service. 1998. Final Recovery Plan for the Shortnosed Sturgeon (*Acipenser brevirostrum)* is not part of the record.

[1] • Page 5, Section II.A. Impacts on Atlantic and Shortnosed Sturgeon. Footnote 3. The Oct. 24, 2007 NOAA-Fisheries Biological Opinion for a Cianbro dredging project in the Penobscot River in Brewer, Maine is not part of the record.

[1] • Page 6, Section II.A. Impacts on Atlantic and Shortnosed Sturgeon. Paragraph 7, first sentence and footnote 5. "The 2007 Biological Opinion ('BO') issued by NOAA-Fisheries for a dredging project in the Penobscot River in Brewer, Maine contains extensive evidence and discussion of direct and indirect impacts to shortnose and Atlantic sturgeon from dredging operations of the type proposed in the lower Kennebec River."[5] The NOAA-Fisheries. 2007. Biological Opinion for Cianbro Constructors, LLC Brewer Module Facility, F/NER/2007/05867 is not part of the record.

In accordance with the Department's Chapter 2 Rules Concerning the Processing of Applications and Other Administrative Matters, the record for appeals heard by the Board is the administrative record prepared by the Department in its review of the application. The Board may allow the record to be supplemented on appeal when it finds that the evidence offered is relevant and material and that:

a) the person seeking to supplement the record has shown due diligence in bringing the evidence to the attention of the Department at the earliest possible time; or
b) the evidence is newly discovered and could not, by the exercise of reasonable diligence, have been discovered in tie to be presented earlier in the licensing process.

Given that the Board must consider these appeals prior to the proposed dredge, which would occur in August, the Board will consider this matter at its July 21, 2011 meeting. This necessitates an abbreviated schedule for filing of comments. Accordingly, if any party wishes to comment on the admissibility of the above listed documents that are outside the Department's licensing record, the party must do so by Thursday, June 9, 2011 at 10:00 am. The Chair will then rule on the admissibility of these documents on Friday, June 10, 2011.

The licensee's response to the appeal must be filed by Friday, June 17, 2011. In addition, since the licensee has also appealed the Commissioner's licensing decision, the other appellants (Town of Phippsburg et al, Dot Kelly, and Douglas Watts / Ed Friedman) may respond to the issue regarding Condition 4 raised by the licensee in its appeal of the permit, but no other issues. The deadline for any such response is also Friday, June 17, 2011. Responses are limited to argument from the record; new evidence is not permitted.

All correspondence concerning this matter should be addressed to the Board Chair, Susan M. Lessard, and copied to all persons on the attached service list.

Following staff review of the appeal documents and responses thereto, Department staff will draft a recommendation for the Board's consideration. The appeal documents, staff recommendation and excerpts from the Department's file will be included in a packet of material for the Board's consideration at a regular meeting of the Board. You will receive a copy of all material provided to the Board on this matter and will have an opportunity to address the Board at the meeting. The time and location of the Board meeting will be confirmed at a later date, but please reserve July 21, 2011 for consideration of the appeal.

If you have any questions, you may contact me at 287-2452 or Thomas Harnett, Assistant Attorney General, at 626-8812.

Sincerely,

Cynthia S. Bertocci

Cynthia S. Bertocci, Executive Analyst
Board of Environmental Protection

cc: Service List

B

ATTACHMENT B

I. Non-Record Material Not Identified in the Executive Analyst's June 3, 2011 Letter – This Material Should be Excluded from the Record and Redacted

Town of Phippsburg *et al.* Appeal:

- Page 16, footnote 17: BIW has been unable to located the referenced web page in the record.

- Page 31, footnote 32 and the corresponding reference discussion beginning in the final paragraph and continuing onto page 32, beginning: "*See* NMFS *Designation of Critical Habitat for Atlantic Salmon (Salmo salar) in the Gulf of Maine Distinct Population Segment, Final ESA Section 4(b)(2) Report*, at App. A (2009) . . ." and continuing through the sentence concluding ". . . rearing and migration activities." BIW has been unable to find this NMFS's report in the record.

- Page 31 final sentence that continues onto page 32 and the corresponding footnote 34: The sentence that should be redacted begins: "The federal critical habitat listing has since been adopted . . ." and concludes ". . . the Penobscot Indian Nation." BIW has been unable to find the referenced Draft Atlantic Salmon Recovery Framework in the record.

Dot Kelly Appeal:

- Page 13, second full paragraph in its entirety and Attachments 2(b), 2(c), and 2(d): This paragraph relies on a series of attachments, attachments 2(a) through 2(d). BIW has only been able to locate Attachment 2(a) in the record. Accordingly, the discussion of the other figures in Attachment 2, specifically 2(b), 2(c), and 2(d), and the corresponding discussion in the second full paragraph on page 13 should be redacted.

- Page 13, third full paragraph, second sentence continuing through the citation at the end of the paragraph: BIW has been unable to locate the 2009 biological opinion in the record that is referenced here. This reference and associated discussion should be redacted.

Friedman/Watts Appeal:

- Page 7, first full paragraph and footnotes 6 & 7: This paragraph cites and discusses a 2004 biological opinion and 2009 biological opinion. BIW has not been able to locate either document in the record. Reference to and discussion of these documents should be redacted. In addition, appellants submitted a copy of these 2004 and 2009 documents on a CD when they filed their appeal. These documents should not be distributed to Board members whether in paper or electronic form. Thus, the CD should not be reproduced and distributed without modification.

II. Non-Record Material Identified in the Executive Analyst's June 3, 2001 Letter – Expanded Redaction Warranted

Town of Phippsburg *et al.* Appeal:

- Page 28, footnote 28 and first full paragraph, third sentence: The June 3 letter identifies the following statement as outside the record: "Moreover, the Corps recently stated in a work session before the Legislature that in the past dredging of this magnitude took a minimum of two weeks at Doubling Point and one week at North Sugarloaf Island." The immediately following sentence is outside the record and should be redacted as well: "Thus, the assumption in the Order that dredging '*could*' be completed in a manner of days is unwarranted, inaccurate and insufficient to meet the standards under NRPA and Section 401 of the Clean Water Act." Footnote 28 should be redacted as well.

Dot Kelly Appeal:

- Page 11, paragraph 2: The non-record discussion identified in the June 3, 2011 letter should be expanded so that it does not begin with the citation, but also includes the prior sentence supported by the non-record citation. Specifically, the following sentence also should be redacted: "In addition, small particles are known to be detrimental to lung function in humans, and from a quick review of the literature this appears to hold true for gill function for fish and benthic organisms as well." A citation to non-record material immediately follows.

Friedman/Watts Appeal:

- Pages 4-5: These pages reference the 1998 Final Recovery Plan for Shortnose Sturgeon. The June 3, 2001 letter identifies this document as not being part of the record. The appellants submitted a copy of this 1998 document on a CD when they filed their appeal. This document should not be distributed to Board members whether in paper or electronic form. Thus, the CD should not be reproduced and distributed without modification.

- Page 6, final paragraph, discussion of the 2007 biological opinion: The June 3, 2011 letter identifies the 2007 biological opinion as being outside the record. The two sentences that follow the non-record discussion identified in the letter also discuss the biological opinion, referred to as the BO, and similarly should be redacted. Specifically, this two sentence portion of the appeal document begins: "None of this information . . ." and concludes ". . . at the time of the dredging operation." In addition, the following clause in the final sentence of the last paragraph on page 6 also should be redacted: "contains no similar protections and." This reference is to the biological opinion. Finally, appellants submitted a copy of this 2007 document on a CD when they filed their appeal. This document should not be distributed to Board members whether in paper or electronic form. Thus, the CD should not be reproduced and distributed without modification.

C

ATTACHMENT C

STATE OF MAINE
BOARD OF ENVIRONMENTAL PROTECTION

U.S. ARMY CORPS OF ENGINEERS	) NATURAL RESOURCES PROTECTION ACT
Bath and Phippsburg, Sagadahoc County	) COASTAL WETLAND ALTERATION
MAINTENANCE DREDGING	) WATER QUALITY CERTIFICATION
L-16281-4E-E-N	)

APPEAL OF THE DECISION OF THE COMMISSIONER APPROVING THE U.S. ARMY CORPS OF ENGINEERS KENNEBEC RIVER DREDGING PROJCT

NOW COME the Town of Phippsburg, the Phippsburg Shellfish Conservation Commission, the Phippsburg Land Trust, the Kennebec Estuary Land Trust, the Friends of Merrymeeting Bay, Bob Cummings, Lawrence Pye, Dean Doyle, Dot Kelly, Captain Ethan DeBery, and Laura Sewall (together as "Appellants") to appeal the decision of the Commissioner of the Maine Department of Environmental Protection ("Department" or "DEP") on April 14, 2011 ("Order"), granting to the U.S. Army Corps of Engineers ("Corps") a water quality certification pursuant to section 401 of the federal Clean Water Act ("401 Certification") and a permit under the Natural Resources Protection Act ("NRPA"). The Order authorizes the Corps to conduct out-of-season maintenance *and* advanced maintenance dredging in August of two locations in the Kennebec River in Bath and Phippsburg, Maine, and to dump approximately 70,000 cubic yards of dredge spoils at two locations in the Kennebec River and near-shore environments in Phippsburg.

For the reasons below, Appellants request that the Board of Environmental Protection ("Board") modify the Order to allow only the minimum out-of-season August dredging necessary, if any, to allow the U.S.S. Spruance to safely transit the Kennebec River in September, and to require that disposal of dredge spoils, if any, occur at upland and/or offshore locations where it will not cause unreasonable impacts to the environment or to Appellants. In the alternative, if the current disposal sites are approved by the Board, Appellants request that the Board impose conditions that will minimize adverse impacts to the environment and Appellants.

I. INTRODUCTION

The Federal Navigation Project ("FNP") in the lower Kennebec River stretches from shipbuilding facilities at the Bath Iron Works ("BIW") to the Atlantic Ocean. The Corps occasionally dredges the FNP to keep the channel open for deep draft Navy ships. Pursuant to a 10-year maintenance dredging permit issued in 2002, dredging is only authorized between Nov. 1 and April 30 in order to minimize impacts to the environment, including to the endangered shortnose sturgeon.

The Corps last dredged the channel in 2003. Since then, gradual buildup of sand and mud in the Doubling Point reach, located just below BIW, has pushed the navigable channel eastward – outside the FNP channel designation and closer to the eastern bank of the river. Last

fall, the Navy requested that the Corps dredge the marked FNP channel at Doubling Point in order to allow transit of the U.S.S. Spruance for sea trials in February 2011 and then for eventual delivery to the Navy in September 2011. Due to budgeting restrictions, the Corps was unable to let contracts in time to dredge the channel prior to the scheduled sea trials or during the existing November-April permit window. BIW and the Coast Guard, however, temporarily relocated the channel markers at Doubling Point Reach and took the Spruance safely down the river last February. The ship returned to BIW via the same route in March.

In order to ensure that the channel stays open for final delivery of the Spruance to the Navy in September, the Corps has requested a NRPA permit and 401 Certification for out-of-season dredging this August. However, instead of seeking approval to dredge the minimum amount necessary to safely transit the Doubling Point reach, the Corps applied for permits to conduct both full maintenance *and* advanced maintenance dredging at Doubling Point. Maintenance dredging authorizes excavation to the approved FNP channel depth of -27 feet mean lower low water ("MLLW"). Advanced maintenance dredging would authorize overdredging by five feet to -32 feet. Additionally, the Corps has also sought approval for maintenance *and* advanced maintenance dredging by two feet (-29') of the channel near North Sugarloaf Island at the mouth of the Kennebec River off Popham Beach. (Order at 2.)

Dredging is due to begin August 1st and, according to the Corps' Public Notice, it will take three to five weeks to dredge both locations. Overall, the Corps will dredge 50,000 cubic yards of material from Doubling Point and dispose of those spoils at an in-river dump site two miles downstream at Bluff Head (known locally as the Kennebec Narrows or Fiddler's Reach), and 20,000 cubic yards of material from North Sugarloaf Island and dispose of those spoils at a near-shore dump site 0.4 miles south of Jackknife Ledge ("JKL") immediately offshore of Popham Beach State Park. (*Id.*)[1]

The Corps could not have picked a worse time to plan a full-scale dredging and disposal project for the Kennebec River. August is the height of a very short two-month summer season and is the busiest and most critical month of the year for virtually all other users of the Kennebec. It is the most productive month of the year for shellfish harvesters and lobster fishermen; it is when the beachfront hotels, bed-and-breakfast inns, campgrounds, and restaurants have a full house almost every night; it's when the river is most heavily used by striper fishermen, fishing guides, and recreational boaters; it is the peak season for the beaches, state parks, surfers, sunbathers and kayakers.

August is also an incredibly productive month for wildlife in the Kennebec estuary. August is traditionally the dry season in Maine, when the Kennebec water quality is at its highest. It is when the juvenile clam spats set on the clam flats; when endangered sturgeon and salmon are actively moving in the river channel; when alewives, shad and other critical anadromous species are in the midst of their downstream migration; when groundfish, sea bass, and harbor seals are plentiful in the estuary and bays; and when the lobsters are at their peak out in North Sugarloaf Island channel and on Jackknife Ledge.

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[1] Maps of the proposed dredging and disposal sites are provided in the Corps 30-Day Public

Dredging and dumping of 70,000 cubic yards of spoils into this ecosystem in August would be devastating to these resources and to the people who rely upon them. It is no exaggeration to say that the livelihoods of the town's lobstermen, shellfish harvesters, fishing guides, and tourist business operators are all at stake – and that the combined impacts from dredging and disposal would be devastating for Phippsburg.

To protect their economy and way of life, a broad cross section of the community has come together in unison to ask the Board of Environmental Protection to reverse the Commissioner's decision to issue permits for this incredibly damaging and unnecessary project. Appellants contend that the Kennebec River channel can be kept open for the U.S.S. Spruance without subjecting the local community to such severe economic and environmental impacts.

Accordingly, appellants ask that the Board modify the permit to:

(a) Approve only the minimum out-of-season dredging necessary, if any, to enable the Spruance to exit the river in September; and

(b) Since minimal dredging will vastly reduce the volume of dredge spoils, to disallow summertime dumping of dredge spoils in-river or near-shore, and instead to require disposal of dredge spoils upland or in the Corps' pre-approved offshore ocean disposal site near Portland.

In the alternative, if the current disposal sites are approved by the Board, Appellants request that the Board impose conditions on the permit and 401 Certification requiring:

(1) Monitoring for potential water quality impacts and sedimentation of clam flats;

(2) Immediate shut down of dredging and/or dumping operations should monitoring results require closure of open clam flats;

(3) Provisions to compensate licensed fishermen for lost lobster and shellfish harvests; and

(4) Implementation of the Department of Marine Resources recommendations to mitigate impacts to endangered shortnose sturgeon and other endangered species.

II. APPELLANTS

The Town of Phippsburg, with 2,216 residents, is a Sagadahoc county town on a peninsula surrounded by the Kennebec River, the Atlantic Ocean, and the New Meadows River. Residents' lives and livelihoods are often tied to the waters that it. Although Phippsburg is only 6 percent of Sagadahoc County's total population, it has a third of Sagadahoc County's farmers, fishermen and forestry workers. Maintaining traditional occupations and fisheries in Phippsburg is very important to the community; the town manages several town landings specifically for use of area fisherman and clammers, including several locations on the Kennebec River. Residents

not involved in lobstering, fishing, or shellfish harvesting, are often involved in tourism-related businesses, as Phippsburg is home to one of Maine's most popular tourist destinations, Popham Beach State Park and hosts several multi-generational colonies of "summer residents," including a large community at Small Point. Bed and breakfast inns, cottage rentals, fishing guides, local stores, antique shops and artists round out the economic base of Phippsburg. The Town of Phippsburg is deeply concerned that the proposed dredging and disposal operation in August, 2011 will be devastating to the local economy, impacting the local lobster and shellfishing industries at their peak seasons, and affecting attendance at Popham Beach State Park and all the related businesses that depend on the tourist traffic that the State Park creates. Summer residents may choose to go home early rather than endure the disruption of a dredging and disposal operation 24 hours a day, causing further economic impacts. Although Phippsburg residents are also employed at the Bath Iron Works, and town residents recognize the importance of shipbuilding to the local economy as well, the Town of Phippsburg is concerned that the full economic impact of the proposed dredging and disposal project has not been considered, including potential long-term consequences from damage to juvenile lobsters and clams at a critical time of year, as well as the impact on other commercial fish species that live in or transit the lower Kennebec River and the nearshore Popham Beach environment. In a brief 4 day period, 250 town and area residents signed a petition circulated by the Phippsburg Shellfish Conservation Commission that urged rejection of the current proposal and supported less disruptive alternatives. The Phippsburg Selectboard voted unanimously to join this appeal.

The Phippsburg Shellfish Conservation Commission represents 40 local commercial shellfish harvesters who depend on the shellfish flats on the Kennebec River for a substantial portion of their families' financial support. In the seven years ending in 2007, Phippsburg's harvesters dug an average of 225,543 pounds of clams each year. However, the productivity of the flats varies widely depending on the time of year, the height of tides, and the weather. Stormy weather and periods of high water flow on the River cause the levels of pollution to rise to unacceptable levels, closing down the flats. Under Phippsburg's local shellfish ordinance, commercial shellfish license holders commit extensive time each year to management of the shellfish resource. Each year, surveys are held to determine the clam population, in order to ensure we have a sustainable fishery. Several reseedings are held annually, to move juvenile clams from one area to another in order to ensure a wide distribution of the shellfish population. Regular water samples are collected by Commission members and tested by the Department of Marine Resources to ensure the waters remain healthy, along with numerous additional water samples required to ensure pollution levels have dropped sufficiently to allow reopening of closed areas. The month of August is the single most productive and profitable period for shellfish harvests. The Phippsburg Shellfish Conservation Commission is deeply concerned that the dredging and disposal as currently permitted will cause high levels of pollution, shutting down the most productive shellfish flats in Phippsburg at the most profitable time of year. The Commission is also concerned that the suspended solids and siltation deposits caused by the dredging and disposal may kill or injure juvenile clams that in August are just emerging from their larval stage to "set" just below the surface of the mudflats. Shellfish harvesters' past experiences with dredging and disposal events indicates that the silt component of the dredged material does not fall to the bottom upon disposal; instead, re-suspended sediments are transported widely by the strong currents and tides of the Kennebec River and deposited on the shellfish flats, blocking the holes created by a clam's respiration and feeding process. This effect

is both stressful and harmful to the clams, and prevents the harvesters from identifying clam locations, reducing productivity by as much as half. In short, the Phippsburg Shellfish Commission feels the full time, multi-week dredging and disposal operations planned for August, 2011 will have a devastating impact on Phippsburg's commercial shellfishing industry. Landings and income generated in August support fishermen's families at other less productive times of the year. Damage caused to juvenile clams setting into the Kennebec River flats in August will disrupt future shellfish harvests and the long term sustainability of this fishery.

The Phippsburg Land Trust is a community land trust that preserves, protects and stewards the special wild and natural places in Phippsburg for the benefit and education of Phippsburg children, grandchildren and future generations. The Land Trust is a Maine non-profit corporation that currently protects 800 acres of land in Phippsburg through easements and fee ownership; more than half of these acres abut or drain into or are viewsheds along the Kennebec River. The Phippsburg Land Trust holds easements on about 120 acres in the Fiddler's Reach area of Phippsburg, and holds a fee interest in 13 acres at our Noble Hill Preserve at the end of Fiddler's Reach on the Kennebec River. In total, there are six Phippsburg Land Trust preserves at Fiddler's Reach that are potentially affected by the proposed disposal activity at Bluff Head. The Phippsburg Land Trust also holds fee interest in approximately 10 acres at Cox's Head, an area affected by the dredging activity planned for the mouth of the Kennebec River. The Land Trust sponsors guided walks each summer on its preserves and in other areas in Phippsburg; planned activities in the Fiddler's Reach area and Cox's Head will need to be rescheduled or moved due to the disruptive impact of dredging and disposal on enjoyment of our preserves. The Land Trust is deeply concerned with the potential environmental impact of changes that have been observed along the shores of the Kennebec Narrows, such as the influx of sand and mud on the shoreline, and decreased depth measurements in the channel due to extended use of the Kennebec Narrows disposal site. The Land Trust holds a conservation easement creating the Greenleaf Preserve, an area abutting and just south of this disposal area with a small salt marsh wetland that would be significantly damaged by sedimentation from dredging disposal. The Land Trust's Wilbur Preserve at Cox's Head serves in part as a public access point for Phippsburg shellfish harvesters to access the highly productive Cox's Head and Atkin's Bay mudflats, which extend from the preserve at the point of Cox's Head across to Fort Popham. This area is less than a quarter mile from the area where dredging is planned at the mouth of the Kennebec. The Land Trust is concerned that turbidity, siltation and pollution impacts from the dredging could shut down this important shellfish harvesting area.

The Kennebec Estuary Land Trust ("KELT") is a community based membership organization serving the towns of Arrowsic, Bath, West Bath, Georgetown, Westport Island and Woolwich. KELT is committed to conserving land and wildlife habitat of the Lower Kennebec and Sheepscot River estuaries and has protected lands both through direct acquisition and through collaborations with state and federal agencies and private conservation organizations under the umbrella of the Maine Wetlands Protection Coalition. KELT's work has resulted in the protection of over 18,000 acres of critical wetland habitat. Additionally, KELT sponsors educational workshop on environmental stewardship techniques, leads trips to lovely local places, and offers educational programs on the local environment. KELT is concerned that the proposed August dredging will negatively impact the Kennebec estuary and wetlands, and will disturb its educational and stewardship mission, and interfere with its field work and workshops.

Friends of Merrymeeting Bay ("FOMB") is a non-profit Maine corporation with over 450 members. FOMB undertakes research, advocacy, land conservation, education, and litigation activities in order to preserve the ecological, aesthetic, historical, recreational, and commercial values of Merrymeeting Bay, its watershed, and the Gulf of Maine. FOMB has members who live near, own property near, and recreate on and near Merrymeeting Bay, the rivers that flow into the Bay and the lower Kennebec flowing out of the Bay. Among other activities, FOMB members kayak and canoe, recreationally fish, hike, photograph, and observe aquatic life and wildlife in and around all of these waters. FOMB members receive economic value from these waters through, among other activities, commercial fishing and guiding. FOMB members are interested in maintaining the natural biodiversity of the Merrymeeting Bay watershed and the Gulf of Maine. FOMB has long recognized the important connections between Maine's rivers and the Gulf of Maine (the Bay and lower Kennebec making that connection). FOMB's "Healthy Rivers, Healthy Gulf Program" is devoted to educating the public and policy makers about these connections. FOMB has conducted intensive circulation studies of waters in Merrymeeting Bay and its tributaries, sediment toxicity studies, and successfully filed an Endangered Species Act petition to expand the Atlantic salmon listing to include the Kennebec and Androscoggin River salmon populations. FOMB is concerned that dredging and disposal in August will significantly impact water quality, recreation, and wildlife and thus harm the interests FOMB and its members have in these waters.

Bob Cummings has lived on Drummore Bay since 1962, and has been a member of the Phippsburg Shellfish Committee for the last 20 years. Prior to serving on the Shellfish Committee, he served as a Phippsburg selectmen for 12 years. In these roles, he has spent years working to clean up the Kennebec River and reopen once-closed clam flats. He enjoys canoeing on Drummore Bay and the Kennebec River, watching the seals at play in the Kennebec and the eagles that reside on Lee Island. In summer, his canoe is joined by many other small boaters who are fishing and recreating on the Kennebec River. He is concerned that the wildlife in this portion of the Kennebec River will be disturbed by impacts from the dredge operations; that clam flats in the lower part of Drummore Bay will be contaminated; that his boating experience will be negatively affected by the noise and disruption of the dredging and reductions in water quality; and that the fishing and guiding businesses that depend on this stretch of the Kennebec River will be adversely affected by the full-time dredging and disposal operation planned for August, 2011.

