IN THE MATTER OF

U.S. ARMY CORPS OF ENGINEERS Bath and Phippsburg, Sagadahoc County MAINTENANCE DREDGING L-16281-4E-E-N (approval)	)))))	WATER QUALITY CERTIFICATION APPEAL—U.S. ARMY CORPS OF ENGINEERS RESPONSE TO APPELLANTS DOUGLAS H. WATTS AND ED FRIEDMAN

INTRODUCTION

The U.S. Army Corps of Engineers ("Corps") provides the following in response to the appeal filed by Mr. Douglas H. Watts and Mr. Ed Friedman ("Appellants") challenging the Maine Department of Environmental Protection's ("DEP") Order of April 14, 2011 granting a water quality certification ("WQC") to the Corps for a proposed maintenance dredging project of the Kennebec River federal navigation project. This response incorporates by reference the responses filed by the Corps to the appeal by the Town of Phippsburg et al. ("Phippsburg appeal"), and to the appeal filed by Ms. Dot Kelly ("Kelly appeal"), and addresses items not raised in the Phippsburg and Kelly appeals. As set forth more fully below and in the Corps response to the Phippsburg appeal, DEP's Order satisfies the applicable standards of the Natural Resources Protection Act ("NRPA"), and therefore the Order should be affirmed.

Much of Appellants' arguments focus on impacts to shortnose sturgeon, a species listed as endangered pursuant to the federal Endangered Species Act ("ESA"), and to Atlantic sturgeon, a species proposed for listing (but not yet listed) as threatened under the ESA. 75 Fed. Reg. 61872 (Oct. 6, 2010). As part of its environmental review and coordination for this project, the Corps has engaged with the National Marine Fisheries Service ("NMFS") pursuant to Section 7 of the ESA. This Section 7 consultation will help ensure that the Corps will not jeopardize the future existence of any listed species, and if any such species are expected to be impacted (i.e. "incidental take") by the project, NMFS will provide reasonable and prudent measures to reduce such impacts to listed species.

I. The Proposed Tagging of Shortnose Sturgeon Would Represent "Take" Under the ESA.

Appellants argue that DEP should have required the Corps to capture and tag fifty (50) sturgeon prior to commencing dredging, and to monitor these fish with acoustic equipment. However, it is important to recognize that capturing sturgeon in this manner would expose these fish to risk of mortality and as such would represent a "take" as defined by the ESA, and would therefore require Section 7 consultation with NMFS as a matter of federal law. "Take" is defined by 16 U.S.C. § 1532(19) to mean "to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture or collect, or to attempt to engage in any such conduct." Thus, even if DEP attempted to require the Corps to engage in such activities through WQC conditions, without a Section 7 review and approval by NMFS, the Corps could not lawfully perform such actions. At no point has NMFS suggested that such capture and tagging activities would be appropriate or reasonable

and prudent measures, and none of the NMFS Biological Opinions for dredging in the Kennebec cited by Appellants have imposed such requirements.

II. The Proposed Tagging of Shortnose Sturgeon Is Not Practicable and NRPA Standard 3 Does Not Mandate This.

Appellants argue that DEP should have required tagging and acoustic tracking of shortnose sturgeon during Corps dredging operations, and failure to do so violates Standard 3 of the NRPA because absent such a WQC requirement there will be "unreasonable harm" to sturgeon species. However, the NRPA does not demand such requirements for this project, particularly where the record reflects the impracticability of such measures in light of the project's purpose. DEP appropriately considered the impacts to sturgeon and other species, and reasonably concluded that Standard 3 was satisfied.

As noted in the Order, because the dredging project will require continuous operation to achieve the Navy's scheduled departure of the Spruance, the Department of Marine Resources' ("DMR") suggestion that dredging operations cease whenever sturgeon are acoustically tracked in the vicinity is simply unworkable. Neither DEP, DMR, nor the Corps has ever suggested that this project will not impact sturgeon, and such a standard would be impossible to achieve. The issue of the proposed monitoring is rather one of practicability, and the NRPA framework plainly takes into account such concerns in its definition of "practicable," which considers "cost, existing technology and logistics based on overall purpose of the project." 06-96 C.M.R. Ch. 310 § 3(R). The dredging operations must be able to proceed 24 hours a day to accomplish the Navy's scheduled departure of the Spruance and to minimize the time that the dredging operation is in the river. If dredging were to cease whenever sturgeon were detected near the dredging operation, this would jeopardize the Navy's schedule and would extend the time that the environmental impacts of dredging would occur. NMFS, the federal agency with jurisdiction over shortnose sturgeon, indicated that the duration of the dredging operation was its primary concern, and that led the Corps to choose a hopper dredge over a mechanical dredge for this project. Draft EA at 3-4. Moreover, even if fifty sturgeon were tagged and acoustically monitored, other untagged sturgeon could move into the dredging area and still be impacted by dredging operations. Thus, the measure's effectiveness of protecting any shortnose sturgeon other than the fifty tagged fish (within a growing Kennebec population estimated at 9,488 in 2003) is uncertain. Conversely, the mere presence of sturgeon in the area does not equate to a guarantee that the fish would all be entrained into the dredging equipment, and cessation of operations every time sturgeon are detected could therefore amount to an unnecessary delay. It is important to note that the Corps is aware of no other dredging project where the proposed tagging/acoustic monitoring has been imposed—indeed, neither the 2004 nor the 2009 Kennebec dredging projects cited by Appellants required such measures. Accomplishing a dredging project would not be workable if operations were required to stop every time a sturgeon appeared near a dredge, particularly with a hopper dredge that is not anchored to the river floor. This would result in excessive, unreasonable costs and would extend the duration of the operation to an indefinite period with uncertain results. DEP was entirely reasonable in declining to impose such experimental and uncertain conditions in its WQC decision.

At the same time, however, the Corps must abide by conditions imposed by the NMFS,

including limits on incidental take of shortnose sturgeon. These limits will ensure that dredging will not jeopardize the continuing existence of the endangered shortnose sturgeon, and if these limits are reached the Corps will need to cease operations for further coordination with NMFS. This represents an important "failsafe" to ensure that there will not be unreasonable impacts to shortnose sturgeon.

Standard 3 does not constitute a "no impacts" mandate, but only that DEP consider whether there will be unreasonable harm. DEP considered the impacts to sturgeon and other marine species as part of its analysis. While there may be individual sturgeon taken by dredging operations, past dredging projects have not resulted in a large number of takes of sturgeon. In fact, in 2003 when the Corps performed dredging in this area at a time of year when sturgeon were present, qualified sturgeon observers only witnessed five (5) shortnose sturgeon that were entrained by the hopper dredge equipment and represented "takes" pursuant to the ESA. 2004 Biological Opinion at 