Capt. Ethan DeBery is a Phippsburg resident and owner and operator of Fish 'n' Trips Charters. Capt. DeBery operates the ferry to Seguin Island and conducts fishing charters around Popham Beach area and in the Kennebec River estuary. The proposed dredging would impact his ferry and charter fishing operations by obstructing and preventing use of impacted waters during the height of the boating and fishing season. Additionally, the proposed activity would create noise, air pollution, water quality impacts, and disturb fish, wildlife and habitat – all of which would degrade the experience for his customers and detract from his business.

Peggy Johannessen is owner and operator of Popham Beach Bed & Breakfast. The B&B is located in the old lifesaving station on Popham Beach at the mouth of the Kennebec River, directly opposite the proposed dredge operations near North Sugarloaf Island. August is the

B&B's busiest month of the year, and accounts for roughly a third of its business. Generally, the B&B has a full house all month long. Past dredging conducted during winter and spring months has been marked by very loud and persistent noise, night and day, but when few or no guests were present. Mrs. Johannessen is concerned that the proposed dredging during August will significantly affect her guests and deter business. In particular, she is concerned about noise impacts, which will occur night and day, as well as nighttime lighting and other impacts to the otherwise spectacular views of the ocean, islands and the Seguin Lighthouse.

Dot Kelly is a Phippsburg property owner, member of the Phippsburg Conservation Commission and FOMB, and direct riverfront abutter to the disposal area in the Kennebec Narrows at Bluff Head. Mrs. Kelly uses the river and shores to swim and wade, is an avid river kayaker and observer of wildlife. She highly values the river's quiet, clean and natural setting, and likes to observe fishermen drifting with currents in the river. Past dredge and dumping events have disrupted this natural setting, both during the day and at night and have been loud enough to wake her and her family up at night. Mrs. Kelly has also personally observed that during and after past dredging and disposal events, the entire river corridor in front of her house turned turbid and discolored, resulting in deposits of sand and silt along her shoreline and upstream and downstream areas. These impacts detract from her ability to use the area, and have driven away resident seals and other wildlife that she enjoys watching.

Lawrence Pye is a Phippsburg resident, Phippsburg Town Selectman, and commercial lobster fisherman. Lawrence traditionally fishes the waters surrounding JKL in August and plans to continue fishing this area in the future. Dredging of the Popham beach area and disposal of dredge spoils at JKL would prevent Lawrence from continuing to fish the area, and would result in destruction of lobster habit, burial of his lobster gear under the sand, and cut lines and lost and damaged gear due to dredge, barge, tug, and attendant boat traffic. Lawrence is also concerned that long term and cumulative impacts from dredging and disposal at JKL would degrade the habitat and lobster fishery in the waters surrounding JKL and the North Sugarloaf Island channel.

Laura Sewall is a Phippsburg resident who lives on the Sprague River Marsh, very near to Seawall Beach in the Small Point area. Laura is an avid swimmer and surf kayaker and enjoys the water at Seawall Beach and other area beaches on most August days. Laura greatly values the aesthetic experience of a clean, quiet, scenic, and natural coastline. She is also the director of the Bates-Morse Mountain Conservation Area (BMMCA). Every summer season, nearly 16,000 people walk over Morse Mountain to go to Seawall Beach. The trail ends just inshore of Jack Knife Ledge. The turbidity in the water, and concerns about potential toxins stirred up by dredging and dumping would prevent Laura and the public users of BMMCA from engaging in recreational activities in and on the water, and would detract from their enjoyment of the scenic, quiet and natural experience that the area has to offer.

Dean Doyle is a Phippsburg resident, commercial clam harvester, and chair of the Phippsburg Shellfish Conservation Commission. For the last 16 years, Mr. Doyle has harvested clams throughout Phippsburg, including clam flats in Drummore Bay, the Upper Flats, Parker Head, Wyman's Bay, Atkins Bay, and the Popham/Small Point Beach and Morse/Sprague River areas. During and immediately after prior dredging events, including the last time the FNP

channel was dredged in 2003, Mr. Doyle has personally observed a layer of silt and sediment dispersed over productive clamflats and the filling of clam air holes due to such sedimentation. He is concerned that the silt and sediments from the proposed action will affect the above listed clam flats and force closure of shellfishing under state and federal public health protocols. A closure due to dredging in August would impose severe negative impacts on Mr. Doyle's business and all other shellfish harvesters in town: August is the most important month of the year for harvesters because it generally has the best weather (i.e. fewest rain-induced flats closures) and long days for harvesting. Not only is their harvest volume highest in August, but harvesters also get premium prices during the month – often double the price paid for clams in the winter and spring. Even short of a closure, deposition of silt and sediments on the clam flats will cover air holes, making it difficult to find clams and reducing harvests. In addition, siltation in August is likely to have severe negative impacts on clam spats (juvenile clams), which must set near the top of the flats until they mature sufficiently to survive at deeper levels. Mr. Doyle is concerned that burial by a layer of silt and sediment will kill many of these juvenile clams, potentially eliminating an entire year class from future harvests.

III. THE FINDINGS OF FACT, CONCLUSIONS OF LAW, AND CONDITIONS OR APPROVAL CHALLENGED IN THIS APPEAL

1. The Applicant failed to affirmatively demonstrate that the proposed action will not result in unreasonable adverse impacts to the environment. 38 M.R.S.A § 480-D.

2. The Applicant failed to affirmatively demonstrate that there are no practicable alternatives that would be less damaging to the environment. *Id.*; 06-096 CMR ch. 310, §§ 5(A), 9(A).

3. The Applicant failed to affirmatively demonstrate that dumping of approximately 70,000 cubic yards of dredge spoils will not violate Maine's water quality standards, including;

    a. Class SA standards preventing direct discharges, *id.* § 465-B(1)(C);
    b. Class SA habitat and marine life standards, *id.* §§ 465-B(1)(A), (B);
    c. Class SB habitat and aquatic life standards, *id.* §§ 465-B(2)(A), (C);
    d. Class SB bacteria and shellfishing harvesting standards, *id.* §§ 465-B(2)(B), (C).

4. The Applicant failed to affirmatively demonstrate that proposed disposal of 70,000 cubic yards of dredge spoils in the Kennebec River and near-shore environment in August will unreasonably harm significant wildlife habitat, estuarine and marine fisheries, and other aquatic life, in violation of 38 M.R.S.A § 480-D(3).

5. The proposed disposal of 70,000 cubic yards of dredge spoils in the Kennebec River and near-shore environment in August will unreasonably interfere with existing scenic, aesthetic, and recreational uses in violation of 38 M.R.S.A § 480-D(1).

IV. GROUNDS FOR THE APPEAL

1. THE PRIOR PERMITS.

Out-of-season dredging is generally impermissible under NRPA due to the severe and unreasonable impacts dredging causes to shellfish, marine fisheries, aquatic life and habitat. *See* 38 M.R.S.A § 480-D. As longstanding Department guidance states,

> Dredging and the disposal of dredged material have both long and short term adverse impacts on the marine environment. Short term effects include the degradation of water quality due to increased turbidity, the suspension of toxic contaminants contained within the sediments and the physical removal of marine organisms. Long term effects include the cumulative disturbance caused by the need for periodic maintenance, the removal of soft bottom sediments that provide habitat to economically important species and the possible acceleration of adjacent shoreline erosion. These guidelines are intended to minimize the adverse impacts of dredging to the greatest extent possible.
>
> ...
>
> **Timing** of [a dredging] project must coincide with the time of year that will minimize impacts on marine resources. The impact to these resources will be minimized by performing dredging activities at the time of year that avoids anadromous fish runs, shellfish spawning and lobster migration activities. For most projects, this means that dredging must be undertaken between November 1 and April 15.

DEP Issue Profile, *Applications to Dredge or to Dispose of Dredged Material in Coastal Waters* (March 1997) (emphasis in original).[2] *See also* 06-096 CMR, ch. 310, § 5(A) ("no activity may be permitted if there is a practicable alternative to the project that would be less damaging to the environment").

In a series of prior permit decisions in 1989, 1997, 2000, and 2002, in order to minimize impacts to the endangered sturgeon, shellfish, and lobster, the Department consistently prohibited dredging of the FNP in the Kennebec River in summertime.[3] In 2002 the Department issued a ten-year permit – which is still in effect – expressly prohibiting maintenance dredging and advanced maintenance dredging of the FNP by hopper dredge except between Dec. 1 and March 1, and by mechanical clamshell bucket dredge except between Nov. 1 and April 30.[4]

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[2] Attached as Ex. 2 and available at: http://www.maine.gov/dep/blwq/docstand/fsdredg.htm.

[3] The 1989, 1997, 2000, and 2002 permits are attached as Ex. 3.

[4] Order # L-16281-4E-D-N, at 2-3 (March 15, 2002), Ex. 3.

In other words, for the last 20 years the Department has consistently determined that dredging of the Kennebec River FNP in August – during the critical period for shellfish spawning and harvesting, lobster migration and anadromous fish runs – would unreasonably impact the marine environment in violation of NRPA. The fact that this year the Corps failed to act within its existing permit window does not, by itself, transform what have long been considered unreasonable impacts into reasonable impacts. Rather, "a reasoned explanation is needed for disregarding facts and circumstances that underlay [the prior determination.]" *FCC v. Fox Television Stations, Inc.*, 129 S. Ct. 1800, 1811 (2009); *Uliano v. BEP*, 2005 ME 88, ¶ 23 (findings in licensing order must be stated with sufficient specificity to permit understanding and meaningful review). In this case, however, neither the applicant nor the Department provided any new information, revised findings or conclusions of law, or any other rationale to explain why the prior permit determinations were all in error, why it is departing from its longstanding guidance, and why use of a hopper dredge in August is suddenly reasonable under NRPA.[5]

These omissions are fatal and, as a matter of law, require reversal of the Department's Order, reconsideration of the evidence, and issuance of new findings. *Id.*, 2005 ME 88, ¶ 25.

2. REVIEW OF PRACTICABLE ALTERNATIVES.

The Department's Order also fails to comply with NRPA's mandatory review of practicable alternatives. Pursuant to DEP rules, the review of practicable alternatives must include a review of alternate sites, alternate configurations, and reduced project size and scope. 06-096 CMR, ch. 310, §§ 5(A), 9(A). The alternatives review is not a separate, stand-alone determination; rather "consideration of practicable alternatives to a proposed project is a factor that should be balanced in [the] section 480-D[] analysis." *Uliano v. BEP*, 2005 ME 88, ¶ 17; *Uliano v. BEP*, 2009 ME 89, ¶ 40. In other words, *Uliano* directs that the Department use the alternatives review as a means to compare and identify the least environmentally damaging alternative as it evaluates each NRPA criterion.

The Order, however, disposed of all potential alternatives in a single paragraph that provides no analysis or review of *any* impacts. The entirety of that review is excerpted below:

> The applicant submitted an alternatives analysis for the proposed project in the February 2011 Draft Environmental Assessment. The purpose of the proposed project is to restore the depth of the federal channel and reduce the potential of groundings by ships. The alternatives analysis considered a no dredge alternative and several alternate dredging methods

[5] Not only is there zero new information in the record to support the Department's reversal of its longstanding position, the 2011 Order utterly fails to even review or make findings regarding potential dredging and disposal impacts to important marine resources that are most vulnerable in late summer, such as lobster migration, juvenile clams, or anadromous fish runs. This failure comes despite detailed comments on these very concerns provided by Appellants during public hearings and in written comments.

> (mechanical, hydraulic, or hopper dredge) and disposal methods (ocean or upland disposal). The Department finds that the analysis demonstrates that ocean disposal is the least environmentally damaging practicable alternative that meets the project purpose.

(Order at 7.) This is exactly the sort of cursory and meaningless review that is impermissible under Maine law. In *Uliano I*, which reversed and remanded the Board's denial of a dock permit under NRPA, the Maine Supreme Judicial Court held that findings that "merely summarize the evidence considered and state the Board's conclusion" are "inadequate as a matter of law." *Uliano v. BEP*, 2005 ME 88, ¶¶ 23, 25. In this case, the Order does not even summarize the evidence: it merely lists the alternatives and stated the Commissioner's conclusion.

Additionally, by arbitrarily eliminating all other options the Department only evaluated the environmental impacts of a single alternative – the proposed project. This fails to meet the standard for balancing the impacts of reasonable alternatives as set out by the Supreme Judicial Court in both *Uliano* decisions. *Uliano v. BEP*, 2005 ME 88, ¶ 17; *Uliano v. BEP*, 2009 ME 89. These flaws are also fatal under Maine law and render the Order invalid. To cure the above defects, the Board must undertake a real and meaningful review of all practicable alternatives, including alternative dredging methods (clamshell bucket, hopper dredge), reduced scope (minimal dredging instead of overdredging), timing (deferring major dredging activities to winter), and alternate disposal sites (upland, offshore). At a minimum, that review must include the following alternatives

a. No Dredge Alternative

The sole rationale in the record for *out-of-season* dredging is to provide safe passage through Doubling Point reach for the U.S.S. Spruance to exit from BIW to the sea in September. (Order at 1; Draft EA at 1.) The Corps, however, is not just proposing to dredge to the minimum safe depth for transit of a DDG Destroyer (-25 feet),[6] or even to the authorized depth of the FNP (-27 feet). Instead, the Corps is proposing to overdredge 35 acres in the Doubling Point reach by an additional five feet (-32 feet). In addition, despite the lack of any evidence showing that the North Sugarloaf Island reach is currently impassible,[7] the Corps is also proposing to overdredge two acres in the North Sugarloaf Island reach by an additional two feet (-29 feet). (Order at 2.)

[redacted]

[6] *See* email from Bob Herman, BIW, to Bob Green, DEP, April 7, 2011, 1:47 pm, attached as Ex. 4.

[7] *Id. See also* Letter from Bill Kavanaugh, Army Corps, to Kathleen Leyden, Maine Coastal Program, at 2 (Feb. 16, 2011), attached as Ex. 5.

[redacted]

This is overkill. The Draft EA contends that failure to conduct this full scale dredging would prevent or delay sea trials and transits of the river by Navy, cargo ships and other deep draft vessels, eventually making the federal navigation channel totally impassable and causing negative economic impacts on the region. As noted above, however, regular maintenance of the FNP is separately permitted. Thus, the No Dredge Alternative would not cause any of the impacts suggested by the Corps. Rather, the sole potential impact of the No Action Alternative would be to delay transit of the U.S.S. Spruance by no more than three months (until normal in-season dredging can begin in November 2011).

Even then, there may be no need for delay. As noted in the Army Corps' Feb. 16, 2011 letter to the State Planning Office, "a lane of travel with deeper depths exists to the east of the shoal area in the FNP [at Doubling Point]."[9] Thus, dredging may not in fact be necessary. Additionally, this letter makes no mention of any need to dredge the North Sugarloaf Island reach to allow ship transit. As is clearly indicated in the maps attached to the Corps Public Notice for the August dredging project, current channel depths in the western portion of the FNP at North Sugarloaf Island allow ship transit *without dredging*.[10]

Using alternate routes at both locations, the Spruance can clearly exit the Kennebec River safely. In fact it did so to conduct sea trials in February and to return in March, as shown by the photograph in Figure 1.

[9] *See* note 7.

[10] Public Notice at 8; attached as Ex. 1. *See also* Order at 2 ("At North Sugarloaf Island reach, sand has shoaled at a lesser rate, but *some areas within this reach* are still above the authorized river channel depth of -27 feet MLLW.") (emphasis added).

Figure 1: The U.S.S. Spruance seen leaving the mouth of the Kennebec River at Fort Popham in February 2011

Thus, the evidence currently fails to shows the need for out-of-season dredging in either location. This is particularly true for the North Sugarloaf Island reach, which is only partially shoaled and is open for ship passage at MLLW depths of 27'. Neither the BIW nor the Army Corps' memorandums and emails explaining the need for this project state that August dredging is necessary in the North Sugarloaf Island reach to allow the Spruance to safely transit the river.[11] Barring new evidence to the contrary, no action at North Sugarloaf Island is clearly practicable and less environmentally damaging.

Because the no dredge alternative is a practicable solution and would not impact any coastal wetlands, the environmental impacts from the proposed action are, by rule, "unreasonable" and therefore may not be permitted. 06-096 CMR, ch. 310, § 5(A).

b. Minimized Summertime Dredging

To the extent that new hydrographic surveys expected to be conducted in late May show that some level of out-of-season dredging is absolutely required in one or both dredging locations to enable egress of the Spruance in September, the Corps must evaluate a low impact alternative that authorizes the least amount of August dredging necessary *in each location* to help this one ship exit the river.

The Corps has already conceded that dredging in August has the greatest impact of any month. Army Corps project manager Bill Kavanaugh, recently wrote to Maine DEP and DMR, "As discussed with you at the meeting, we're all in agreement that August isn't the best month for dredging – in fact it probably can't get any worse relative to the Kennebec." Email from Bill Kavanaugh, Army Corps, to Brian Swan, DMR, and Bob Green, DEP, at 1, April 5, 2011, 10:15

[11] *See* email from Bob Herman, BIW, to Bob Green, DEP, April 7, 2011, 1:47 pm, attached as Ex 4; Letter from Bill Kavanaugh, Army Corps of Engineers, to Kathleen Leyden, Maine SPO, Feb. 16, 2011, attached as Ex. 5.

a.m., attached as Ex. 6. Given the Corps forthright admission that August is the worst month of the year for dredging, its failure to consider a minimal solution that dredges to lesser depths and/or dredges a smaller area this summer and defers additional dredging to the winter months when it will cause less environmental damage is a categorical violation of NRPA. *See* 06-096, CMR ch. 310, § 9(A) (alternatives analysis must evaluate alternative sites and "[r]educing the size, scope, configuration or density of the project" to avoid or reduce impacts to protected natural resources). Clearly, one possible alternative configuration is to change the timing of the project to reduce impacts; indeed this has been standard DEP condition on dredging impacts since 1997.[12]

c. Alternative Dredging Methods

In a minimal dredging alternative, the Corps may be able to further minimize pollution and impacts to anadromous fish by using mechanical instead of hydraulic dredging. Mechanical dredging by clamshell bucket was once state of the art and was widely used in the Kennebec River. This method is clearly practicable: it is still used by BIW to dredge its facility and sinking basin, and Reed and Reed contractors has a full suite of deck barges, clamshell buckets and push and work boats at its Woolwich Dockyard on the Kennebec.

Mechanical dredging has environmental benefits over hopper dredging, including reduced water quality impacts and lower turbidity.[13] Mechanical dredges also reduce the chance of entraining fish in the hopper dredge's impellers, screens, pipes and hoppers. For this reason, although less efficient than a hopper dredge, the Corps' Draft EA notes that a "mechanical dredge has also been considered if work is urgently needed during the warmer months, to reduce potential impacts to shortnose sturgeon." (Draft EA at 3.) This is why, on recommendation of DMR, the last permit issued to the Corps limited use of a hopper dredge to the period from Dec. 1 to March 15. For dredging outside that window, the permit required the corps to "use a mechanical dredge with clamshell bucket, which is less likely to capture sturgeon," but only between Nov. 1 to April 1." (License # L-16281-4E-D-N at 2, March 15, 2002, attached as Ex. 3.)

[redacted] The Corps theory is that

[12] *See* note 2 above.

[13] *See* note 18, below.

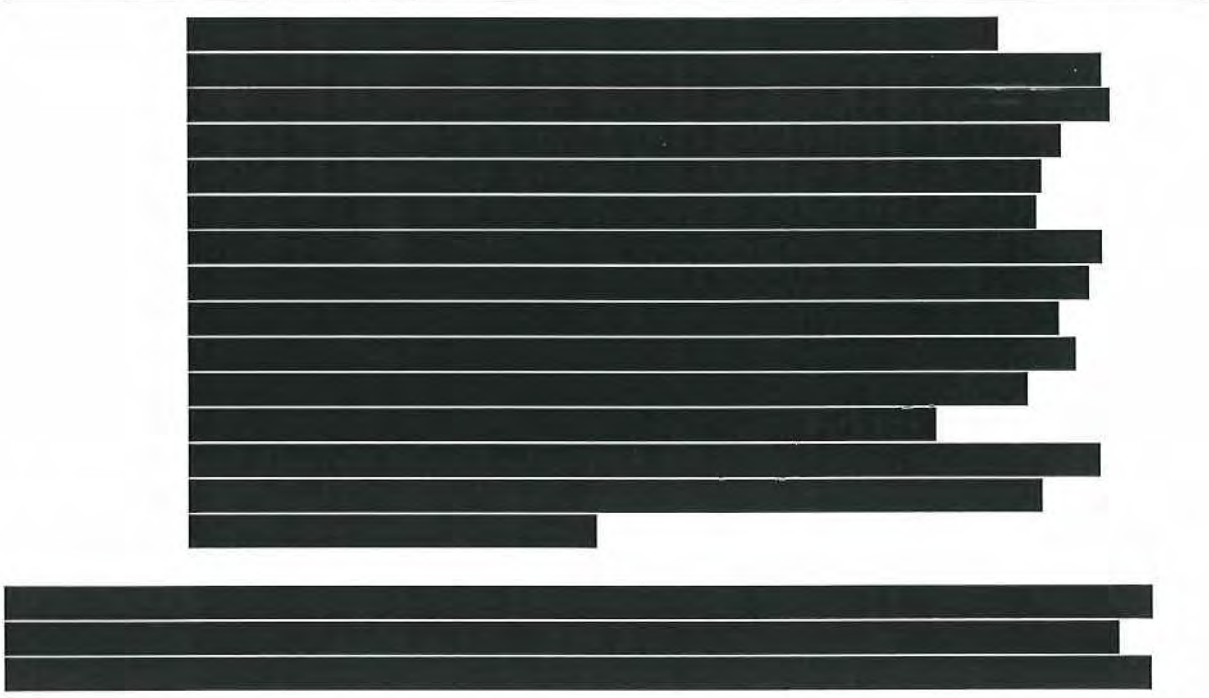
[redacted]

even though the chances for lethal entrainment from a hopper dredge are far higher (and several sturgeon were in fact trapped by the dredge in 2003, *see* Draft EA at 22.), the work goes faster and therefore there is less chance for interactions between the dredge and fish. This is mere speculation: the Corps offers no evidence whatsoever that a project of shorter duration but which kills more fish per day is better than a project of longer duration but which kills no or less fish per day. The question is how many fish could be impacted by each alternative – and the Corps has utterly failed to meet its burden to affirmatively demonstrate that it has chosen the best alternative (and the Department has likewise failed to explain why it chose one alternative over the other.)

Moreover, under a minimal dredging alternative, the Corps' logic falls apart. Clearly, the environmentally preferred alternative is to dredge as little as possible (or not at all) in August when the Kennebec is heavily used by migratory and endangered fish. In such a case, a clamshell bucket dredge may be both environmentally and technically preferable. Additionally, under a minimal dredging alternative the economy of scale that favor hopper dredging disappears. This is particularly true if dredging in North Sugarloaf Island reach can be deferred until the normal winter dredging window.

Once again, this is exactly the sort of balancing and weighing of impacts among alternatives that NRPA requires and which the Department failed to do. *Uliano v. BEP*, 2005 ME 88, ¶ 17; *Uliano v. BEP*, 2009 ME 89, ¶ 40.

d. Minimum Dredging and Upland Disposal



To the extent that minimal dredging can reduce the volume of spoils, the Corps must re-consider upland disposal. Because upland disposal is not water-dependent, by rule it is presumptively available and less impactful. 06-096 CMR, ch. 310, § 5(A). The Draft EA acknowledged that upland disposal is viable but dismissed it unless a site and financial sponsor could be found. (EA at 7.) This approach, however, illegally reverses the applicant's burden to affirmatively demonstrate compliance with NRPA standards. It is the Corps' burden to show that no sponsors can be found, and in this case it has made absolutely no effort to solicit bids or to explore this option. Such lack of effort stands in marked contrast with BIW, which currently contracts with Reed & Reed to dispose of a portion of its dredge spoils on land.[15] As BIW and Reed and Reed have learned, there is a market for clean sand for construction and road building, which can defray the costs of such disposal.

In sum, the available evidence demonstrates that, contrary to the Draft EA, the necessary equipment, infrastructure, and trained personnel are all available for land-based disposal in a scaled-back alternative and that such an alternative may be economically viable. Moreover, because use of sand from dredge spoils will displace other sand and gravel mining – which causes environmental impacts – environmental *benefits* would accrue from this alternative. Additionally, it could provide jobs for local companies and local workers instead of an out-of-state dredging company with transient workers.[16]

Unless and until the applicant submits new evidence affirmatively demonstrating that minimum dredging with full or partial upland disposal at one or both sites is not practicable – and currently there is no such evidence in the record – the Board must reverse the Commissioner's Order and deny this permit.

e. Minimum Dredging and Offshore Disposal

To the extent that out-of-season dredging at one or both sites is absolutely required to enable egress of the Spruance and the Corps can demonstrate based on clear and convincing evidence that upland disposal is impracticable for one or both dredge sites, the Corps must demonstrate that it is also impracticable to dispose of reduced dredge spoils in an offshore location, including the pre-approved DAMOS offshore disposal site near Portland.[17]

As is detailed below, dredging and disposal in August will have unacceptable impacts on virtually all other users and resources in the river aside from navigation. In-river and near-shore disposal, in particular, may be very damaging to the environment and to Appellants. The Draft EA acknowledges that offshore disposal was used previously and remains economically

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[15] *See* Comments of the Phippsburg Commenters ("PC") at 8 (March 30, 2011), attached as Ex. 7.

[16] According the Corps, there is but one company with a hopper dredge in the entire northeast.

practicable. The Corps, however, rejects this alternative because it does not keep the material within the littoral system. (Draft EA at 7.) The concern is that dredging should not deplete the Kennebec River sand budget and potentially lead to erosion of Popham Beach. Yet there is no analysis of whether a reduced amount of material from a one-time emergency dredging event this summer could be safely removed from the littoral system without impacting the beaches.

By dredging the least amount possible, the Corps would reduce the duration and extent of dredging impacts to other resources and remove less material from the Kennebec River sand budget. By using pre-approved offshore disposal sites (such as the pre-approved Portland Disposal Site), disposal impacts to lobstering, shellfishing, tourism and recreation, wildlife, endangered fish species, wetlands, and water quality would be averted. Based on the totality of the circumstances, such an alternative could reduce overall environmental impacts and may represent the optimum solution to what is admittedly a complex problem. This is exactly the sort of balancing and weighing of impacts among alternatives that NRPA requires. *See Uliano v. BEP*, 2005 ME 88, ¶ 17; *Uliano v. BEP*, 2009 ME 89, ¶ 40.

The Commissioner's Order, however, makes no attempt to weigh the potentially competing environmental impacts of the proposed action versus off-shore disposal, or to devise an alternative solution that achieves the optimum balance to minimize the overall impact. For this reason, the Order violates NRPA and must be reversed.

In summary, because the applicant failed to affirmatively demonstrate that less environmentally damaging alternatives, including no dredging, mechanical dredging, minimal summertime dredging, and upland and/or offshore disposal are impracticable, the Order violates NRPA. Appellants respectfully request that the Board modify the order to conduct the proper alternatives analysis, and, specifically, that the Board review an alternative that limits summertime dredging and disposal to the absolute minimum necessary to allow safe transit of the U.S.S. Spruance, that considers mechanical dredging to minimize impacts to marine fisheries, and that requires dredge spoils, if any, be disposed of upland or offshore.

3. WATER QUALITY VIOLATIONS

The primary issue driving this dispute is the proposed dumping of 70,000 cubic yards of dredge spoils at in-river and near-shore dump sites during the height of the summer tourist, clamming and fishing seasons in August. Dumping this massive amount of pollution during the most critical summer month – generally one of the very cleanest months of the year on the Kennebec – will severely impact all other users of the system, and in particular lobster fishermen, shellfish harvesters, and anglers and their guides. It will also violate multiple state water quality standards and therefore cannot be permitted under either NRPA, 38 M.R.S.A § 480-D(5), or sections 401 and 404 of the Clean Water Act, 40 C.F.R. §§ 121.2(3), 230.10(b)(1).

a. Background on Water Quality Impacts from Dredging and Disposal

Since the early 1980s, local shellfish harvesters have complained that dumping of dredge spoils in-river increases bacteria levels in the river and causes siltation and sedimentation of clam flats. The Corps contends that disposal of dredge spoils produces only very localized impacts at dump sites and that, according to studies done in the 1980s and 1990s, dumping of spoils in-river at the Kennebec Narrows will not result in sedimentation or pollution of downstream flats. Based on this narrow and dated look at potential sedimentation of clam flats from one of the two disposal sites (and ignoring all other water quality impacts), the Order found that the proposed activity would not violate Maine water quality standards. (Order at 6-7, 8.)

This finding is deeply flawed and ignores both the very severe and significant water quality violations from localized impacts – which are not in dispute – and evidence showing that disposal of such large volumes of dredge spoils in August will also result in more widespread impacts and water quality violations to clam flats and other resources in the system (such as marine fisheries).

First, however, we discuss the background on water quality impacts from dredging and disposal.

The Corps is proposing to use a hopper dredge, which vacuums material off the bottom and pumps a slurry of sand and water to be filtered in a hopper (thus the name) at the surface. Hopper dredges result in turbidity levels that are triple the levels from clamshell bucket dredges.[18] It takes approximately two hours to fill the hoppers with slurry (one part spoils, four parts water) and then the dredge ship will move to a dump site. The ship will release the accumulated dredge slurry at the dump site by opening bay doors under the hold. Although mostly coarse sand, the data and personal observations show that the liquefied dredge spoils do not drop straight to the bottom, but rather "cause sediment to be suspended in the water column." (Draft EA at 19.) For example, during November 2009 dumping of similar material by BIW at the Kennebec Narrows, Appellant Dot Kelly, an adjacent landowner, reported that dumping resulted in immediate turbidity and discoloration of the entire river, from bank to bank. [19] That dredge event – approximately 18,000 cubic yards – deposited about a foot of coarse brown sand topped by finer black silt on the normally rocky shoreline and intertidal zone (more than half of the sand is still present today, see Figure 2).

These observations are consistent with the limited studies that have been conducted to monitor dredging impacts in the Kennebec Narrows. An analysis of dumping at the Kennebec Narrows by Corps staffer William Hubbard in 1981 found that bottom areas 300 meters (1,000')

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[18] Comments of Dot Kelly to DEP and Army Corps, at 12-13 (March 30, 2011) (attached as Ex 9)

[19] *Id.* at 2-3.

downstream of the disposal site accumulated dredge spoils at 50% of the rate of bottom areas immediately underneath the disposal site. *See* William A. Hubbard, *Analysis of Survey Data Kennebec River Disposal Site, Sagadahoc County, Maine*, contained in Draft EA, Appendix 1). After dumping approximately 50,000 cubic yards of "sandy material," the mound of spoils accumulated on the river bottom immediately below the 150m x 150m Kennebec Narrows dump site averaged approximately 3 meters deep (just under 10'). 300 meters downstream spoils accumulated to an average of 1.4 meters (4' 6"). (*Id.*) No measurements were taken to either side of the dump location or further downstream; however, the Corps estimates that dredge spoils dumped at the Narrows will initially disperse at least 3,000 feet downstream. (Draft EA at 19.) In the Kennebec Narrows, the shoreline on each side is within 55 meters (180') of the dump site boundaries, and well within the range of impact identified by Hubbard and the Corps. Thus, Kelly's observations are wholly consistent with Hubbard's findings and provide clear and irrefutable evidence that dumping at the Kennebec Narrows will, at a minimum, result in deposition of large amounts of sandy material in the intertidal zone along much of the Narrows.

A second analysis was conducted by Normandeau Associates in 1997, which was summarized in a cover letter (rather than a scientific or peer reviewed report) that accompanied the data results. (*See* M. Bowne, Office Manager, Normandeau Associates, Dec. 5, 1997 letter to Bob Herman, BIW, at Table 1. Attached as Ex. 13.) The Order relies upon the Normandeau letter's conclusions that "turbidity levels were consistent with other sampling stations along the Kennebec River and that there was no trend related to station, depth, or dredging/disposal." (Order at 4.) Reliance on the Normandeau Letter is error for two reasons. First, the study is fatally flawed, both in design and in implementation. Second, the limited data it produced actually demonstrates the opposite of Normandeau's conclusion – there is a clear trend showing that dredging and dumping results in increases in turbidity and fecal coliform levels.

Regarding the study design, Normandeau evaluated water quality at only four locations (with a pair bracketing the dredge site and disposal site, respectively). (*Id.*) Use of just four data points is wholly insufficient to support a study of a river system of this complexity. More problematically, Normandeau only took measurements at the bottom and at mid-depth. No measurements were taken close to the surface where hopper dredge filtering and dumping occurs. Finally, the study sites and data were not correlated to tides and currents, which is critical to measuring and understanding dispersal patterns. (*Id.*) These flaws render the study design statistically inadequate to support any findings.

Next, Normandeau collected its pre-dredge baseline samples during a "large storm event" instead of normal conditions. (*Id.*) Due to high levels of pollution from storm events (CSO discharges, POTW overflows, stormwater runoff, and non-point pollution) data collected on that date does not provide a valid baseline. To make matters worse, Normandeau then failed to follow EPA sampling protocols for the baseline samples, making the baseline data suspect. Finally, Normandeau reported post-dredge sampling dates (Nov. 18th) on days that clearly occurred prior to completion of dredging. (*Id.*) Based on the numerous and fundamental flaws in design and implementation, the Department erred by relying upon the Normandeau study.

Second, contrary to the conclusions stated in the cover letter, the Normandeau data in fact show an increase in turbidity levels due to dredging and dumping. At station 4 located

downstream of the dump site, the turbidity value was lowest pre-dredge (even though it was measured during a storm event); turbidity doubled the day of dredging, and rose even higher a day later, post-dredge. In fact three of the four sampling sites show increases in turbidity levels during and immediately after dredging, while the fourth station (#3) stayed even. The data results are re-produced below.

Table 1. Turbidity (NTU) before and during Kennebec River Dredging

Station	Depth	Pre-Dredge*	Dredge	Post-dredge
1	Mid	8.5	14.0	10.0
	Bottom	9.5	12.0	9.0
2	Mid	6.5	9.0	12.0
	Bottom	6.3	9.0	8.0
3	Mid	8.0	7.0	8.0
	Bottom	7.0	9.0	9.0
4	Mid	3.0	5.0	6.0
	Bottom	2.5	5.0	9.0

* Samples exceeded the allowable holding period.

(*Id.*) Contrary to the conclusions in the Order, the trend is clearly one of increasing turbidity from dredging. Moreover, this is based on comparisons to Normandeau's corrupted baseline data (2.5 to 9.5 NTU). When the Normandeau dredge and post-dredge data is compared to dry weather turbidity levels as measured by a separate study BIW modernization program (1.1 to 1.8 NTU during the months of August to October) (*Id.*, Table 2), the data clearly indicate that dredging will likely result in substantial increases in turbidity above normal water quality conditions in August. In short, the Normandeau data do not show no impact to water quality from dredging; rather the data indicate that dredging in August – normally among the very cleanest months of the year – will significantly reduce water quality.

Normandeau's fecal coliform tests show the same general trend. Pre-dredge sampling — which occurred during a large storm event – found bacteria levels at the dump site as high as 43 and 23 MPN/100 ml (above and below the Kennebec Narrows dump site, respectively). The day after dredging, bacteria levels matched or more than doubled the rainy day bacteria levels (93 and 23 MPN/100 ml) (*Id.*, Table 4.) This indicates that disposal of dredge spoils causes an increase in bacteria levels that is similar or higher than increases in bacteria levels from storm events, which often result in closure of the clam flats. Additionaly, the Normandeau data occurred during months when most upstream wastewater treatment plants do not chlorinate. In August, however, treatment plants are under seasonal disinfection requirements. Thus, the August baseline water quality will be much higher for bacteria.

The Normandeau data – to the extent the study has any validity – do not show no impact from dredging. Rather, the clear trend indicates that dredging does in fact increase bacteria levels and therefore poses a threat to downstream clam flats. This threat is cumulative for each day of dredging, just as in an extended rain event. Moreover, the threat also increases during wet weather, since the addition of bacteria from dredging to background levels could raise total

bacteria counts above safe levels for human consumption and thus cause DMR to close downstream the clam flats.

A third study cited in the Order, "*A Final Report on the Effects of Dredging and Spoil Disposal on the Sediment Characteristics of the Clam Flats of the Lower Kennebec Estuary*," by Peter Larsen in March 1982, attempted to measure sedimentation rates before during and after dredging of the FNP in October 1981. Larsen's methodology – burial of plates 15-20 centimeters deep in the clam flats – compromised his data from the start because it involving altering the very locations he studied. Moreover, he sampled generally sampled only one location for each flat, even though impacts vary widely depending upon exposure to tides and currents. Additionally, the sampling protocol looked only for accumulated deposition over an extended period (six data points for each sampling site over a one-month period). But as every clammer knows, the flats change daily with each tide, river levels, rain events, currents, and other natural causes. The study design did not and could not identify the level of daily sediment flux or potential causes for changes in sedimentation. Moreover, the study includes no information about intervening water levels, water quality, weather events or tides (including occurrence of spring or neap tides) that may have affected results. Area clammers contend that disposal of finer materials in dredge spoils can and sometimes does result in siltation of downstream clam flats and that the silt may raise levels of bacteria and/or toxins and, at a minimum, will fill in breathing and feeding holes. The Larsen study, sheds no light on whether such siltation occurs, i.e. whether deposition occurs on one tide and is then washed downstream to another flat on the next tide, whether breathing and feeding holes have been filled, whether clams are exposed to water quality impacts (bacteria, toxins), and potential impacts to juvenile clams. Finally, October-November conditions are generally wetter, with lower water quality and stronger tides. Thus, the same test done in August could produce significantly different results .

In summary, based on direct observations, sediment accumulation on nearby riverbanks, and the limited studies that have been done, dredge spoils – including even coarse-grained sands – do not drop straight down like a rock. Rather, the spoils and any liberated bacteria are carried by currents and tides to surrounding waters. Finer materials disperse even farther. Given the volume and locations of proposed dumping, the proposed action will likely result in severe reduction in water quality and cause multiple violations of Maine water quality standards.

b. Violations of Class SA Standards – Kennebec Narrows

Currently, the Kennebec Narrows dump site is designated by the legislature as class SA. 38 M.R.S.A § 469(5)(B). Discharge of dredge spoils is therefore categorically prohibited. *Id.*, § 465-B(1)(C). The Order authorizes the proposed action on the premise that the 1990 class SA designation was in error, and makes the 401 Certification and NRPA permit contingent upon anticipated legislation to revise the Kennebec Narrows classification to class SB. (Order at 8.) Appellants strenuously dispute that the 1990 classification was an error and that the 2011 Legislature can unilaterally revise the classification without meeting federal requirements for downgrading the classification of a water body, including the requirement to conduct public hearings in the affected communities and developing a Use Attainability Analysis pursuant to 40 C.F.R. § 131.10. Additionally, no such downgrade is effective unless and until reviewed and

approved by EPA. *Id.* § 131.21(c). *See also* James E. Tierney, Maine Attorney General Opinion 86-6A, at (March 10, 1986) (*quoting Mississippi Commission on Natural Resources v. Costle*, 625 F.2d 1269, 1275 (5th Cir. 1980) (water quality revisions must be submitted to EPA to be effective and the agency has the final voice on the legal adequacy of the standards)). Thus, at a minimum, the Order must be modified to clarify that disposal of dredge spoils at the Kennebec Narrows is contingent upon both Legislative downgrade of existing class SA designation *and* EPA approval of that downgrade.

c. Violations of Class SA Standards – Jackknife Ledge

The proposed Jackknife Ledge disposal area is in class SB waters immediately adjacent to and abutting class SA waters. (*See* Public Notice at 8.)[20] Direct discharges of pollutants, including dredge spoils, are prohibited in class SA waters. 38 M.R.S.A § 465-B(1)(C).[21] Here, the proposed discharge point is immediately proximate to the Class SA boundary. Based on the Hubbard study and the Draft EA – which shows that initial dispersal of dumped spoils will extend between 1,000 feet (up to 50% of total accumulation) to 3,000 feet (up to 10% of total accumulation) (Draft EA at 19) – disposal of 20,000 cubic yards of dredge spoils at JKL will undoubtedly result in large amounts of pollution entering into and settling out within immediately adjacent class SA waters. Direct discharges into class SA waters violate Maine water quality standards and cannot be permitted.

Additionally, under Class SA standards, "habitat must be characterized as free-flowing and natural," 38 M.R.S.A § 465-B(1)(A) and "estuarine and marine life . . . shall be as naturally occurs. *Id.* § 465-B(1)(B). "'Natural' means living in, or as if in, a state of nature not measurably affected by human activity." *Id.* § 466(9). "'As naturally occurs'" means conditions with essentially the same physical, chemical and biological characteristics as found in situations with similar habitats free of measurable effects of human activity." *Id.* § 466(2).

Dumping of 20,000 cubic yards of dredge spoils immediately adjacent to the class SA boundary – which will cause "measureable" amounts of dredge spoils to enter those class SA waters and to bury class SA habitat and natural occurring marine life under many feet of pollution – expressly violates class SA water quality standards. Burying some of the prime lobstering grounds off of the Phippsburg peninsula under several feet of dredge spoils cannot even be remotely described as "natural" or "a state of nature not measurably affected by human activity." *Id.* Moreover, based on the applicant's own studies, such dumping will result in measurably higher levels of turbidity in class SA waters, which may kill, stress and displace

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[20] The circular 500-yard JKL dump site is within a hundred feet, or less, of the Longitude 69° 47' 0" W boundary between Class SA and SB waters.

[21] Direct discharge is defined in statute to mean the same thing as a point source, i.e. a any discernible, confined and discrete conveyance from which pollutants are discharged. *Cf.* 38 M.R.S.A § 466(5) (definition of "direct discharge") with 06-096 CMR, ch. 520, § 2 (definition of "point source").

lobsters (and their food sources) at a key period in their migration, during molting, when their shells are too soft to offer protection from predators.

Appellants raised concerns about impacts to lobster and lobster habitat repeatedly, at both the public hearing and in written comments. For example, Dean Doyle, chair of the Phippsburg Shellfish Conservation Commission, wrote that

> The mouth of the Kennebec has a significant amount of lobstering activity (particularly south of Jackknife Ledge). One committee member noted you could practically walk from Morse River to Seguin Island on the sea of lobster buoys in the area in August. We are concerned that the dredge itself will cut lines and wipe out lobster traps that are in its path, both while dredging and while transporting the dredged material to the disposal site. The dredging and dumping at the mouth of the Kennebec will kill and stress lobsters in this very active fishery, again at a time of year when demand for the product is at its peak.

Comments of Dean Doyle, Chair, Phippsburg Shellfish Committee, at 3-4 (March 25, 2011); *see also* PC at 12.

At the start of the permit review process, DMR also raised concerns with DEP that the project would "definitely [impact] lobstering off Popham beach."[22] The next day the DEP project manager commented to his supervisor that "this looks like something we will have to rush through, possibly over [DMR's] concerns."[23] And that is exactly what DEP did. Nowhere does the Department Order even mention, let alone provide a reasoned analysis, of potential dredging and disposal impacts to habitat or marine life (including lobsters and all other marine species) in the North Sugarloaf Island reach or surrounding Jackknife Ledge, whether in class SA or SB waters (see discussion of almost identical violation of class SB standards, below). Failure to address this problem is yet another fatal flaw in the Order. *See Uliano v. BEP*, 2005 ME 88, ¶23.

Accordingly, because dredging of the North Sugarloaf Island channel is not necessary in August to allow safe transit of the Spruance; because the applicant has failed to meet its burden to affirmatively demonstrate that dumping at Jackknife Ledge will not violate class SA habitat and marine life standards; and because the Department's Order fails to provide any analysis or meaningful review of these issues, the Order must be reversed. Given these major gaps, the Department's conclusion that the proposed action will not violate any state water quality law is arbitrary and capricious and must be set aside. (*See* Order at 8.) At a minimum, the Board must revise the order to minimize disposal impacts, particularly to lobstering, shellfish harvesting, and guided fishing, and to require compensation for lost fishing days.

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[22] Email from Brian Swan, DMR, to Bob Green, DEP, Feb. 1, 2011 at 5 p.m., attached as Ex. 10.

[23] Email from Bob Green, DEP to Marybeth Richardson, DEP, Feb. 2, 2011, at 9:35 a.m., attached as Ex. 10.

d. Violations of Class SB Standards – Habitat and Aquatic Life

Maine's class SB standards for habitat and aquatic life require that "habitat must be characterized as unimpaired." 38 M.R.S.A § 465-B(2)(A).[24] "Discharges to Class SB waters may not cause adverse impact to estuarine and marine life in that the receiving waters must be of sufficient quality to support all estuarine and marine species indigenous to the receiving water without detrimental changes in the resident biological community." *Id.* § 465-B(2)(C).[25]

The Kennebec Narrows disposal site north of Bluff Head is a rocky deep, narrow (300 yards wide) channel with strong currents, eddies and upwelling. It is a critical and very biologically rich area: all the anadromous fish and aquatic life that ride the currents up and down the Kennebec and Androscoggin Rivers transits these narrows. Since it is a fertile fishing ground, it attracts diving ducks, birds, birds of prey and seals. Impacts to this rich aquatic environment have not been studied in any prior dredging analysis; nor are there any analyses of impacts to this river segment in the draft EA or Public Notice document.

During a prior BIW dredging event in November 2009 – which involved disposal of 18,750 cubic yards of material also designated as "clean sand" in the permits issued to BIW – Appellant Kelly observed that the dumping resulted in immediate and extreme turbidity and discoloration of the entire reach of the Kennebec Narrows, from bank to bank, which drove virtually all visible wildlife from the area.[26] Despite findings by the Department that dredged sands from the BIW dredging would cause no impacts, a foot-plus thick layer of sand and mud was deposited on the adjacent intertidal zone, including both the Kelly shoreline and the adjacent marshes. This impact is not temporary. As shown in the photograph in Figure 2, approximately four to six inches of sand still covers most of the intertidal zone over 17 months later. This layer of sand extends throughout much of the Kennebec Narrows shoreline and adjacent marshes and wetlands, including the marsh at the Phippsburg Land Trust's Greenleaf Preserve. (This is also an example of the kind of deposition that threatens clam flats, see below).

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[24] "'Unimpaired' means without a diminished capacity to support aquatic life." *Id.* §466(11). Aquatic life "means any plants or animals which live at least part of their life cycle in fresh [sic] water" *Id.* § 466(1).

[25] "'Without detrimental changes in the resident biological community' means no significant loss of species or excessive dominance by any species or group of species attributable to human activity." *Id.* § 466(12). "'Resident biological community' means aquatic life expected to exist in a habitat which is free from the influence of the discharge of any pollutant. This shall be established by accepted biomonitoring techniques." *Id.* § 466(10).

[26] *See* note 18, above. *See also* PC at 16, Ex. 7; Dot Kelly, *Comments to DEP*, at 9-12 (March 20, 2011) attached as Ex. 9.

Figure 2: A thick layer of sand still coats the western shore of the Kennebec Narrows approximately 17 months after being deposited from the dumping of dredge spoils in 2009

Sustained burial of the Kennebec Narrows' normally rocky shoreline under a thick layer of sand and mud fundamentally alters normal conditions and detrimentally affects the resident biological community by filling interstices and smothering habitat. This is a clear violation of class SB habitat and aquatic life standards. Although Appellants raised this concern during the public comment period, the Department made no effort whatsoever to review this concern or even respond to the Appellants concerns. *See* Order at 6-7.

Pursuant to NRPA and Section 401 of the Clean Water Act, it is the applicant's burden to affirmatively demonstrate compliance with all applicable standards, including proof that the "activity will not violate any state water quality law, including those governing the classification of the State's waters." 38 M.R.S.A § 480-D(5). Here, the applicant made no such effort and the Department utterly failed to even consider the issue. The only evidence in the record conclusively shows that extensive deposition from dredging has in fact occurred on this shoreline, in levels and for durations sufficient to detrimentally affect the resident biological community. This evidence is corroborated by the applicant's own studies of dispersal rates (Hubbard, Draft EA) and turbidity levels (Normandeau), which both show that dumping will result in extensive sedimentation of the shoreline. Accordingly, barring new evidence affirmatively demonstrating that the undisputed localized impacts from dredging will not violate water quality standards, the Board must find that the Order is in error and that in-river disposal at the Kennebec Narrows is prohibited under NRPA and the Clean Water Act because it is reasonably likely to cause violations of class SB standards. 40 C.F.R. § 121.2(3).

The applicant and Department face the same problem at the Jackknife Ledge disposal site. As noted above, the bottom surrounding JKL is prime lobster habitat. Burial of a wide area of the bottom under several meters of sand will detrimentally affect lobsters and other resident biological life, thus violating class SB standards. While the Order can be read as downplaying such impacts based on a best case scenario that dredging will only last for a few days (Order at 3,

5), the Draft EA acknowledges that regardless of the dredge duration the immediate impacts will last for years, and that repeated impacts from disposal events are cumulative.

As the Draft EA states, "the benthic organisms that have colonized the [Jackknife Ledge disposal] site since the previous disposal operation will be buried. Re-colonization is anticipated to occur *within a few seasons* of larval and adult recruitment." (Draft EA at 21-22, emphasis added.) No discussion is provided of how many seasons larval and adult recruitment will take. But return of the benthic population, which makes up the prey base for the lobster population, is critical for appellants, whose livelihood depends upon maintaining a high quality fishery. As this discussion makes clear, from a water quality, habitat and fisheries perspective, JKL is a bad location to dump large volumes of dredge spoils – particularly during the lobster molting season in August. Moreover, given anticipated widespread dispersal of spoils due to strong tides and currents in the area, the impact will not be confined to the relatively small dumping area, but can be expected to cover a wide area of bottom habitat.

Since the only evidence in the record conclusively shows that deposition from disposal of dredge spoils will obliterate (i.e. "impair") the benthic community for a period of years, at a minimum, the Department erred in finding that the proposed disposal at JKL will not violate any water quality law, including class SB standards. Accordingly, the Board must find that the Order is in error and that near-shore disposal at JKL is prohibited because it is reasonably likely to cause violations of class SB habitat standards.

e. Violations of Class SB Standards – Shellfish and Bacteria

Disposal of dredge spoils in class SB waters is also prohibited if it would cause or contribute to excessive bacteria levels or cause the Department of Marine Resources (DMR) to close open shellfishing areas. 38 M.R.S.A § 465-B(2)(C). Maine's class SB standards for clam flats and shellfish harvesting provide that:

- E.Coli bacteria levels of human origin (which would include suspension of formerly isolated bacteria because of dredging) may not exceed a geometric mean of 8/100 ml or an instantaneous level of 54/100 ml. Total coliform levels in shellfish harvesting areas may not exceed the criteria recommended by the U.S. National Shellfish Sanitation Program. *Id.* § 465-B(2)(B).[27]

- "There may be no new discharge to Class SB waters that would cause closure of open shellfish areas." *Id.* § 465-B(2)(C).

In findings four and five, Order finds that there will be no violation of the class SB bacteria and shellfish standards. For example, finding five states: "Given the composition of

[27] The Kennebec River estuary is included in the 2009 statewide bacteria TMDL. *See* Maine DEP, *Maine Statewide Bacteria TMDL*, Report # DEPLW-1002 at 16 (August 2009). Because direct discharge of dredge spoils is not assigned a waste load allocation under the TMDL, any discharge of bacteria is technically prohibited by the Clean Water Act. *See id.* at 26 (Table 4-2).

dredged material and the provisions that will be taken to protect open shellfish areas, the Department does not anticipate that the proposed project will violate any state water quality law, including those governing the classification of the state's waters." (Order at 7.) This is in error for the following reasons.

First, this finding is arbitrary and capricious because in fact the Order makes no provisions to protect open shellfish areas. To the contrary, the current plan is to close the flats if monitoring shows contamination, not to stop dredging. Due to public health concerns over bioaccumulation of toxins and bacteria, DMR has determined that the project will require regular testing. (Patrick Keliher, Acting Deputy Commissioner of DMR, *Additional Comments*, at 2, April 11, 2011, attached as Ex. 14). DMR has further stated that if it measures an impact, "we will need to close the shellfish resource downstream of the disposal site, until such time as testing confirms that there is no longer a public health issue." (*Id.*) No conditions are imposed to stop dredging operations. Thus, because no provisions have been made to protect open shellfish areas, the Department's Order is based on a false premise. This alone warrants reversal of the Department's Order.

Second, to add insult to injury, the Department also rejected DMR's recommendations to provide compensation to shellfish harvesters if a closure does occur. As DMR stated:

> The time period for this proposed dredging activity (late July to August) falls during the time of year when most of the harvesting takes place in the area, and when clam prices are historically the highest of the entire year. License and landings data available at the towns show that many harvesters make as much as 50% of their annual harvest income during the proposed dredging period, and therefore *compensation should definitely be required*, if there is a shellfish closure triggered by the dredging activity.
>
> Because the dredging/disposal activities would be taking place outside the normal work window, DMR strongly suggests that the Corps, DEP, DMR, BIW, the Navy and the Phippsburg Shellfish Committee meet to discuss the ramification to shellfish harvesters for lost income in the event of a necessary shellfish area closure caused by these activities.

(*Id.*, emphasis added.) The Department's refusal – without explanation – to incorporate DMR's recommendation to compensate harvesters violates NRPA standards prohibiting interference with existing uses, 38 M.R.S.A § 480-D(1), and unreasonable impact to marine fisheries, *id.* §§ 480-D(3), (9). *See also Uliano v. BEP*, 2005 ME 88, ¶23 (License must provide rationale for each determination). For this reason also, it must be set aside.

Third, the Department's finding of no impact to shellfishing is in error because it relies upon a best case scenario assumption that dredging will be completed in as few as two or three days. Specifically, the Order found:

> The Corps stated that, given the 24 hours a day work schedule for this project, dredging operations at Doubling Point *could be completed in as few*

> *as two or three days* and less for dredging at North Sugarloaf Island reach. Because DMR proposes to monitor water quality downstream of the Bluff Head Disposal Site, and given the low percentage of silt-sized particles that would create turbid discharge and *the short time to perform the dredge*, the Department finds that the proposed project is not expected to have an unreasonable impact to the clam flats near the mouth of the river.

(Order at 5, emphasis added.) In contrast to this rosy prediction, the project application is for a three to five week dredging project. [redacted] Here again, the Department's finding is based on a false premise and is therefore in error.

Fourth, and most importantly, the Department erred in assuming that water quality impacts from dredging and disposal will be limited to local areas and will not affect clam flats downstream of the Kennebec Narrows or in-shore from JKL. Although the Department cites to grain sample sizes and to a pair of old (and deeply flawed) studies to show no impact, the actual experience of DMR and the Phippsburg shellfish harvesters is far different. As DMR has explained,

> The lower Kennebec had very little shellfish resource that was classified as approved for harvest in 1997, when the issue of potential shellfish area closure downstream of Corps' dredging/disposal was last studied. In recent years, DMR has been successful with an incredibly intense effort to re-classify shellfish resource in that area and make it available to local harvesters. In the process of this work, we have documented that shellfish resource in the lower Kennebec River has proven to be excessively sensitive to river flow and discharge characteristics.

(Keliher, *Additional Comments*, at 2.) The Phippsburg Shellfish Committee is unequivocal that, based on the personal experience of harvesters during dredge events in 1997, 2000, 2002, and 2003, dredging and disposal into this very sensitive system does in fact effect the clam flats. In his comment letter to DEP, chair Dean Doyle stated:

> In our experience, dredged material does not stay within the proposed dumping area and/or the dredging process itself releases noticeable and significant silt spreads throughout the clam flat areas along the Kennebec, particularly those in proximity to the dredging or dump sites, closing the feeding and breathing holes used by harvesters to locate populations of clams. Dredging at Doubling Point and dumping at Bluff Head affects active shellfish flats at Dromore Bay, the Upper Flats, Parker Head, Wyman's Bay

[redacted]

> and Atkins Bay. Dredging at Popham Beach and disposal at Jackknife Ledge affects the entire Small Point/Popham Beach complex, including the Morse and Sprague rivers.

Comments of Dean Doyle, Chair, Phippsburg Shellfish Committee, at 3 (March 25, 2011).[29]

There is no dispute that fine grain sediments (silts and clays) from dredging, as Maine Geological Survey ("MGS") states, "would not settle quickly but would be carried by tidal and river currents to intertidal and subtidal depositional sites upstream and downstream of the disposal sites." (Order at 4.) The Department dismisses this impact simply because the percentage of estimated fines is small, about 1-2% of the spoils based upon the Corps sampling. (*Id.*) That, however, misses the point. Spoils expand exponentially when liquefied; particularly the fines. This is why the Hubbard survey of the 1981 dumping in the Kennebec Narrows found disposed spoils were four times greater in volume than the amount of material dredged, just within the disposal area (Kelly at 11), and it is undisputed that much of the spoils settled out downstream of the disposal area. A 50,000/20,000 cubic yard dumping event, is more than capable of entraining enough silt in the water column to produce some siltation on downstream flats, including, at a minimum, the filling in of breathing and feeding holes. The clammers' testimony provides first hand evidence that this may be exactly what happened in prior years.

The Department's dismissal of these impacts based solely upon older and flawed studies, to the exclusion of the testimony of fishermen who regularly work the flats and who have first hand knowledge of dredge impacts, is arbitrary and capricious and should be reversed. This is especially true since the concerns of the harvesters are supported by testimony both from DMR, which states that the flats are "excessively sensitive" to river flows and discharges (Keliher at 2), and from MGS, which stated that "it is not possible to quantify and predict transient water quality impacts, nor is it possible to identify specific areas that may become silted as a result of the proposed project." (Order at 4.)

This is not just some academic dispute. For the Phippsburg commercial harvesters, the months of July and August are the best months of the year – the weather tends to be dry, the days long (often two low tides per day), and the value of each bushel of clams is at its peak. Moreover, in recent years, the Kennebec River flats have been subject to a number of closures due to high rainfall and excessive upstream pollution; resulting in closures as many as half of the fishing days in 2009 and 2010. Additionally, if there is a red tide closure this summer on the coast, which is not uncommon, the inland Kennebec River flats are often the only local areas that remain open.

In short, the risk of dredging and disposal in August to local harvesters is extreme. Closure in August could easily cost $350,000 to $500,000, not including recreational harvests. But the concern is not just for this year. If dispersal of dredge spoils by currents and tides results in impacts to any of the clam flats, and especially the highly productive clam flats in the Morse and Sprague Rivers, there is a real concern for long term impacts:

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[29] Attached as Ex. 11.

> The Jackknife ledge disposal site sits offshore from the Fox Islands and the mouth of Morse River. It is part of the sediment circulation system that feeds the entire Small Point and Popham beach area. As noted above, this is apparently part of the reason why the Corps has selected the Jackknife Ledge site, as the area is considered part of the littoral system. This is also why we are especially concerned about dredging and dumping – both in this area and at this particular time of year.
>
> In the last few years, the Morse River has become one of the most productive clam spawning grounds in Phippsburg. It is one of the few places where sufficient seed clams for our reseeding efforts could be found in 2010. In August, any spring-spawned clams that have survived will be in the top inch or so of these flats; these juveniles are especially susceptible to stress and suffocation if buried under silt or dredging debris, or if they are in waters with a high amount of suspended solids.... The risk to the juvenile clam population means that the impact of dredging in August does far beyond the current economic costs to today's harvesters; such activity will impact the sustainability of our shellfish program for years to come.

Doyle, at 3.

In sum, because there are no provisions to protect open shellfish flats or compensate for lost harvests at this key time of year; because dredging is expected to take weeks, not days; because there is undisputed evidence that a percentage of dredge spoils (fines) will in fact impact clam flats; because any siltation in August could affect recruitment of juvenile clam spat; and because there is a significant concern that bacteria levels may, cumulatively, require closure of some clam flats, the Board should reverse the Department's order and require disposal of (minimal) dredge spoils upland and/or offshore where it will not impact this key ecological and economic resource.

4. IMPACTS TO SIGNIFICANT WILDLIFE HABITAT AND MARINE FISHERIES

Under NRPA, the Department must consider impacts both to "significant wildlife habitat" and to "marine fisheries." 38 M.R.S.A § 480-D(3). Federally endangered Gulf of Maine Atlantic salmon (GOM salmon) and critical habitat for GOM salmon fall within both of these provisions. Yet, the Order provides no analysis or discussion of any potential impacts to the endangered GOM salmon or to critical habitat for GOM salmon within the Kennebec River. This is reversible error for the following reasons.[30]

[30] Appellants also incorporate by reference the appeal of Douglas Watts regarding impacts to wildlife, fisheries, and habitat.

First, the finding that the project area contains no significant wildlife habitat, as defined by NRPA, is arbitrary and capricious. (Order at 6.)[31] To be "significant wildlife habitat," habitat must meet two requirements: (1) habitat must within one of the areas designated by statute, and (2) it must include habitat, as defined by IFW, for certain species, including species appearing on the state or federal endangered or threatened species lists. 38 M.R.S.A § 480-B(10)(A).

The Kennebec River estuary meets both requirements.

Regarding the first requirement, the Kennebec estuary meets the "areas" definition of the statute, which includes habitat "within any other protected natural resource." *Id.* § 480-B(10)(A). The definition of a protected natural resource includes "coastal wetlands" and "rivers", *id.* § 480-B(8), both of which will be affected by the proposed project.

Regarding the second requirement, IFW has, to date, expressly reserved the definition of "[h]abitat for species appearing on the official state or federal lists of endangered and threatened species" for future rulemaking. 09-137 CMR ch. 10, § 10.02(1). That does not end the story, however. The federal, not state government has jurisdiction over migratory and federally endangered species, including habitat designations for those species. The National Marine Fisheries Service ("NMFS") has defined critical habitat for GOM salmon, and that designation includes the entire Kennebec River estuary. [redacted][33]

[31] Sedimentation of riverbanks, marshes and flats will also affect listed significant wildlife habitat for endangered shorebirds. *See* maps at Ex. 12.

[redacted]

[33] Section 3(5)(A) of the federal Endangered Species Act, 16 U.S.C. 1532(5), defines critical habitat for a threatened or endangered species as:

> (i) the specific areas within the geographical area occupied by the species, at the time it is listed in accordance with the provisions of [section 4 of the Act], on which are found those physical or biological features (I) essential to the conservation of the species and (II) which may require special management considerations or protection...

[redacted]

Under the Supremacy Clause of the U.S. Constitution, states may not override federal determinations of critical habitat or other protections for federally endangered species – either expressly or by failure to act, as here. Thus, any definition of significant wildlife habitat for federally endangered species when adopted by IFW[35] must at a minimum include federally designated critical habitat for the endangered GOM salmon. This is particularly true in this case since the habitat designation was jointly developed by state and federal biologists. It would be arbitrary and capricious for Maine DMR to recommend inclusion of habitat as "critical" under a federal program yet exclude the same habitat as "significant" under a state program.

Finally, given the clear designation of critical habitat by NMFS with the express support, cooperation, and concurrence by Maine DMR, it is immaterial that Maine IFW has yet to designate significant wildlife habitat for endangered species. The Legislature has clearly and expressly indicated its intent that significant habitat for endangered species be protected under NRPA. IFW may not defeat this clear legislative purpose through inaction. Accordingly, the Order must be revised to evaluate impacts to significant habitat for endangered GOM salmon.

The Order is also in error because it completely omitted *any consideration* of whether the proposed action would cause "unreasonable harm . . . to marine fisheries." 38 M.R.S.A § 480-D(3). As noted above, longstanding Department guidance prohibits dredging in summer in order to minimize impacts to anadromous fish and other marine species. DEP Issue Profile, *Applications to Dredge or to Dispose of Dredged Material in Coastal Waters* (March 1997)("Timing of the project must coincide with the time of year that will minimize impacts on marine resources.")[36]

There can be no dispute that GOM salmon are a marine fish that occupy the affected area during August. Thus, the Department's failure to consider the impacts to GOM salmon is error for this reason as well, and the permit must be revoked unless and until the applicant can affirmatively demonstrate that there will be no unreasonable harms pursuant to §480-D(3).

Additionally, as noted in the draft EA, other marine fisheries subject to this same analysis include, Atlantic sturgeon, shortnose sturgeon, Atlantic cod, pollock, whiting, red hake, white hake, winter flounder, yellowtail flounder, windowpane flounder, American plaice, ocean pout, Atlantic halibut, Atlantic sea herring, bluefish, and Atlantic mackerel. (Draft EA at App. 6.) Additional diadromous species using the estuary include: alewives, American shad striped bass,

[redacted]

[35] Since GOM salmon are migratory, IFW (nor for that matter the Maine Department of Marine Resources) has no jurisdiction to alter the designation of critical habitat for this species.

[36] *See* above at note 2.

American eel, and blueback herring. In considering impacts to all of these species the Department must requiring timing of construction activities to occur where it will cause the least disturbance to fisheries. *See* 06-096 CMR ch. 335, § 3(C) (activity may not unreasonably disturb fisheries; Department may require activities to occur during period of least impact unless impracticable).

In Order # L-16281-4E-D-N (March 15, 2001) the Department previously limited the Corps legal dredging window to winter months in order to minimize impacts to marine fisheries (sturgeon). Given that determination, the Department cannot reverse its findings now unless it provides compelling new information showing that the impacts of summertime dredging are suddenly no longer "unreasonable." Moreover, because the Corps has a permit to conduct dredging in winter and normally conducts dredging at that time, by definition, wintertime dredging is practicable. The Corps' failure to meet he time constraints in its existing permit obligations does not magically render wintertime dredging impracticable.

5. INTERFERENCE WITH RECREATION, TOURISM, AND EXISTING USES

The Order omits any mention of the incredible recreation and historic resources on the Phippsburg peninsula. Popham Beach State Park is one of the crown jewels of the Maine Park's system, and is among the most heavily visited parks in the entire state. Together with Fort Popham, the Popham Colony historic site, Fort Baldwin, the Seguin Island Lighthouse, the Bates-Morse Mountain Conservation Area, and Seawall Beach, the project area offers some of the best recreation opportunities in Maine. Visitors and locals alike come to enjoy the spectacular beaches, swimming, surf kayaking, fishing, sailing, motor boating, clamming, hiking, nature trails, historic sites, scenic ocean views and more. The tourism and recreation business is a mainstay of the local economy and supports a wide range of businesses including restaurants, gifts shops, hotels, B&B's, vacation cottages, campgrounds, retail outlets, water sports, boat tours, fishing charters, etc. August is the key month for each and every one of these businesses, and accounts for the bulk of their annual income.

The proposed action would involve three to five weeks of day and night operations beginning Aug. 1, 2011, using massive hopper dredges – essentially giant vacuums – located a just few hundred feet offshore of Popham Beach, and in the Kennebec River downstream from Bath. Hopper dredging uses suction to lift material off the bottom, pumps it to the surface in slurry form, and then filters the slurry in floating barges. This activity will result in constant noise, visual impacts, air pollution, water quality impacts (both at the bottom and at the surface), disturbance of fish and wildlife, loss of habitat, take of endangered species, destruction of fishing gear, and a hazard to fishermen and boaters. All of these harms will occur immediately offshore of some of the most popular and scenic beaches in Maine and in some of the most heavily fished and recreated waters on the Maine Coast. Disposal of dredge spoils at Jackknife Ledge (JKL) will result in total suspended solids dispersed throughout the water column and surrounding areas, and will likely also impact nearby swimming areas, beaches, and mudflats in the Popham, Small Point, Morse River and Sprague River Marsh.

At the upstream Doubling Point dredge site and Bluff Head disposal site, kayakers, canoers, motor boaters, anglers, fishing guides, nature lovers, homeowners and tourists will be

displaced by a massive dredging operation that will dominate the narrow river channel and make other uses difficult and dangerous – again operating day and night during the height of the season. Further, dredging operations will cause noise, air quality and water quality impacts that will harm and detract from all other uses of the river. Noise from similar operations has, in the past awakened nearby residents, yet the Order provides no analysis of decibel levels. Nor does it consider imposing conditions to minimize noise impacts late at night.

Clearly, the proposed action will have severe and intensive negative impacts upon all aspects of the recreational experience – swimming, boating, aesthetics, view, sound, air quality, wildlife, etc. – for virtually all visitors, in violation of 38 M.R.S.A § 480-D(1). One visits the shore to hear the sound of the surf and wind, not massive vacuum barges operating day and night. One buys the services of a fishing guide as much for the aesthetic experience as the fish. Clearly, many people will lbe detred from these activities by the presence of a major dredging operation.

Coming during the most important month of a very short summer tourism season (which lasts all of two months) the economic impacts could well be devastating to many businesses that rely upon summer visitation. The degree of impact within this context is local but extreme: it will significantly impact the entire local economy, and consequently rises to the level of unreasonable interference under NRPA, 38 M.R.S.A § 480-D(1).

Conclusion

For the above reasons, Order should be modified to authorize only minimal dredging necessary, if at all to enable the U.S.S. Spruance to exit the Kennebec River and to prohibit discharge of dredge spoils in-river or near-shore. In the alternative, the Board should impose conditions requiring monitoring of water quality impacts, provisions to stop dredging if water quality impacts threaten open clam flats, provisions to compensate fishing and tourism industries for lost revenue, and requirements to protect endangered species.

Sincerely,

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List of Exhibits

1. Army Corps of Engineers, Public Notice of Maintenance and Advanced Maintenance Dredging of the Federal Navigation Project in the Kennebec River, Maine.

2. DEP Issue Profile, *Applications to Dredge or to Dispose of Dredged Material in Coastal Waters* (March 1997).

3. Kennebec River Dredging permits for the years 2002, 2000, 1997, 1989 (corrected) 1989 (original), Project No. L-16281-4E.

4. Email from Bob Herman, BIW, to Bob Green, DEP, April 7, 2011, 1:47 pm.

5. Letter from Bill Kavanaugh, Army Corps, to Kathleen Leyden, Maine Coastal Program, (Feb. 16, 2011).

6. Email from Bill Kavanaugh, Army Corps, to Brian Swan, DMR, and Bob Green, DEP, at 1, April 5, 2011, 10:15 a.m.

7. Comments of the Phippsburg Commenters to the Army Corps of Engineers and Maine DEP (March 30, 2011).

8. Map of U.S. Army Corps of Engineers, Disposal Area Monitoring System, Portland, Maine.

9. Comments of Dot Kelly to Army Corps (March 30, 2011); Comments of Dot Kelly to Maine DEP (March 20, 2011).

10. Email from Brian Swan, DMR, to Bob Green, DEP, Feb. 1, 2011 at 5 p.m; Email from Bob Green, DEP to Marybeth Richardson, DEP, Feb. 2, 2011, at 9:35 a.m.

11. Dean Doyle, Chair, Phippsburg Shellfish Committee, Comments the Phippsburg Shellfish Committee (March 25, 2011).

12. U.S. Fish and Wildlife Service, Map of Essential Habitat for Bald Eagles, Roseate Terns, and Piping Plover (1994).

13. M. Bowne, Office Manager, Normandeau Associates, Dec. 5, 1997 letter to Bob Herman, Bath Iron Works.

14. Patrick Keliher, Acting Deputy Commissioner of DMR, *Additional Comments*, April 11, 2011; Patrick Keliher, Acting Deputy Commissioner of DMR, *Comments*, March 10, 2011

STATE OF MAINE
BOARD OF ENVIRONMENTAL PROTECTION

APPEAL OF THE DECISION OF THE COMMISSIONER IN THE MATTER OF

U.S. ARMY CORPS OF ENGINEERS	**Natural Resources Protection Act**
Bath and Phippsburg, Sagadahoc County	**Coastal Wetland Alteration**
L-16281-4E-E-N (approval)	**Water Quality Certification**
***Corrected Order 4/15/2011**	**Findings of Fact and Order**

I. Introduction:

The U. S. Army Corps of Engineers received the above permit from the Maine DEP "pursuant to the provisions of 38 M.R.S.A. 480-A et. seq, and Section 401 of the Federal Water Pollution Control Act." (The Federal Water Pollution Control Act is also known as the Clean Water Act "CWA").

The permit in the project description states, "At the request of the U. S. Navy, the applicant proposes to dredge from both Doubling Point and North Sugarloaf Island reaches to the approved 27-foot channel to ensure safe passage for the U. S. S. Spruance."

The permit incorrectly addresses only the sites of dredging and not of disposal. The one place where the permit discusses practicable alternatives to the disposal sites (page 7 of 10), the permit finds "**that the analysis demonstrates that ocean disposal is the least environmentally damaging practicable alternative that meets the project purpose.**" This conclusion is appropriate and removes many of the deficiencies in this permit decision. This finding is, however, ignored.

The result is the contravening of the CWA Section 401 Certification requirement, the Maine Wetlands and Waterbodies Protection rules and the Maine Natural Resource Protection Act. Then, without following the law, the Kennebec Narrows disposal site in-river and the Jackknife Ledge disposal site near shore are designated for disposal of the dredge spoils.

Neither a proper application for approval of the disposal sites (Kennebec Narrows or Jackknife Ledge), nor a legal approval of the disposal sites has been obtained.

Additional issues:

1. Incorrect application of 40 CFR 230.60 to determine that chemical and biological sampling of the dredge spoils was not needed.
2. Superficial and perhaps flawed analysis dismissing the use of an in situ technique to remove sand waves in the navigation channel for the purpose of this out-of-season emergency dredging.
3. Improperly ignoring the significant impact from dumping about 1MM pounds of silt/clay in the fast tidal currents at Bluff Head, because it only is about 1% by weight of total

dredged material. A similar analysis should be carried out for the Jackknife Ledge disposal area.

4. Information available to the applicant has been withheld from interested parties. All information known to the Army Corps of Engineers or the Department of Environmental Protection which has a bearing on the dredging and disposal permit should be made available, prior to closing the DEP comment period, publishing of a draft order and then issuance of an L-16281-4E-E-N permit.

5. Neither the biological opinion nor the Environmental Assessment is available or finalized, based on a conversation with Mr. Bill Kavanaugh on May 13, 2011. He was not prepared to say when they would be ready. These documents must be made available, with at least a minimum comment period, prior to issuance of the DEP NRPA permit and the CWA Section 401 certifications (dredge spoil discharge (401(a)) and state water quality standards (401(b))).

6. Reasonable conditions were not included in the DEP permit, and the rationale for not including these conditions were either not given or were not explained satisfactorily.

This appeal incorporates by reference the appeals submitted by the Phippsburg commenters and Mr. Douglas H. Watts, Kennebec River wildlife photographer. This appeal incorporates by reference the comments of Dot Kelly to the Maine DEP dated March 15, 2011 and March 20, 2011 and the comments to the ACOE, and copied to Maine DEP, dated March 30, 2011 (sent on March 31, 2011). Please note that the March 20 and March 30 comments are appended to the Phippsburg commenters appeal.

This appeal recommends that the BEP remand this NRPA permit, Water Quality Certification, Clean Water Act Section 401 Certification, and Coastal Wetland Alteration regulation compliance back to the Maine DEP for further analysis since it is defective as enumerated below.

The BEP must insist that the disposal sites, which by their nature contribute to long-term impacts (not days, but years) are not utilized until the proper evaluation of the current state of the disposal sites is done as well as the impacts of this proposed dredging disposal is evaluated and analyzed as required by the Maine Wetlands and Waterbodies Protection regulations, the Maine Natural Resources Protection Act and the Clean Water Act Section 401 certification.

For this emergency dredging, in case it should prove to be necessary, an evaluation of using in situ measures, like a dragline to knockdown the critical sandwaves should be done now, as well as the alternative of a minimal low turbidity dredging with reuse upland or disposal at an approved ocean disposal site.

Please do not shy away from enforcing these legal responsibilities, even if they have been ignored in the past. Thank you for your service to the State of Maine.

II. Standing of Dorothy A. (Dot) Kelly

Since my property, 98 Pleasant Cove Road Phippsburg, Maine, abuts the "Bluff Head Disposal Site"[1], and since the dumping that took place in 2009 had an immediate negative impact on my intertidal zone by covering the rocky shore and the bottom of the stairs with slippery muck, I submit that I have standing to appeal the decision.

In addition, the 2009 disposal impacted the three seals which were residents in the Narrows prior to the disposal. The disposal, with its extensive, long-lasting turbidity, modified their behavior and then apparently caused them to leave the area. Muck remains today in the lower intertidal zone (the upper intertidal muck has been carried to other areas by the current action). [redacted] The cumulative effect of dumping an additional 50,000 cubic yards of dredge spoils in August has not been evaluated. The intertidal zone is degraded for walking on because it is easy to slip on the muck as well as sink into the accumulated muck, making enjoying the water, especially for kayaking and wading, dangerous and difficult. In addition, the areas with accumulated muck are dead zones and appear anoxic, as opposed to being alive with copepods and other creatures. As a property owner to the low tide mark, the impact of immediate and longer term disposal of additional dredge spoils on my property and the estuarine marshes adjacent to the disposal area, as the deposited dredge spoils are winnowed by the currents, was not described, evaluated and determined to be consistent with Maine environmental law. See Figure 5 from the March 20 comments, page 12.

Figure 5. One of the areas of accumulated muck, on an otherwise rocky shore. Footprints From 2/24/2011 when retrieving a sample of the muck for the Phippsburg public meeting.

Additionally, as a member of local conservation organizations, including being an appointed member of the Phippsburg Conservation Committee, I have a keen interest in the quality of the Kennebec Estuary in and around Phippsburg generally.

[1] The Bluff Head Disposal Site is alternatively called the North of Bluff Head Disposal Site, the Fiddler's Reach Disposal Site, and the Kennebec Narrows Disposal Site among others. The site's actual location is shifted around by the applicant, based on a review of licensing documents. The most recent shift, northward, occurred in the BIW use of the site in 2009, under a permit issued by the Army Corps of Engineers. The location is in the Kennebec River in Phippsburg and Arrowsic in the Kennebec Narrows, south of the Morse Cove State Boat Launch which is in Phippsburg and North of "Bluff Head" which is in Arrowsic.

[redacted]

As a 1980 Bachelor of Science chemistry graduate, a former Director of Energy and Environmental Services for a major chemical company, a current energy and environmental consultant, and a past and current member of various environmental and energy boards and committees, I have for more than two decades focused on issues related to environmental compliance and on scientifically evaluating and finding practical, real world improvements to environmental impacts from man-made pollution.

III. Grounds for this Appeal

Appellant asserts the L-16281-4E-E-N approval was issued by the Department of Environmental Protection improperly.

A. **The permit is fatally flawed and must be overturned. On page 7 of 10 at 6.A., the Department finds that the "analysis demonstrates that ocean disposal is the least environmentally damaging practicable alternative that meets the project purpose." However the permit approval does not require "ocean disposal" but approves in-river disposal at the "Bluff Head" site (locally referred to as the Kennebec Narrows and only 330 yards wide) as well as the "Jackknife Ledge" site located in the nearshore adjacent to Popham Beach State Park.**

Since the DEP has determined that "ocean disposal" is the least environmentally damaging practicable alternative and has published that in the permit document, the use of the Kennebec Narrows and Bluff Head for the August dredging needs to be disallowed.

B. **The approval references Section 401 of the Federal Water Pollution Control Act (also known as the Clean Water Act "CWA"), however the approval only discusses the State water quality certification requirements of 401(b) and ignores the requirement 401(a), which require that the DEP certify the applicant's compliance with CWA Section 404, dredged spoil disposal in navigable waters.**

Section 401(a) of the Clean Water Act states:

> **Clean Water Act, Section 401 Certification**
>
> **(a) Compliance with applicable requirements; application; procedures; license suspension**
> (1) Any applicant for a Federal license or permit to conduct any activity including, but not limited to, the construction or operation of facilities, which may result in any discharge into the navigable waters, shall provide the licensing or permitting agency a certification from the State in which the discharge originates or will originate, or, if appropriate, from the interstate water pollution control agency having jurisdiction over the navigable waters at the point where the discharge originates or will originate, that any such discharge will comply with the applicable provisions of sections 301, 302, 303, 306, and 307 of this title.

Thus, for this action, the discharging of dredge spoils into the Kennebec Estuary, the applicable provision is section 301(a).

Section 301(a) states:

> SEC. 301 (a): Except as in compliance with this section and sections 302, 306, 307, 318, 402, and 404 of this Act, the discharge of any pollutant by any person shall be unlawful.

Section 404 of the Clean Water Act regulates the discharge of dredged or fill materials into the waters of the United States. For the purpose of the ACOE permit for dredging the Lower Kennebec, Section 404(b) specifies how discharges of dredged or fill material, are approved. Thus, Section 301(a) says that except in compliance with Section 404, the discharge of any pollutant is unlawful. The State is required to issue a certification that the applicant's discharge of dredged materials into the waters of the United States is compliant with the requirements, or the discharge is prohibited. To the extent the DEP was postponing the 401(a) certification until more information was provided by the applicant, that postponement should have been clearly documented and an additional comment period discussed.

Section 404(b) describes the requirements for a disposal site to be specified. Disposal sites are specified by complying with the guidelines prepared by EPA in 40 CFR 230. If after applying the guidelines in 40 CFR 230, (which includes the evaluation of the site, the material to be disposed, the affect of the discharged spoils over time and weighing the impact), the Secretary determines the site is not approvable, the Secretary is allowed to consider the economic impact of the site on navigation and anchorage.

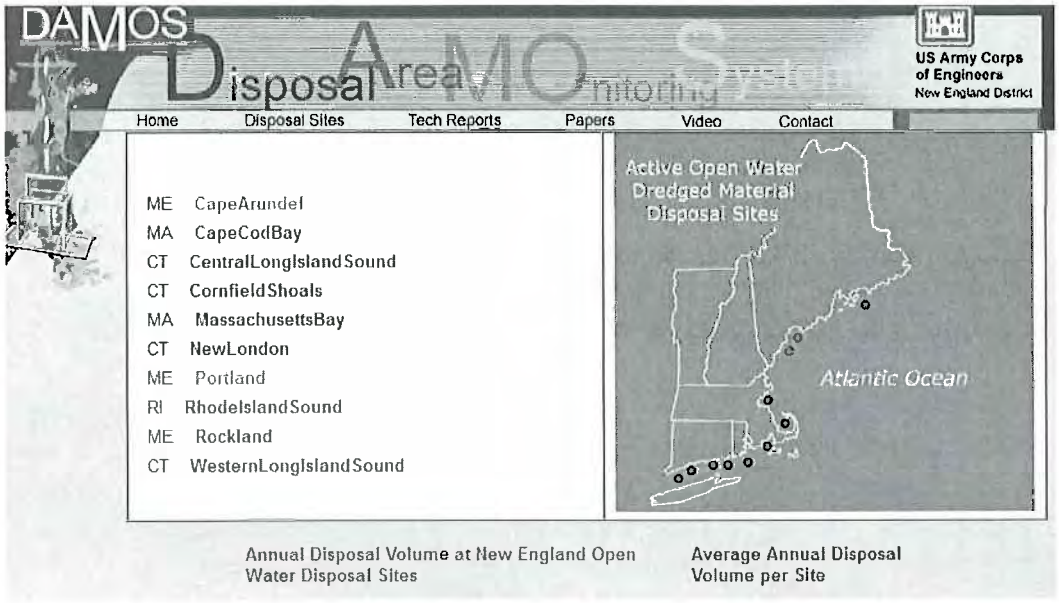
Section 404(b):

> (b) Subject to subsection (c) of this section, each such disposal site shall be specified for each such permit by the Secretary (1) through the application of guidelines developed by the Administrator, in conjunction with the Secretary which guidelines shall be based upon criteria comparable to the criteria applicable to the territorial seas, the contiguous zone, and the ocean under section 403(c), and (2) in any case where such guidelines under clause (1)
> alone would prohibit the specification of a site, through the application additionally of the economic impact of the site on navigation and anchorage.

In the current situation, neither the Kennebec Narrows disposal site, nor the Jackknife Ledge disposal site have undergone the extensive monitoring necessary to determine the potential impacts on physical and chemical characteristics of the aquatic ecosystem (subpart C); potential impacts on biological characteristics of the aquatic ecosystem (subpart D); potential impacts on special aquatic sites like wetlands, mudflats and vegetated shallows (subpart E); potential effects on human use characteristics (subpart F); then actions to minimize adverse effects (subpart H); and compensatory mitigation for losses of aquatic resources (subpart J). Please see the March 30, 2011 comments pg. 8 – 15, regarding the inadequacy of the ACOE application material as a showing of 40 CFR 230 compliance. The DEP must clarify that the

401(a) certification has not yet been issued, thus making the L-16281-4E-E-N permit incomplete.

Recognizing that the effort to approve a site using 40 CFR 230 is a daunting process, the regulations provide for advanced identification of disposal areas (40 CFR 230.80). These sites in New England are managed under the DAMOS program http://www.nae.usace.army.mil/damos/index.asp and include the following sites:



Thus, the extensive process of being qualified as a disposal site under 40 CFR 230 needs to be completed. If after the detailed studies are complete and the determination is made that the site is not a suitable disposal site, the Secretary of the Navy can do an analysis of the economic impact of the site on navigation and anchorage and weigh whether that should overrule impacts determined in the 40 CFR 230 evaluation. To date, no evaluation using the 40 CFR 230 regulations has been complete. Considering the paucity of data on the two disposal sites, it may be years until a suitable evaluation is complete.

The need for the DEP to issue a Section 401(a) certification has been raised numerous times with the DEP, the ACOE and BIW since November 2009, the last disposal action at the Kennebec Narrows. Hopefully compliance with the law will start now.

C. **Even if the step-by-step reasoning of the CWA statute Section 401, presented above, which shows the DEP is required to certify that the Army Corps of Engineers has satisfied Section 404 is rejected, the designated disposal sites must be scientifically evaluated through application of Maine Law (Maine Wetlands and Waterbodies Protection regulations and the Natural Resource Protection Act law). The level of evaluation and analysis provided to the DEP by the Applicant is woefully insufficient and does not meet the statutory requirements.**

The Army Corps of Engineers submitted with the permit application an unsigned and unfinished document dated February 2011 *Environmental Assessment for the Maintenance Dredging of the Kennebec River Federal Navigation Channel. Preliminary Draft. Not for Public Release.* The Maine DEP relied on this document to determine that the Wetlands and Waterbodies Protection Rules were complied with. On page 6-7, the document described modification of the proposed disposal. No analysis for upland use of the sand was described. No analysis of "reducing the size, scope, configuration or density of the project [dredging] as proposed, thereby avoiding or reducing the wetland impact" was done. Thus the application requirements for a Wetlands and Waterbodies Protection Rule permit was not met, and the approval must be overturned.

The Application requirements are detailed in Section 9. Application Requirements.

> ***9. Application Requirements.*** *In addition to broader information required for a Natural Resources Protection Act permit and Water Quality Certification, an application for a wetland alteration activity must contain the following information, unless the department determines that more or less information is needed to evaluate a specific project, based on the nature of the alteration proposed.*
>
> ***A. Alternatives Analysis.*** *A report that analyzes whether a less environmentally damaging practicable alternative to the proposed alteration, which meets the project purpose, exists.*
> *Determining whether a practicable alternative exists includes:*
> *2) Reducing the size, scope, configuration or density of the project as proposed, thereby avoiding or reducing the wetland impact; [related to dredging]*
> *4) Demonstrating the need, whether public or private, for the proposed alteration [related to the disposal in the Kennebec Narrows and Jackknife Ledge].*
> ***B. Site Characteristics Report.*** *A report that contains the following:*
> *1) A plan at a scale of a minimum of 1 inch equals 100 feet, that shows two-foot contour intervals, existing wetland boundaries, the area of wetland to be altered, and project dimensions. All components of the project impacting wetlands or other protected natural resources must be included;*
> *2) Existing wetland characteristics including water depths, vegetation and fauna;*
> *3) If required, a functional assessment of the wetland to be altered, conducted by a qualified professional, that analyzes the wetland's value based on the functions it serves and how the wetland will be affected by the proposed alteration. . . .*
> *4) Current photographs of the wetland to be altered that show its characteristics. Photographs may be taken from the air or ground but should be taken during the growing season.*
> ***C. Activity Description.*** *A description of the overall proposed activity with particular reference to its impact on the wetland, including the precise location of the project activity, its dimensions, the amount of fill (if any proposed), any proposed drainage, the timing and procedures proposed for the alteration, and any efforts proposed for reducing impacts.*
> ***D. Compensation Plan.*** *A plan for the proposed compensation work, if any. . .*

F. Additional Information. *Because of the site specific nature of activities and potential impacts, more or less information may be required by the department on a case-by-case basis, in order to determine whether the standards are met.*

These Wetland and Waterbodies Protection rule requirements were just ignored. Thus even under Maine law, the use of the Kennebec Narrows and Jackknife Ledge has not been evaluated in compliance with the law.

D. **Both the Maine DEP and the ACOE maintain that applying the regulations in 40 CFR 230.60 (a-d), results in a conclusion that chemical and biological testing of the dredge spoils is not required. Not testing the dredge spoils has been the watchword of the ACOE for the last 30 years. However, a fair reading of the regulations shows that neither the ACOE or the Maine DEP is correct in maintaining that the dredge spoils should not be tested. Considering the ongoing nature of the dredging and the known contamination of shipbuilding historically and the waterfront area of Bath, not ever testing the dredge spoils is unexcusable and this decision should be reversed.**

40 CFR 230.60(b) states: *The extraction site shall be examined in order to assess whether it is sufficiently removed from sources of pollution to provide reasonable assurance that the proposed discharge material is not a carrier of contaminants. Factors to be considered included but are not limited to:*
(1) Potential routes of contaminants or contaminated sediments to the extraction site, based on hydrographic or other maps, aerial photography, or other materials that show watercourses, surface relief, proximity to tidal movement, private and public roads, location of buildings, municipal and industrial areas, and agricultural or forest lands.
(2) Pertinent results from test previously carried out on the material at the extraction site, or carried out on similar material for other permitted projects in the vicinity. Materials shall be considered similar if the sources of contamination, the physical configuration of the sites and the sediment composition of the materials are comparable, in light of water circulation and stratification, sediment accumulation and general sediment characteristics. Tests from other sites may be relied on only if no changes have occurred at the extraction sites to render the results irrelevant.
(3) Any potential for significant introduction of persistent pesticides from land runoff or percolation;
(4) Any records of spills or disposal of petroleum products or substances designated as hazardous under Section 311 of the CWA (See 40 CFR parts 116).
(5) Information in Federal, State and local records indicating significant introduction of pollutants from industries, municipalities, or other sources, including types and amounts of waste material discharged along the potential routes to the extraction site; and
(6)Any possibility of the presence of substantial natural deposits of minerals or other substances which could be released to the aquatic environment in harmful quantities by man-induced discharge activities.

With the Doubling Point shoal adjacent to the south side of Bath and south of Bath Iron Works, the reasonable conclusion is the dredge material should be tested especially since the data described in (b)(1-5) has not been disclosed. In fact, the permit under C. (page 2) erroneously

describes the west side along the Doubling Point reach as "Brunswick", not Bath. In order to allow a decision not to test, the information described in 40 CFR 230.60(b)(1-5) should be included and analyzed.

Ignoring 40 CFR 230.60(b)(1-5), the Department on page 4 of 10, makes the finding that, "in accordance with 40 CFR Part 230.60, no further testing would be required because the composition of the samples is primarily sand and not considered a likely carrier of contaminants." D. Kelly's March 30th comments detail why the DEP finding is incorrect, see page 13-14. Simply, the Army Corps agreed that testing was required by 40 CFR 230.60(b), though not for the obvious reason that the historic and industrial potential contamination from Bath and BIW means testing is mandatory, but because BIW had a spill of a significant amount of hydraulic oil since the last dredging in 2003. Unreasonably the Army Corps maintains it did not need to test the dredged material because of 40 CFR 230.60(c).

230.60(c) states:

> (c) . . . Where the discharge site is adjacent to the extraction site and subject to the same sources of contaminants, and materials at the two sites are substantially similar, the fact that the material to be discharged may be a carrier of contaminants is not likely to result in degradation of the disposal site. In such circumstances, when dissolved materials and suspended particulates can be controlled to prevent carrying pollutants to less contaminated areas, testing will not be required.

ACOE asserts to the DEP that the dredging site and the disposal site meet the criteria of 230.60(c). That is not true. Firstly, the area at Doubling Point has an industrial history, surrounded by lumber mills and ship yards, blacksmith shops, and a large population with all the attendant contamination risks. The Kennebec Narrows is a rocky, sparsely populated rural area that has no industrial contamination history.

Secondly, the silt & clay are not contained. In an email from Dr. S. Dickson of the Maine Geological Survey dated February 14, 2011 at 12:37 pm, which is available in the DEP permit file, Dr. Dickson states, "Based on the grain size data up to 1% of the sediment volume might be silt and clay (muddy), not settle to the bottom quickly, and be carried by tidal and river currents to intertidal and subtidal depositional sites nearby as well as upstream and downstream of the disposal area."

This important information about the fate of the silt and clay within the dredged material separating from the sand and depositing on my property, the marshes adjacent to the disposal site, and the clam flats, was not included in the permit findings.

Although the ACOE maintains that testing is not required because 230.60(c) is applicable and the Maine DEP maintains that testing is not required for reasons that the ACOE application does not believe are accurate, the actual application of the regulations must be read to require testing of the dredge spoils. The BEP should remand the permit and require chemical and biological testing of the dredge spoils if disposal is going to be in the waters of the United States.

E. **In situ technique may be an alternative control method for critical peaks of sand waves to provide that the Spruance can depart as desired.**

At the February 24th public meeting hosted by Brian Swan of the Department of Marine Resources, Mr. Kavanaugh stated that to dredge the whole navigation channel in the Doubling Point area to the authorized depth of 27 feet would require dredging of 10,000 cubic yards of material. Although not dredging in August is the most desirable alternative from an environmental impact consideration, it is possible that some minor movement of the sand will need to be done.

[redacted]

Bill Kavanaugh, on February 15, 2011, in an email to Robert Green which was just added to the permit file last week well after the comment period ended, discussed "dragging". Bill wrote, "We have actually used "dragging" (the process she describes) to eliminate small shoals that have remained when a dredging project is near completion (typically in silty material) to clear the project to the required depth. However that process wouldn't work here and has been virtually eliminated from use as it is thought to actually increase levels of turbidity by most of the regulatory folks". A quantitative analysis, about the applicability of in situ options, rather than just generalities, especially since the ACOE has used the technique a number of times, seems warranted.

This appeal requests that the best in class in situ sand wave knock down techniques be considered for a targeted polishing if any high section of the channel needs reduction for the September sailaway.

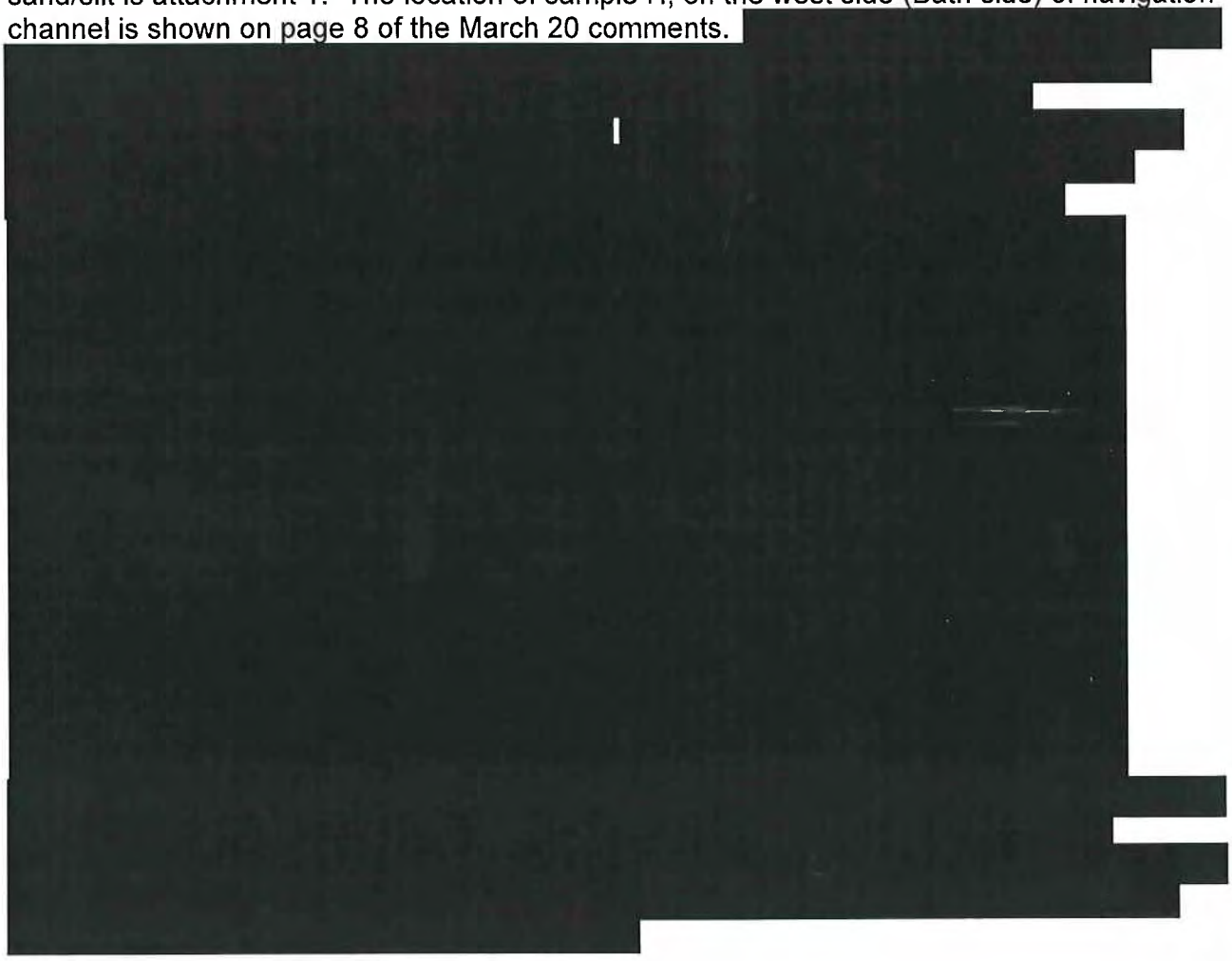
F. **Improperly ignoring the significant impact from dumping about 1MM pounds of silt/clay in the fast tidal currents at Bluff Head, because the Army Corps of Engineers**

[redacted]

and the DEP focus solely on the fact that the silt/clay is about 1% by weight of the total dredged material. A similar analysis should be carried out for the Jackknife Ledge disposal area.

An analysis of the number of particles of silt/clay in the dredge spoils (assuming 1% dry weight of silt/clay) compared to sand particles shows that there are between 200,000 to 10,000,000 silt/clay particles for every sand particle. The calculation assumed either all the silt/clay particles were at the largest particle size for silt/clay or that the particle size was at the diameter that distinguishes silt from clay according to ASTM. Although this only is a gross estimation, the huge number of fine particles compared to sand particles, makes clear why the silt/clay particles need to be considered.

D. Kelly's March 20, 2011 comments, page 9 and 10 discussed the calculation used to determine that if the Doubling Point shoal dredge spoils contained 1% silt/clay, and estimated that the dredged spoils contained 135 MM pounds of silt/clay. This comment, and the impact of 135MM pounds of silt/clay being suspended in the Lower Kennebec in August, was not addressed by the DEP in their findings. The sample H grain size analysis, showing 1.1% sand/silt is attachment 1. The location of sample H, on the west side (Bath side) of navigation channel is shown on page 8 of the March 20 comments.



G. **Information, and analysis, available to the applicant has been withheld from interested parties. All information known to the Army Corps of Engineers or the Department of Environmental Protection which has a bearing on the dredging and disposal permit should be made available, prior to closing the DEP comment period and issuing this L-16281-4E-E-N permit.**

The proposed dredging and disposal has not yet had a biological opinion issued, nor a completed environmental assessment. When I spoke to Mr. Kavanaugh last week, he was unwilling to provide me with a date when these would be complete. These important facets of whether the actions are protective of Maine's natural resources and water quality would seem to need to be finished before DEP could certify that the disposal sites are compliant, that the water quality standards won't be violated, and that the Natural Resources Protection Act requirements have been met. Other information that has not been disclosed includes where the missing sample "G" was taken, see page 8 March 20, 2011 comments. I've since learned that the missing sample "G" was attempted but not successful, because, in fact, the high spot was not an accumulation of sand, but ledge. Obviously, even though overdredging has been done in the past, the ledge didn't just appear. If overdredging is approved, how will the ledge be managed?

Thus, detailed information on where the ledge is and how that impacts the navigation channel should be disclosed. The initial handling of the information, just deleting sample "G" from the map and not mentioning it, is not appropriate scientific reporting.

Along the same line, only one sample was attempted in the Kennebec Narrows disposal area. The map, page 8 of 3/20/2011 comments, did indicate that a sample was attempted in the deepest part of the disposal area but was unsuccessful. No information on how it was unsuccessful was provided. Having reviewed the recently added emails in the permit file at the DEP, it's been learned from a February 3, 2010 email sent from Mr. Kavanaugh to Mr. Green and Mr. Clement that "we also attempted to get a sample at the in-river disposal site, however, our grab sampler got lodged on the rocky bottom (in about 95' of water) at the disposal site and was lost to the cause, so no sample was taken."

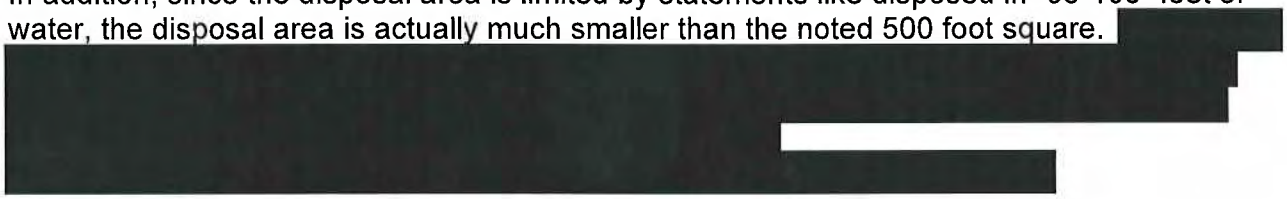
Although the email does shed some light on the sample, questions remain. Why didn't they go back and take samples in a few locations. Since the muck showed up immediately in the intertidal zone with the November 2009 disposal and has been somewhat removed by the current, it's important to know how much dredge spoils still remains in the greater disposal area and whether an additional dumping will push additional muck to the shores or will add sand on top of the squishy muck. A new bathymetry survey was taken of the disposal area, which is an on-going requirement of the disposal site regulations. However, the findings did not discuss the survey, which showed no area in the disposal area actually was 95 feet or more deep. See comment on page 9 of the D. Kelly March 20, 2011 comments to DEP.

Additionally, the ACOE should have analyzed the bathymetry data throughout the survey and compared it to prior surveys going back to 1980 and commented on the changes and similarities. As noted in the loss of the core sampling equipment, the rocky bottom probably

hasn't changed significantly, but in the shallower areas, the extent of shoaling and how that impacts the determination of whether the Kennebec Narrows is an appropriate disposal site needs to be part of the record.

Because the disposal area must be evaluated for cumulative impacts, a study that determines the amount, physical and chemical characteristics of the remaining deposited material and whether it is stratified, e.g. sandier in the somewhat deeper regions and more silt/clay in the shallower areas is important. Sampling should also be done in the intertidal zone throughout the disposal area and in the adjacent areas to determine the current state of the greater disposal area, with acknowledgment of where it changes from a water of the State to private property.

In addition, since the disposal area is limited by statements like disposed in "95-100" feet of water, the disposal area is actually much smaller than the noted 500 foot square.



Clearly demarcating the disposal area is currently not done sufficiently. During disposal, the disposal area should be buoyed.

These are just examples of information that has not been adequately shared.

H. **Only accept statements that have appropriate documentation.**
Many statements in the permit application are not documented with specific references to the underlying information that supports the statement. For example, the email statement by Mr. Kavanaugh on dragging relates information, but there is no way to ascertain whether the information is true. Having the applicant provide accurate, detailed information (like correcting the depth information that has been provided in the permit application) as well as full disclosure (like reporting that sample "G" was attempted in a designated area that turned out to be a ledge) will be an important improvement to the dredging and disposal permitting process.

G. **Suitable conditions to assure that the dredging and disposal occur as described.**

These comments show that the Kennebec Narrows and Jackknife Ledge disposal areas are not permitted in accordance with the law. However, suitable conditions, need to be included in the permit to protect the environment and to track the operation for dredging and the allowed

disposal. These permit conditions were based on a review of some Rhode Island permits and each one should be considered.

Permit conditions should include:

1) no overflow on hopper dredge, if hopper dredge is used.

2) Measuring of turbidity at 50 meters and at 1500 feet if plume extends (more than 10 NTUs above background), additional sampling required at the dredging site and the disposal site if plume extends to 1500 feet..

3) Failed samples at 1500 feet result in requirement that disposal occur at slack tide.

4) Monitoring the disposal area at low tide along both shores to confirm that the dredge spoils are staying off private property.

5) Daily monitoring for fecal coliform and turbidity close to the disposal area, both upstream and downstream, to test for the largest impact.

6) Have the dredge observers present; observe and document both the dredging and disposal.

7) Monitor for noise impacts.

8) Take two grab samples of the dredge spoils on each disposal for analysis and comparison between the samples and across different disposals.

9) Document the actual amount of material dredged and the method by which that is determined.

IV. Recommendations

Appellant recommends the Maine BEP remand this NRPA permit and 401 certification back to the Maine DEP for further analysis and modification as described within and in the comments included by reference.

Sincerely,

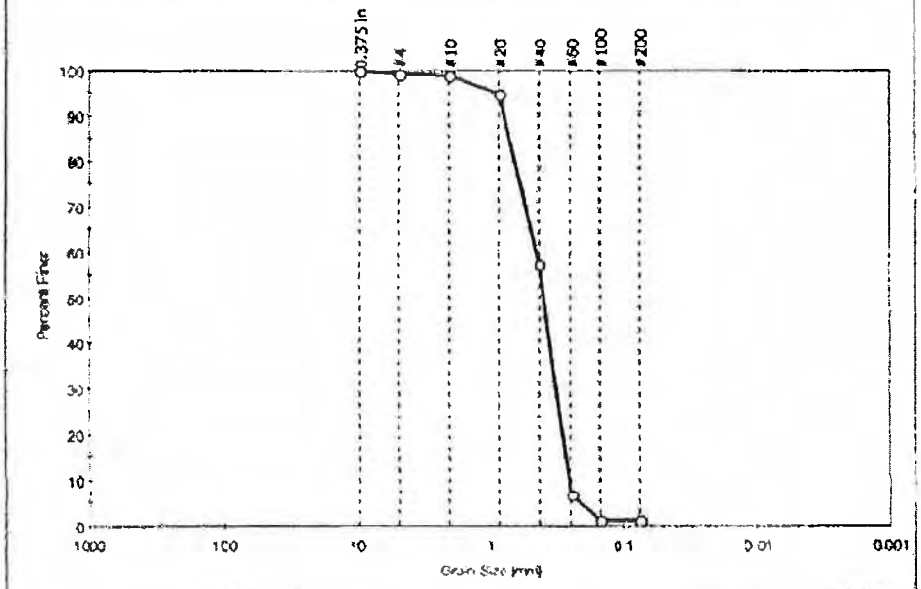
Dot Kelly
dot@dkelly.org
98 Pleasant Cove Road
Phippsburg, Maine 04562
May 16, 2011

Attachment 1: Sample H. Doubling Point Reach west side of navigation channel. Brown sand. 1.1% silt + clay.

GeoTesting EXPRESS

Client:	U.S. Army Corps of Engineers				
Project:	Kennebec River				
Location:	---			Project No:	GTX-10487
Boring ID:	---	Sample Type:	bag	Tested By:	jbr
Sample ID:	Kenrebec H	Test Date:	01/04/11	Checked By:	jdt
Depth:	---	Test Id:	202159		
Test Comment:	---				
Sample Description:	Host, brown sand				
Sample Comment:	---				

Particle Size Analysis - ASTM D 422-63 (reapproved 2002)



%Cobble	%Gravel	%Sand	%Silt & Clay Size
--	0.4	98.5	1.1

Sieve Name	Sieve Size (mm)	Percent Finer	Spec. Percent	Complies
0.375 in	9.500	100		
#4	4.750	100		
#10	2.000	99		
#20	0.850	98		
#40	0.425	57		
#60	0.250	7		
#100	0.150	1		
#200	0.075	1		

Coefficients

D_{85} = 0.7063 mm	D_{30} = 0.3191 mm
D_{60} = 0.4462 mm	D_{15} = 0.2727 mm
D_{50} = 0.3935 mm	D_{10} = 0.2560 mm
C_u = 1.774	C_c = 0.892

Classification

ASTM: Poorly graded sand (SP)

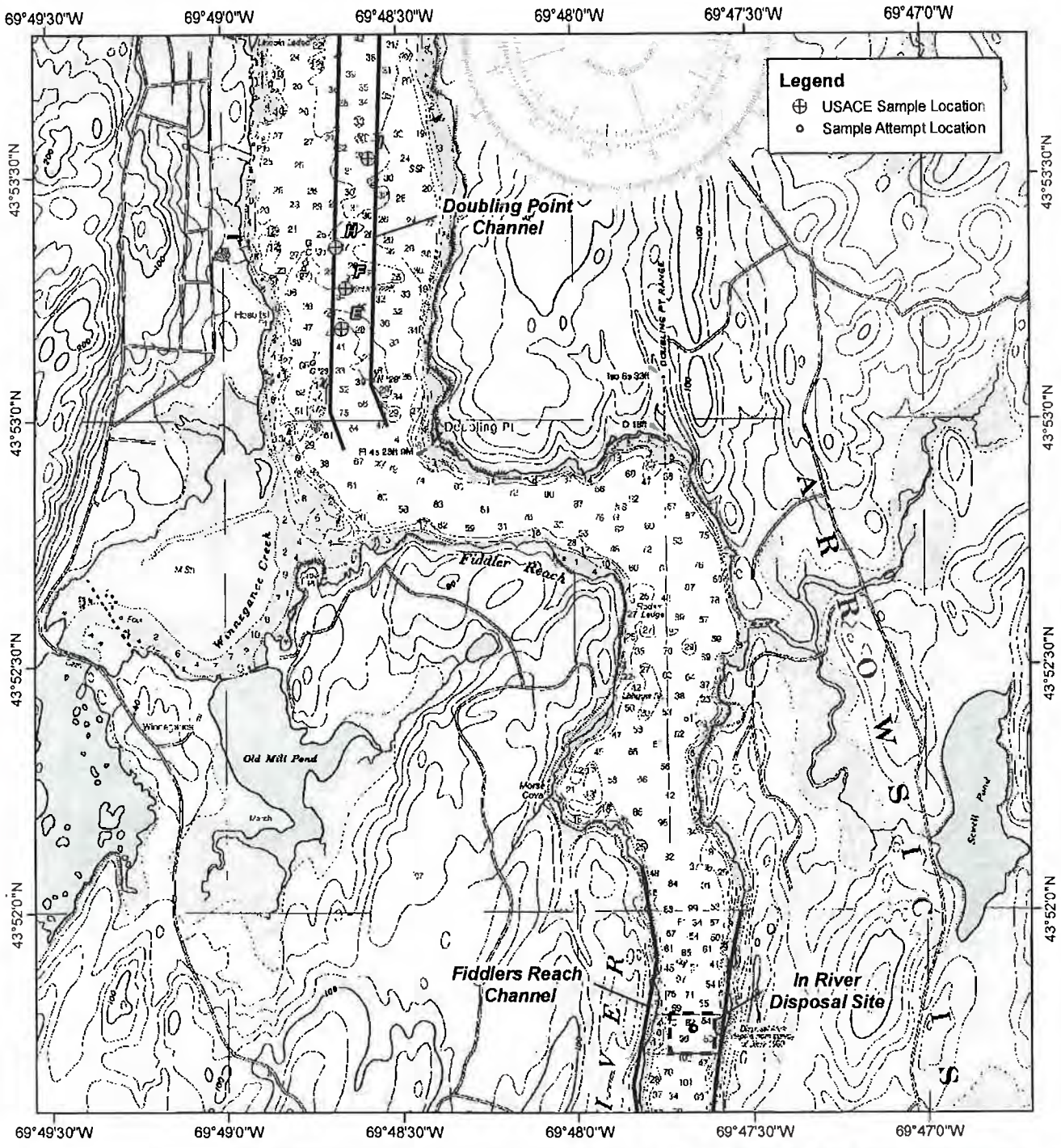
AASHTO: Fine Sand (A-3 (0))

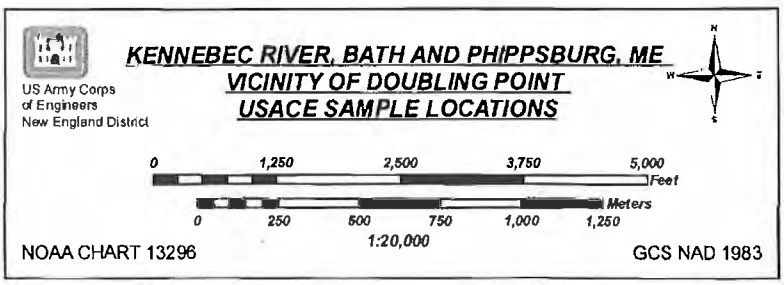
Sample/Test Description

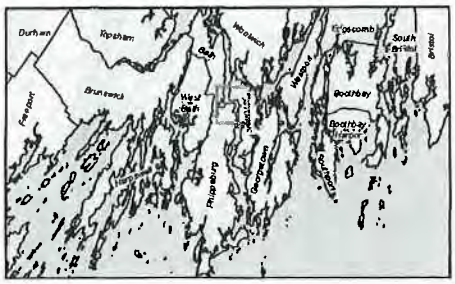
Sand/Gravel Particle Shape : ---

Sand/Gravel Hardness : ---

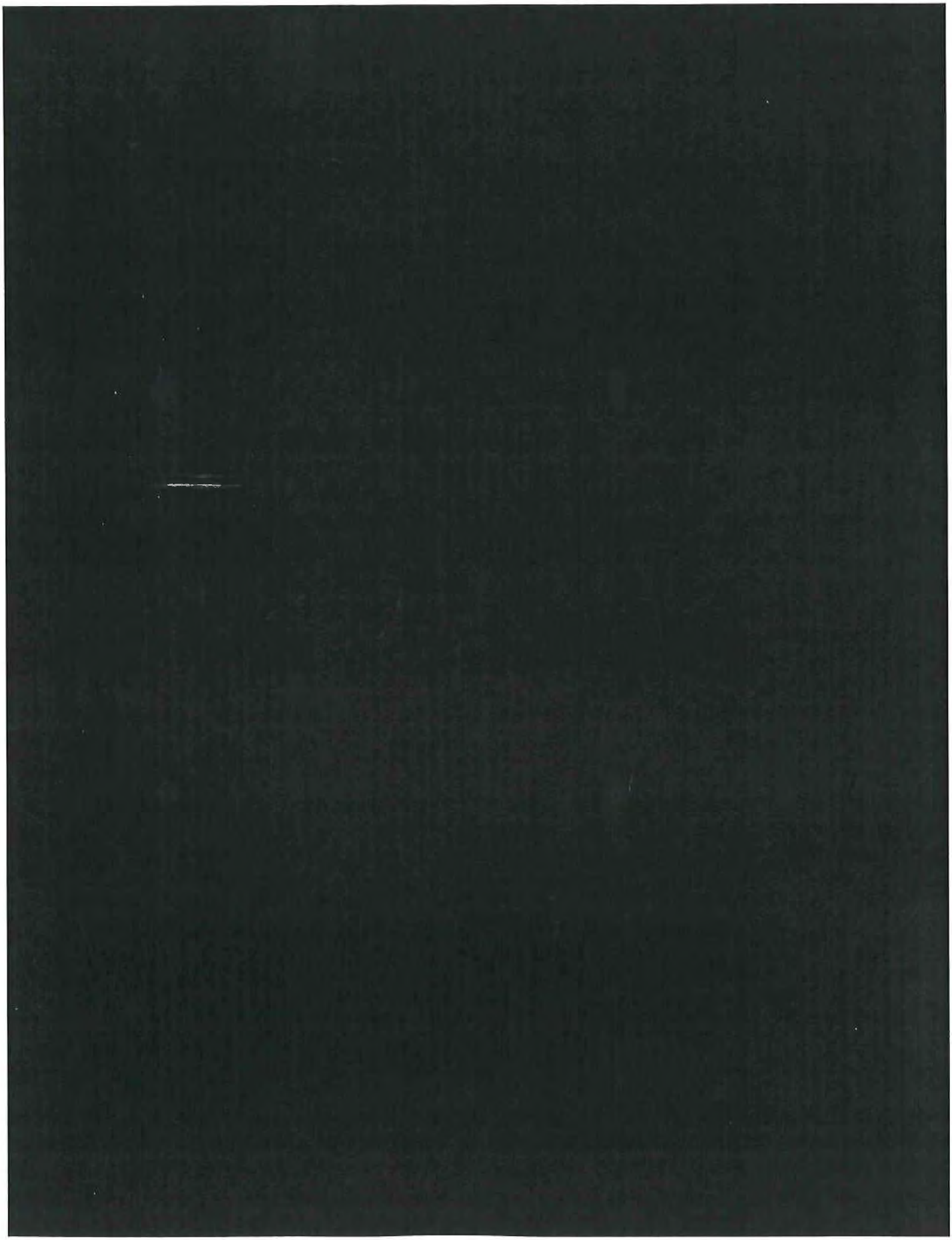
Attachment 2 (a)

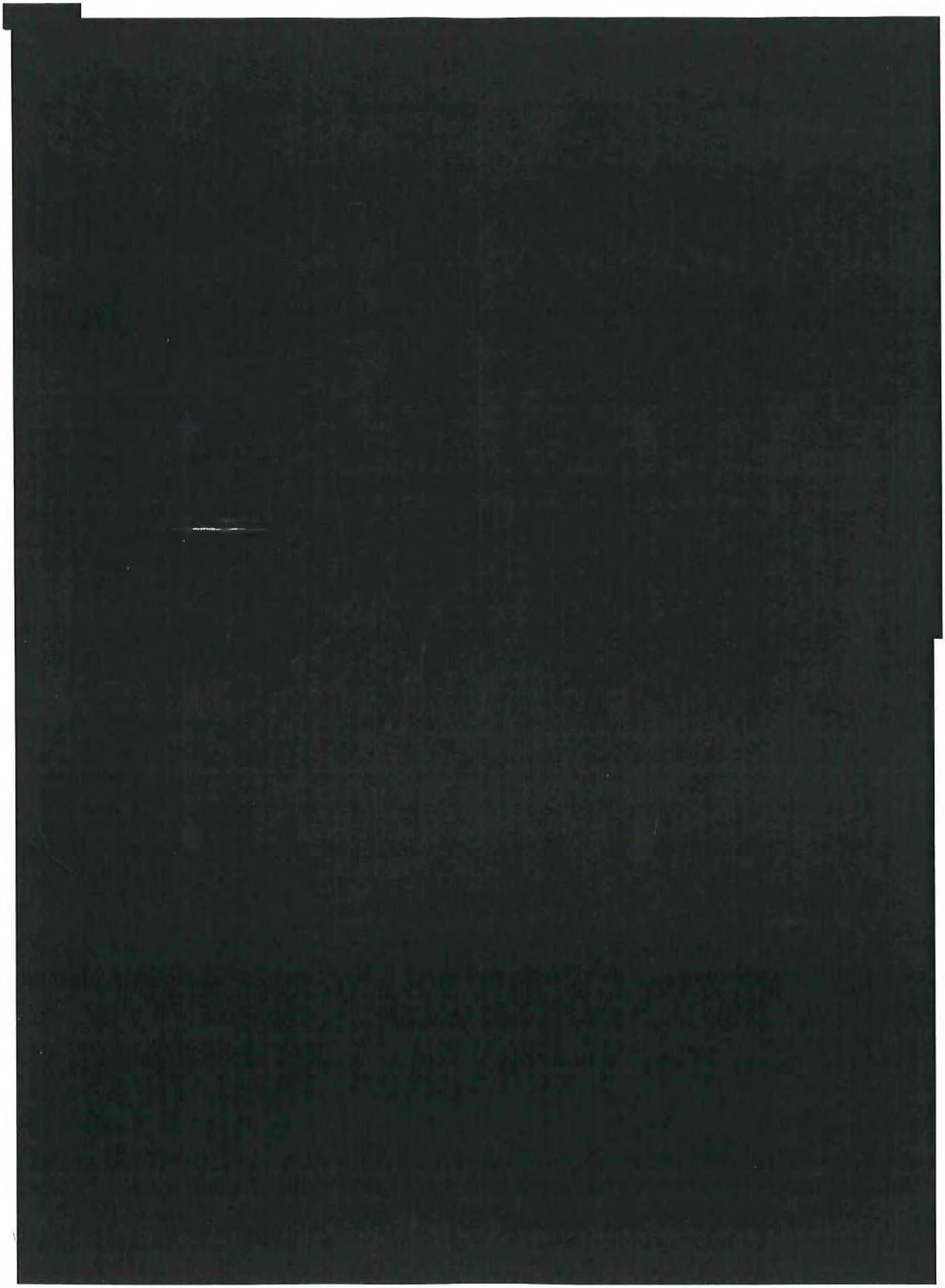


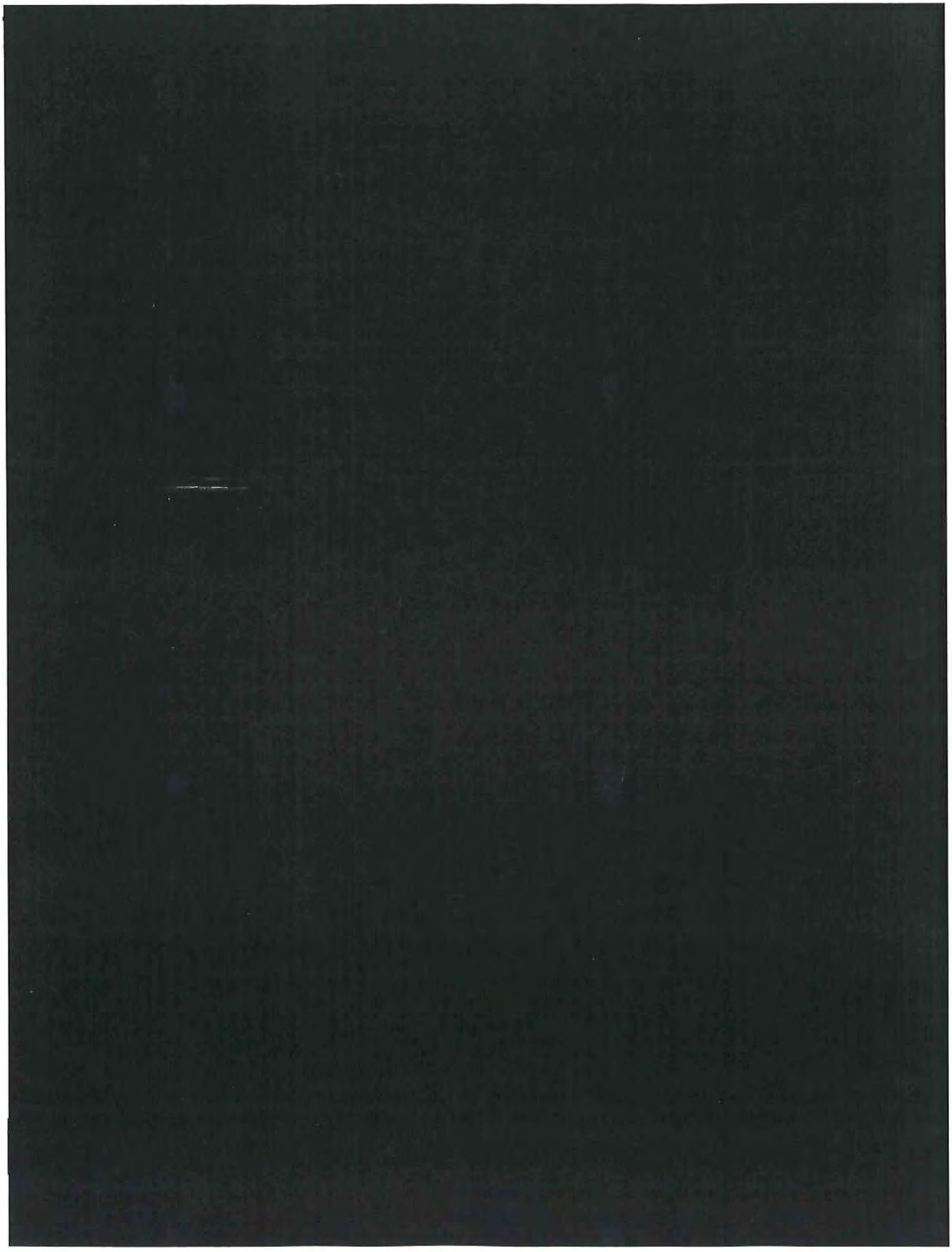




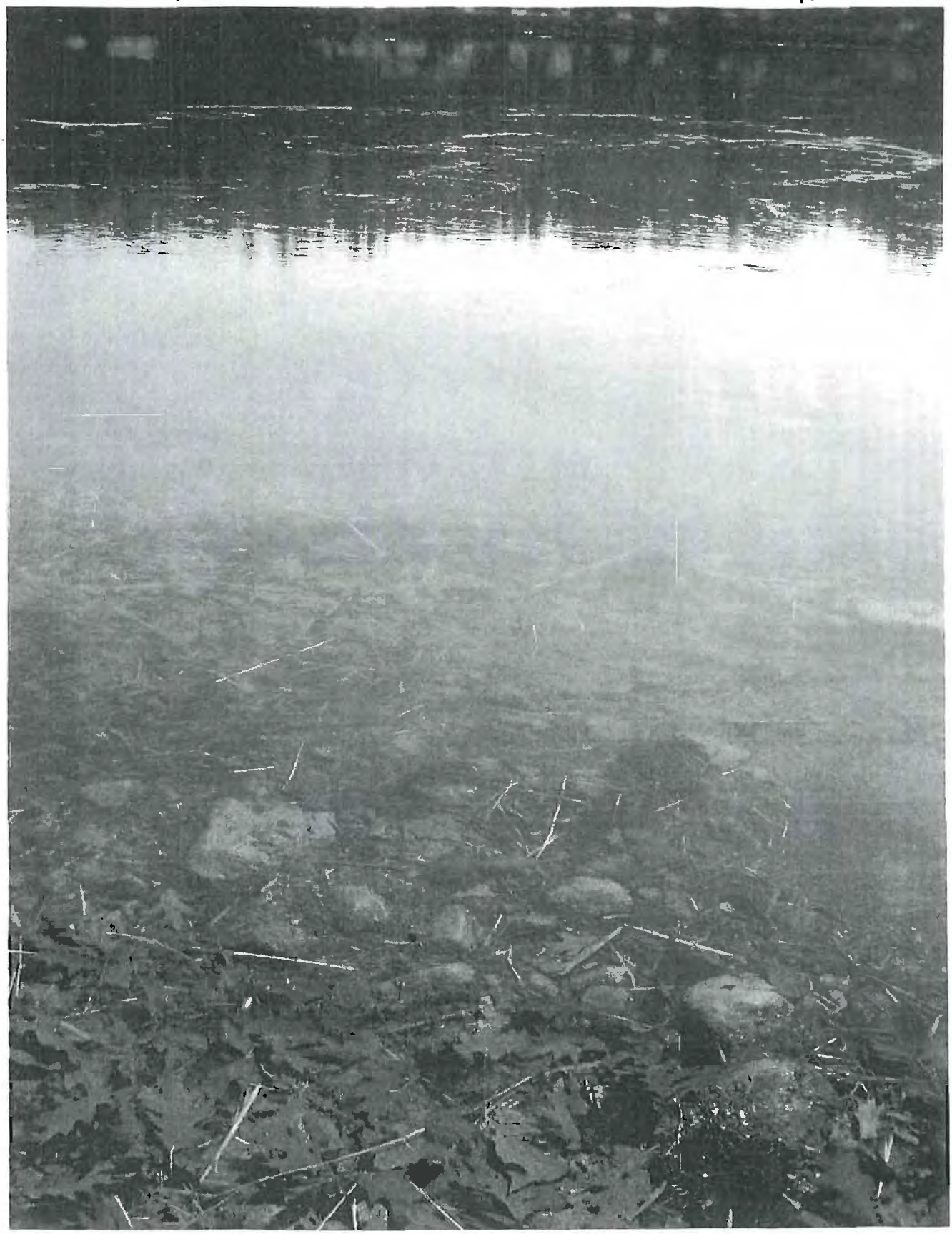
from 2011 permit application of ACOE submission







2/24/2011. 98 Pleasant Cove Rd Phippsburg. Adjacent to "Bluff Head" disposal. Note how clear the water is -- typical.



Attachment 3. Kennebec Narrows disposal site.

2/24/2011. View of Dredge Spoil Disposal Area at low tide. The cloudy area is where I washed off my boots from the intertidal muck.

Attachment 3: Kennebec Narrows disposal site

STATE OF MAINE
BOARD OF ENVIRONMENTAL PROTECTION

U.S. ARMY CORPS OF ENGINEERS	) NATURAL RESOURCES PROTECTION ACT
Bath and Phippsburg, Sagadahoc County	) COASTAL WETLAND ALTERATION
MAINTENANCE DREDGING	) WATER QUALITY CERTIFICATION
L-16281-4E-E-N	)

APPEAL OF DOUGLAS H. WATTS and ED FRIEDMAN FOR DREDGING OF THE LOWER KENNEBEC RIVER, MAINE.

Douglas H. Watts of Augusta, Maine and Ed Friedman of Bowdoinham, Maine ('Appellants') appeal the NRPA permit and CWA water quality certification ('Permit') issued by the Maine DEP on April 14, 2011 permitting the dredging of the lower Kennebec River in August 2011 by the applicant. The permit and water quality certification under appeal have the designation Maine DEP #L-16281-4E-E-N.

I. STANDING OF APPELLANTS

A. Standing of Douglas H. Watts

Appellant Douglas H. Watts is an aggrieved party to this decision in numerous ways. Mr. Watts resides at 131 Cony Street, Augusta, Maine and has lived along the Kennebec River since 1991 in Augusta and Hallowell, Maine, upstream of the activity site. Mr. Watts has fished the exact area of the dredging site for striped bass and frequently visits Popham Beach and Morse's Mountain and the beach which fronts the Morse's Mountain conservation area and intends to do so in the future.

Mr. Watts is a professional wildlife photographer and videographer with a focus on

the native fish species of the Kennebec River. Mr. Watts' videography of Atlantic sturgeon leaping in the Kennebec River is now on permanent display at the Hudson Highlands Nature Museum in Cornwall, New York. His underwater photography of alewives and blueback herring in the Kennebec River is now on permanent display at the Cape Cod Museum of Natural History in Hyannis, Massachusetts. Mr. Watts earns a portion of his annual income from licensing his photographs of the Kennebec River and its native fish and wildlife and allows free licensing of his work to state and federal fisheries restoration agencies and non-profit conservation organizations. His ability to continue practicing this economic activity is directly dependent on the preservation and recovery of the native fish species of the Kennebec River, including shortnosed sturgeon, Atlantic sturgeon, Atlantic salmon and other native fish.

Since 1991, Mr. Watts has been an active advocate in regulatory and legal matters related to the protection and restoration of the native fish of the Kennebec River before the Maine DEP, the Maine BEP, the Federal Energy Regulatory Commission, the U.S. Fish & Wildlife Service, the National Marine Fisheries Service, and state and federal courts. His efforts for the past 20 years to protect and restore the native fish of the Kennebec River are directly affected and harmed by the negative effects of this dredging operation on native fish life and their habitat in the lower Kennebec River.

B. Standing of Ed Friedman

Ed Friedman has been a resident of Bowdoinham, Maine living a few hundred yards from Merrymeeting Bay for over 25 years and is aggrieved by issuance of the DEP NRPA permit and §401 Water Quality Certification. He has spent many of those years on the Bay, the Kennebec and the other tributaries motoring in a skiff and paddling by canoe and kayak. For nearly all of these years Friedman has been a licensed Maine guide and as owner of a kayaking business he has guided clients many times on the sections of Kennebec subject to this appeal. Between guiding, instruction and boat sales Friedman has spent up to five days/week on the water with clients. The loss in water quality and the adverse affects on anadromous fish species and marine mammals from dredging operations as proposed cause Friedman economic harm. In tours of the Bay or river, his clients or those customers of the Maine Maritime Museum where he also on occasion guides, want chiefly to see wildlife and are delighted to come adventure on a recovering river full of it. It is common in the summer months to see sturgeon leap clear of the water, something not easily forgotten.

Friedman was a charter member of the Maine Island Trail Association when it was founded. He served many years as an island monitor from the Bay down the Kennebec and all the way over to Fort Island in the Damariscotta River. He'd often make the 80 mile trip by skiff through the Kennebec dredge areas to accomplish his task. Like many in Maine, Friedman has spent countless days at Popham and Sewall Beaches whether

kayak surfing, monitoring terns and plovers or walking his dog in the off-season. Since 1996 Friedman has chaired Friends of Merrymeeting Bay (FOMB) also an appellant in this case. Through research, advocacy, land conservation and education FOMB and the appellant have been intimately involved with improving water quality and restoring native diadromous fish in the Kennebec for many years. Summertime large scale Kennebec dredging with in-river disposal harms economic, recreational and aesthetic interests of Mr. Friedman giving him ample cause to bring this appeal.

II. Grounds for this Appeal

The proposed dredging activity has been described as an 'emergency' operation to allow a naval vessel, the *U.S.S. Spruance*, to exit Bath Iron Works in September, 2011 by dredging a shoaled area in the lower Kennebec River near Doubling Point. Appellants assert that the Permit and Findings of Facts do not present sufficient discussion and evidence to support its conclusions that the dredging, at the time and date proposed, will not cause unreasonable harm to aquatic life in the lower Kennebec River and will not cause violations of Maine water quality standards for the river. Appellants assert the Permit does not give sufficient and necessary consideration to less harmful methods of allowing the *U.S.S. Spruance* to exit the lower Kennebec River, including scheduling the dredging in a time window that would be less injurious to aquatic life and habitat. Appellants assert the Maine DEP has no duty to suspend or modify its legal responsibilities solely to accommodate the perceived needs of Bath Iron Works or the U.S. Navy if these needs conflict with Maine law. By the same token, Appellants appreciate the need for the maintenance of the deepwater channel in the lower Kennebec and its importance to the U.S. Navy and Bath Iron Works. However, this need does not override the DEP's duty to properly consider the environmental effects of channel maintenance activities within the lens of the laws the DEP administers.

Specifically, appellants assert the terms and conditions of the permit issued are in violation of NRPA requirements, specifically those at 38 MRSA 480-E(3) which state in pertinent part: "The activity will not unreasonably harm any significant wildlife habitat, freshwater wetland plant habitat, threatened or endangered plant habitat, aquatic or adjacent upland habitat, travel corridor, freshwater, estuarine or marine fisheries or other aquatic life."

Regarding sturgeon, the Permit states at 5:

> "The DMR recognizes the emergency nature of the request to dredge, but it is concerned with the potential loss of shortnose or Atlantic sturgeon based on incidents from past dredging operations when fish were entrained. DMR recommended during the February 8, 2011 pre-application meeting, and again in its review comments, that the Corps tag up to 50 shortnosed sturgeon with acoustic tags and then track the fish with a mobile receiver aboard the hopper

> dredge. During the pre-application meeting, the Corps responded that dredging operations must continue 24 hours a day to ensure that the project is completed on time and that dredging would not be suspended because a tagged sturgeon may come into the area being dredged.
>
> "The Department finds that tagging and tracking sturgeon for this project would be impracticable, and recommends that in lieu of tagging and tracking, the Corps have a qualified observer be onboard the hopper dredge to monitor and report the capture of shortnose or Atlantic sturgeon during the proposed project to the Bureau of Land and Water Quality."

In the above section, the Department admits the likelihood that shortnosed and Atlantic sturgeon will be entrained in the dredging operation. The DEP then rejects the mitigation strategy recommended by the Maine DMR because it is 'impracticable' and further states the applicant has informed the DEP that even if DMR's plan were required, they would not stop dredging even if tagged sturgeon were observed in the dredging area (and presumably if they were subsequently entrained).[1] The Permit fails to explain how the DEP reached the conclusion that Maine DMR's strategy is 'impracticable.' The Permit contains no specific conditions to protect shortnosed and Atlantic sturgeon which may be entrained in the operation. The only condition referenced in the Permit is that the applicant must have a 'qualified observer' on board the dredge who will 'report' the 'capture' of any sturgeon they personally observe to be entrained. Even worse, the Permit suggests the applicant will *not* suspend the dredging operation no matter how many sturgeon are entrained and injured or killed during the operation. Appellant believes these minimal permit conditions fail to meet the legal standard set at 38 MRSA 480-D(3) for the protection of fisheries and aquatic life for the following reasons:

A. Impacts on Atlantic and Shortnosed Sturgeon

1. Shortnosed sturgeon (*Acipenser brevirostrum*) are a federally listed endangered species. Atlantic sturgeon (*Acipenser oxyrhynchus*) are now being considered for federal endangered species status. The lower Kennebec contains the largest population of both species in the United States north of the Hudson River and is one of only two viable populations in Maine of either species (the other populations are in the Penobscot River and are believed to be much smaller and less viable than those in the Kennebec). The Permit admits the likelihood of sturgeon inhabiting the dredging area during the operation and being entrained by the dredging equipment. [redacted]

1 Apparently in this case the applicant believes it can tell the DEP in advance which potential permit conditions are 'off the table' and will not be followed regardless of whether the DEP includes them or not. Appellants are at a loss as to how a permit applicant can dictate to the Maine DEP which permit conditions it will choose to honor and which it will disregard.

[redacted]

2. The Permit contains no description or explanation of how a 'qualified observer' will be able to successfully identify and retrieve any sturgeon entrained by the dredging operation. As described in the Permit, the dredging will occur continuously, day and night, for 24 hours a day. This means that much of the operation will occur at night, making observation conditions difficult. The Permit does not describe how or whether the 'qualified observer' will be able to observe entrained sturgeon 24 hours a day.

3. The Permit contains no conditions for the safe handling of any captured sturgeon, including examination of entrained sturgeon for injury; protocols for the rehabilitation and treatment of sturgeon which appear to be injured; and the final disposition of any sturgeon that are killed or mortally injured by the operation.

4. The Permit contains no conditions setting a maximum numeric entrainment level of sturgeon; nor does it require the operation be suspended if a certain numeric level of entrainment is found to occur. As written, the Permit allows the applicant to entrain, injure or kill an unlimited number of shortnosed and Atlantic sturgeon during the operation. By definition, a Permit which allows unlimited entrainment, injury and death to sturgeon does not meet the legal requirement in 38 MRSA 480-D(3) that the activity will not "unreasonably harm" shortnosed and Atlantic sturgeon.[3]

5. The Permit contains no mitigation for harm caused to sturgeon and rejects without explanation the mitigative strategy recommended by Maine DMR, Maine's expert fisheries agency regarding sturgeon. The DMR strategy would utilize radio-tagged

[redacted]

sturgeon released at the dredge site to inform operators of the likelihood of any sturgeon in the vicinity of the operation; with dredging suspended if monitoring of radio signals shows the presence of a tagged sturgeon at the operation site. The Permit rejects this strategy without explanation and offers no substitute of equal protective value. The Permit allows the entrainment (and death and injury) of an unlimited number of sturgeon during the operation with no requirement to suspend the operation if sturgeon are being entrained, injured or killed. Without a requirement for suspending the operation if sturgeon are observed to be killed and injured, the recommendation for a 'qualified observer' on board is meaningless because it provides no protection to sturgeon from the operation.[4]

6. The Permit improperly rejects the DEP's longstanding practice of confining dredging operations in the Kennebec to winter months to protect aquatic life. Appellant incorporates by reference the lengthy comments and information submitted by various residents of the town of Phippsburg on this topic submitted to the DEP prior to permit issuance. While the DEP claims there is an 'emergency' which requires dredging in August, record evidence does not support this finding, nor does record evidence show why conducting the operation in the winter is not a viable option. Neither is record evidence supplied explaining why minimum mechanical dredging to permit egress of the *U.S.S. Spruance* is not a viable option instead of full-scale maintenance dredging with a hopper dredge. A mere declarative statement by the applicant that they "have to" or "must" conduct the operation in August does not suffice, yet this is the DEP's only basis for not conditioning the operation to the winter months when harm to the environment and aquatic life would be greatly diminished compared with dredging in August.

7. [redacted]

4 Maine DMR's official comments to Maine DEP state that, "Entrainment of shortnosed sturgeon above the number allowed by the National Marine Fisheries Service (exact number currently unknown) would necessitate the ceasing of dredging operations." Letter of Patrick Keliher, Maine DMR, to Robert Green, Jr., Maine DEP, March 10, 2011.

[redacted]

8. [redacted]

9. In an April 4, 2011 email to Brian Swan of Maine DMR, William Kavanaugh of the U.S. Army Corps of Engineers, who will contract for and supervise the dredging, stated:

> "We're all in agreement that August isn't the best time for dredging in fact it can't get any worse relative to the Kennebec .... I think it's safe for me to say that we can assume that the SNS (shortnosed sturgeon) ARE going to be in the area in August."

Mr. Kavanaugh then states that, for this reason, he does not see the value in Maine DEP requiring the ACOE to radio-tag and release sturgeon near the dredging site to determine if sturgeon are likely to be present near the dredge hoses, since the ACOE already admits it is likely they will be. Kavanaugh states that even if ACOE did this tagging project, they would not agree to suspend dredging operations if the radio-tag monitoring showed that sturgeon were in the vicinity of the dredging hoses and equipment and were about to be sucked up into it.

Kavanaugh states that ultimately, NOAA-Fisheries will tell the ACOE how many sturgeon they can entrain in the operation and that if this number is exceeded, "we would have to stop operations until NOAA could be consulted with." This statement by Kavanaugh strongly implies that the ACOE will attempt to continue the dredge operation on schedule regardless of how many sturgeon are being entrained and killed and injured during the operation, since 'consulting' with NOAA means asking NOAA to allow ACOE to exceed their permitted 'take' of endangered sturgeon.

Kavanaugh lastly states that even if the ACOE agreed with the merits of DMR's proposal, which it does not, the ACOE lacks the funding to conduct a tag, release and monitoring operation as part of the dredging project since it only has $5,000 budgeted for monitoring activities. For this reason, he states in his email, "I'm requesting that the State consider carefully the choice of words used in any condition that might come in the WQC."

[redacted]

In this email, ACOE appears to directly dictate what Maine DEP 'should' and 'should not' include in its Permit conditions and what Maine's expert fisheries agency (DMR) 'should' and 'should not' recommend to the DEP for Permit conditions. As best as Appellants can discern, this April 4, 2011 email from Mr. Kavanaugh is the source of Maine DEP's statement in the Permit that Maine DMR's radio-tagging proposal is 'impracticable.'

This email illustrates the unstated political dynamic which underlies this permit proceeding. The ACOE, acting on behalf of the U.S. Navy, has been given a 'job to do' – to dredge the lower Kennebec River in August to accommodate the Navy's desire that the *U.S.S. Spruance* leave BIW in September. The ACOE, admitting that August is perhaps the 'worst' time to dredge in terms of impacts to aquatic species, is stuck in a bind. It feels obligated to obey the Navy's request but must also acquire the state and federal permits it needs to do the dredging.

So, in effect, the ACOE warns Maine DMR and Maine DEP to not attach any conditions to the state Permit that will make the project (a) too expensive; (b) cause it to be suspended in mid-operation or (c) delay the project past August. In essence, the applicant, ACOE, is telling Maine DMR and DEP what conditions to attach to the permit and what to leave out. This turns the entire concept of NRPA and CWA permitting on its head. The applicant does not get to dictate the terms of a license, or whether a license should be issued. But that is apparently the case here. Under NRPA and CWA permitting, the applicant is always free to not accept the proffered license or permit if it finds the conditions are less than desirable. [8] This applies to the ACOE as much as it applies to Joe's Pizza Shop.

B. Atlantic salmon

1. Atlantic salmon (*Salmo salar*) are a federally listed endangered species in the Kennebec River and the dredging area is within federally designated Critical Habitat for the species. It is likely some Atlantic salmon may be present in the dredging area when operations are conducted. The Permit does not even mention the species nor does it require any mitigative or protective measures to ensure Atlantic salmon are not entrained and for the safe handling and rescue of any salmon that are entrained. The Permit contains no measures to even *monitor* the entrainment of Atlantic salmon during the operation.

2. The Permit fails to state how the DEP has concluded the activity will not cause 'unreasonable harm' to federally endangered Atlantic salmon and their critical habitat. As

8 *See:* S.D. Warren v. BEP (2005 ME 27) at ¶26: "[E]ven though this result seems to subject the FPA to the whims of the states, the FERC always has the power not to grant the licenses at all." In the instant case, if the ACOE does not like the terms and conditions of the NRPA permit issued by the Maine DEP, the ACOE is free to not accept it. By the same token, if the Maine DEP does not agree to the 'demands' of the ACOE when it applies for a Maine permit, the Maine DEP is free to deny the ACOE's application.

a federally listed endangered species, any physical harm to individual Atlantic salmon by dredge entrainment is an 'unreasonable' harm. The Permit shows no sign that the DEP ever considered possible impacts to Atlantic salmon. Without such a discussion and analysis, the Permit's overall finding that the activity will not cause "unreasonable' harm to fish and aquatic life (including Atlantic salmon) has no factual basis.

3. Appellants restate in whole their claim regarding the lack of any consideration of mitigation and protective measures to prevent fish entrainment during the dredging operation. The DEP's lack of consideration and inclusion of mitigative measures for Atlantic and shortnosed sturgeon as described above applies equally to endangered Atlantic salmon, especially since Atlantic salmon are far more rare in the river than either species of sturgeon.

C. Other Fish Species

The Permit contains no description or analysis of how many fish of all species will be entrained or killed during the dredging operation. Without such an estimate and analysis, the DEP has no factual basis to find that the operation will not cause 'unreasonable harm' to fish species in the lower Kennebec River. Since the Permit and the Applicant admit that endangered sturgeon are likely to be entrained and killed in the operation it stands to reason that other fish species will be entrained and killed as well.

D. Significant Wildlife Habitat

1. The Permit at 5 states that no significant wildlife habitat ('SWH') will be affected by the dredging activity. In the Permit the Maine DEP has improperly construed this term and in doing so, rendered the term meaningless as defined in NRPA. The area affected by the dredging activity is habitat for two federally listed wildlife species, the Atlantic salmon and the shortnosed sturgeon. The dredging area has also been designated as Critical Habitat for Atlantic salmon. The Permit admits the likelihood that shortnosed sturgeon will be entrained in the dredging operation and will possibly be injured or killed. This risk equally applies to Atlantic salmon.

2. The Maine DEP is well aware that the Maine DIFW has never designated any habitat in Maine as 'significant wildlife habitat' for these two endangered species; and has never done so in the Kennebec River. Review of Maine DIFW selection protocols for SWH designation shows the DIFW has strictly limited SWH designation to selected habitat for island nesting birds, wading birds and vernal pools. There is in fact SWH designated for wading birds in coastal wetlands near the Bluff Head dump site and the Sugarloaf and Jacknife Ledge dredge and dump sites. The permit makes no mention or analyses of these.

3. It is DIFW's *de facto* policy to limit SWH designation solely to selected vernal pools, wading bird habitat and island nesting bird habitat. This policy is arbitrary, capricious and inconsistent with the legislative intent of NRPA as stated at 38 MRSA 480-A. For this reason, the DEP's sole reliance on Maine DIFW for determining what is and what is not 'significant wildlife habitat' under NRPA is arbitrary and capricious.

4. By the DEP's rationale in the Permit, none of the habitat for federally endangered fish species in the lower Kennebec River is considered 'significant wildlife habitat' because Maine DIFW has failed to designate it as such; and even though, in the case of Atlantic salmon, the federal government has already designated the entire lower Kennebec River as Critical Habitat for endangered Atlantic salmon. This construction suggests the Maine Legislature intended its definition of 'significant wildlife habitat' pursuant to NRPA to completely exclude all habitat for federally endangered species in Maine if the Maine DIFW, for any reason, fails to designate it. Nothing in the Legislature's statement of purpose of NRPA suggests the DEP must or should adopt such an interpretation.

5. DEP's interpretation of the meaning of the term 'significant wildlife habitat' collides wildly with the legislative intent of NRPA and the DEP's duties when reviewing NRPA permit applications. DEP is well aware that Maine DIFW, as a matter of longstanding policy, does not map aquatic habitat for federally endangered fish species as 'significant wildlife habitat.' In the case of Atlantic salmon, which were federally listed on the Kennebec in June 2009, Maine DIFW has not considered doing this; nor has it ever done so for shortnosed sturgeon, which have been federally listed and protected on the Kennebec River since 1967. The fact that DIFW has *never* formally designated SFW for a federally listed fish species in the Kennebec River shows the DEP's reliance upon DIFW to determine SFW for endangered fish species in the lower Kennebec River is inapt.

6. Maine DEP is well aware that Maine DIFW does not have the legal authority to 'manage' anadromous Atlantic salmon and Atlantic and shortnosed sturgeon in Maine. This authority is delegated to Maine DMR. For this reason alone, the Legislature's placement of sole authority on Maine DIFW to designate SWH for endangered anadromous fish species in NRPA is misplaced since Maine DIFW lacks the staff, resources and scientific expertise to make such designations. This is a key flaw in the architecture of NRPA and DEP should be well aware of it. Maine DMR, which has sole legal management authority over anadromous fish species, has no authority under NRPA to designate areas as SWH for anadromous fish species. Only Maine DIFW has this legal authority and Maine DEP is well aware of this discrepancy.

7. By Maine DEP's logic in the Permit, it cannot consider as SWH any habitat that has not been previously designated and mapped by Maine DIFW as 'significant wildlife habitat.' This is not true because of the unique inter-agency management delegation

created by the Maine Legislature for native fish species between Maine DIFW and Maine DMR. While Maine DIFW *can* designate SWH for anadromous fish species under NRPA, past and ongoing practice shows Maine DIFW has a *de facto* policy to not do so because these wildlife species are under the legal management of Maine DMR. But under NRPA, Maine DMR has no authority to designate any marine or tidal habitat as SWH for the marine or anadromous fish species it is has sole authority to manage. This technical discrepancy in the law is clearly unintentional and the Maine DEP's use of this discrepancy in the Permit shows a clear intent to evade the legislative purpose of NRPA rather than to support it.

8. Maine DIFW's failure to use its vested authority to designate SWH for endangered anadromous fish species is shown by the fact that it has never promulgated rules under NRPA for the protection of aquatic habitat occupied by federally listed endangered fish species. Maine DIFW could do this at any time, but has never done so. Maine DIFW's failure to promulgate these rules after many years of opportunity does not excuse the failure. Nor does this failure allow Maine DEP to rely upon the failure as its sole justification for claiming that there is no 'significant wildlife habitat' in the lower Kennebec River that would be affected by the dredging operation. The Maine DEP cannot use the failure of another agency to do its job as the reason for not doing its own job.

E. Compliance with the U.S. Endangered Species Act.

At minimum, a Maine NRPA permit and water quality certification must be compliant with the U.S. Endangered Species Act and the U.S. Clean Water Act. On its face, the Permit allows gross violations of both laws.

The Permit allows an unlimited number of two federally endangered species, Atlantic salmon and shortnosed sturgeon, to be killed and injured during the dredging operation. The Permit contains no measures to reduce or prevent these deaths or even to cap them. By the plain language of the Permit, the applicant is allowed to entrain and kill every single sturgeon and salmon left in the Kennebec River. The Permit language admits the likelihood of fish of many species, including endangered sturgeon, being sucked into the dredge and being injured or killed. The Permit contains no conditions or measures to reduce or eliminate this. Instead, the Permit is a *carte blanche* license to the applicant to kill as many fish of any species as they wish.

It is immaterial whether the applicant must also receive federal permissions for the project, including permissions via the U.S. ESA. What matters is that nothing in NRPA

allows the Maine DEP to issue a permit which allows the *unlimited* killing of federally endangered species. The purpose of NRPA permits is to prevent such killing from occurring, not to give it legal sanction.

Maine's own expert fisheries agency, Maine DMR, has repeatedly counseled Maine DEP to restrict dredging operations in the lower Kennebec River to the winter months to reduce the chance of harming fish species, especially endangered species. Here, Maine DEP has refused. Maine DEP and the applicant have also rejected Maine DMR's proposed mitigative strategy of tagging sturgeon as 'canaries in the coal mine' to allow dredge operators to know if any sturgeon are in the direct vicinity of the dredging operation as it is conducted. The only mitigation required by Maine DEP is to have someone on board the dredge boat to count dead sturgeon. Counting dead and injured fish is forensics, not mitigation.

Under the U.S. ESA, the State of Maine cannot issue a permit which allows a 'take' of an endangered species, but that is what this Permit specifically authorizes in an unlimited fashion. Since the Permit does not even attempt to quantify the potential take, let alone mitigate or reduce the take, the Permit is unlawful on its face.[9]

F. Compliance with the U.S. Clean Water Act.

Nothing in the U.S. Clean Water Act allows a state to issue a permit for an activity in a navigable waterbody that directly causes the take of a federally listed endangered species. Issuance of a water quality certification which allows the taking of an endangered species is prohibited by the Clean Water Act because such an activity is not a designated use of the waterbody, nor can it be.[10] Under the CWA and Maine law, the existing use of the lower Kennebec River by sturgeon and salmon is an 'existing in-stream use' which must be 'protected and maintained.' [11] Killing, maiming and injuring these animals in their native habitat in the lower Kennebec River by sucking them up in a dredge along with several tons of sand and mud does not 'protect and maintain' the species. It kills them. The Permit requires no measures to prevent this killing from

9 Recent U.S. District Court decisions in Maine have held, in the case of endangered Canada lynx, that state rules allowing trapping in Canada lynx habitat are themselves subject to the U.S. ESA under Section 7 and Section 10. Appellants believe the instant DEP Permit is in violation of the ESA because it allows an unlimited legal take of endangered species by the applicant and contains no enforceable conditions for suspension of the activity if significant numbers of endangered species are being killed or injured. *See*: Animal Welfare Institute v. Martin, 588 F. Supp. 2d 70, 96-97 (D. Me. 2008).

10 The U.S. Secretary of Commerce, via NOAA-Fisheries, can issue "Incidental Take" permits (ITPs) for the taking of endangered species under Section 7 and 10 of the U.S. ESA. In such a case, any state permit for an activity which will cause a 'take' of an endangered species would have to require the applicant to follow all of the conditions in the ITP. In the instant Permit, DEP does not condition the activity on the applicant acquiring an ITP. At the time of permit issuance on April 14, NOAA-Fisheries had not yet issued an ITP for the dredging.

11 38 MRSA §464(4)(F)(1) states: "Existing in-stream water uses and the level of water quality necessary to protect those existing uses must be maintained and protected. Existing in-stream water uses are those uses which have actually occurred on or after November 28, 1975, in or on a water body whether or not the uses are included in the standard for classification of the particular water body."

occurring and allows the applicant to kill as many endangered sturgeon and salmon as they wish.

For this reason the Permit fails to meet NRPA and CWA criteria that the activity will not violate state and federal water quality standards for the lower Kennebec River, since the Permit admits the likelihood of the activity to entrain, injure and kill federally listed endangered species and places no restrictions on the operation to prevent this from happening. If, for example, Maine DEP relied on expert evidence showing that the operation would at most kill one or two sturgeon, a finding of CWA compliance might be plausible. But in the Permit, Maine DEP cites to no expert evidence and makes no such assertion. Instead, the plain language of the Permit allows the applicant to kill as many federally listed endangered species as they wish and to continue to do so for the entire dredging operation even if they discover they are killing large numbers of endangered fish.

Habitat for endangered fish is a legally designated use of all Maine waters under the CWA and Maine water quality standards. In areas like the lower Kennebec River, where endangered fish species have survived against all odds, this legally designated use weighs even stronger. Under Maine law it is already illegal for anyone to catch or kill a sturgeon or an Atlantic salmon in the Kennebec River. Under the U.S. ESA it is illegal for anyone to kill a shortnosed sturgeon or Atlantic salmon in the Kennebec River. Yet, the Permit officially authorizes the applicant to kill as many sturgeon and salmon as they wish while dredging. The CWA's concept of the 'designated use' of a river as habitat for fish and endangered fish species has no meaning if a NRPA applicant is allowed by the DEP to suck up and kill an unlimited number of endangered fish without any restrictions, conditions or mitigation. But this is what the DEP Permit allows.

G. Intersection with NOAA-Fisheries Incidental Take Permits.

Appellants are aware that the U.S. Secretary of Commerce, through NOAA-Fisheries, has issued Biological Opinions and Incidental Take Permits pursuant to Sections 7 and 10 of the U.S. Endangered Species Act for dredging activities on the lower Kennebec and the Penobscot Rivers regarding endangered shortnosed sturgeon, most recently in 2009, and may issue a similar permit for the proposed August 2011 lower Kennebec River operation. Appellants assume that Maine DEP has made an informal, internal decision to allow NOAA-Fisheries to have the 'final say' for protections and handling protocols for shortnosed sturgeon during the operation and in manner similar to these recent Biological Opinions and Incidental Take permits; and this is why the DEP Permit contains virtually no conditions in this regard. If this surmise is true, Appellants believe it is incorrect and unlawful.

NOAA-Fisheries' authority under the ESA to regulate the dredging operation via

Biological Opinions and Incidental Take Permits is strictly limited to impacts on federally listed endangered species, in this case the shortnosed sturgeon and Atlantic salmon. Atlantic sturgeon are not listed under the ESA, although NOAA-Fisheries has proposed them for listing. As such, NOAA-Fisheries has no authority under the ESA to condition the dredging operation to protect Atlantic sturgeon since they have not yet been formally listed protected under the ESA.

Unlike NOAA-Fisheries, the Maine DEP has a mandate and duty to protect *all* aquatic species affected by the dredging operation, not just federally listed species. While NOAA-Fisheries cannot write a Biological Opinion or ITP to protect Atlantic sturgeon, the DEP can place conditions in the Permit to do so, since its legal authority is much more expansive than that of NOAA-Fisheries, via NRPA and Maine water quality standards promulgated under the U.S. Clean Water Act.

For this reason, the DEP's apparent reliance upon NOAA to protect sturgeon during the dredging operation is misplaced. Moreover, the DEP's failure to provide any meaningful protective conditions for Atlantic sturgeon in the Permit is an abdication of its duties under NRPA and the CWA. This is because NOAA-Fisheries *cannot* and *will not* protect Atlantic sturgeon through its authority under Section 7, 9 and 10 of the ESA. Unlike NOAA-Fisheries, Maine DEP has the legal authority and duty to place protective conditions for Atlantic sturgeon in the Permit, but without explanation has chosen not to do so

For this reason Appellants assert that a claim by Maine DEP that NOAA-Fisheries will 'take care of the sturgeon' is misplaced in law and in fact. NOAA's duty to protect federally listed species does not absolve the Maine DEP from its duty to protect non-listed species, nor it is a workable substitute since NOAA's legal authority in this matter is much narrower and circumscribed than that of Maine DEP.[12]

H. Maine DEP's Duty and Authority is Independent of that of NOAA.

At minimum, the Permit should include a mandatory condition which incorporates by reference all conditions required by NOAA-Fisheries as also required under the Maine DEP permit. This would properly make any violation of NOAA protocols by the applicant a violation of its Maine NRPA permit and water quality certification and thereby subject to Maine DEP enforcement action. Without such a proviso, Maine forfeits much of its enforcement authority over the activity. Why would Maine not want to do this?

12 Appellants believe the cursory and evasive nature of the Permit regarding fisheries impacts is based upon the Maine DEP's hope that NOAA-Fisheries will be forced to play the 'bad guy' in this proceeding by having to place strict measures on the dredging operation, including the suspension of dredging if onboard observers document significant numbers of sturgeon being entrained.

As stated above, NOAA has no ESA authority over non-federally listed species such as Atlantic sturgeon. By 'relying' upon NOAA's permit requirements, Maine forfeits any regulatory or enforcement authority over harm caused to Atlantic sturgeon by the operation, even though the DEP admits it is likely Atlantic sturgeon will be entrained, injured and killed in the operation. Similarly, Maine forfeits all enforcement authority over the killing of any other fish species, no matter how severe.

III. Recommendations

Appellant recommends the Maine BEP remand this NRPA permit and Water Quality Certification back to the Maine DEP for further analysis since it is defective for the following reasons.

1. The Permit contains no reasoned explanation for why the dredging activity cannot be postponed until the winter months, as has been the longstanding regulatory tradition for similar operations in the lower Kennebec River.

2. The Permit contains no reasoned explanation for why a minimal impact mechanical dredging operation with out-of-river disposal will not serve to to allow departure of the *U.S.S. Spruance*.

3. The Permit fails to explain how the 'need' for the dredging operation to occur in August overrides the significant damage to aquatic life which will occur; and why this 'need' overrides past practice and evidence showing dredging conducted in the late fall or winter will be far less damaging to aquatic life and federally endangered species.

4. The Permit contains no protective conditions or consideration for federally endangered species the DEP admits are likely to be entrained and killed during the dredging; nor does it place any maximum numeric cap on the number of endangered species entrained, killed or injured in the operation; nor does the permit contain any requirement for suspension of the operation if evidence shows that significant numbers of endangered species are being entrained, injured and killed during the operation.

5. As shown by the submissions of the "Phippsburg Commenters" there is no demonstrable need for this dredging to occur in August, rather than during the traditional winter dredging period. Past practice and precedent shows the DEP has only issued similar dredging permits for the winter season precisely because of the harms detailed by the Phippsburg Commenters and by Maine DMR.

6. The Permit contains no explanation or cogent reasoning for its wholesale rejection of

the sturgeon mitigation strategy recommended by Maine DMR. Just saying the DMR's strategy is 'impractical' is not, in and of itself, a viable defense for its rejection.

7. The Permit contains no enforceable mechanism for the DEP to order the suspension of the operation if evidence shows the operation is killing and injuring significant number of endangered species and other aquatic life.

IV. Conclusion

Appellants' interest in this matter goes beyond the critical, pragmatic issue of the damage to aquatic life this 'emergency' dredging operation will cause. As best as we can discern, Maine DEP staff this winter were given 'marching orders' by their superiors to expedite and approve this permit exactly as the applicant wished it to read. It is disconcerting that a NRPA permit applicant can apparently dictate to the Maine DEP which terms and conditions it will accept and which it will ignore.

This Permit appears to represent the Maine DEP 'rubber stamping' an improper and ill-timed request by the ACOE to dredge the Kennebec River in August to provide passage for one Navy ship, the *U.S.S. Spruance*. Record evidence indicates that even the applicant admits that August is the 'worst' time to dredge in terms of impacts on aquatic life and endangered species. To make matters worse, the applicant's statements on April 4, 2011 imply that due to the imminent departure schedule of the *U.S.S. Spruance*, the applicant is disinclined to suspend dredging operations even if significant numbers of sturgeon and other fish are being entrained and killed. Consistent with the applicants' stated intentions, the Permit contains no enforceable conditions to protect endangered fish and other aquatic life. The Permit contains no conditions which allow the DEP, as the permit issuer, to order the operation suspended if significant numbers of endangered species and other aquatic life are being entrained and killed. A Permit issued under the color of enforcing state environmental and water quality laws which contains no enforceable conditions to ensure these laws are not violated is arbitrary and capricious. Without enforceable conditions and standards, this Permit is nothing more than a license to break the law.

Sincerely,

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V. References Cited

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Kavanaugh, W. 2011. Email Memo of William Kavanaugh, U.S. Army Corps of Engineerst, to Brian Swan et al., Maine Dept. of Marine Resources, April 4, 2011.

Keliher, P. 2011. Formal Comments and Reply Comments of Maine DMR to Maine DEP by Patrick Keliher, Acting Deputy Commissioner, Maine DMR. March 10, 2011 and April 10, 2011.

[redacted]

Note: Due to their length, the documents referenced in this appeal are being submitted to the BEP as PDF files on a CD-ROM.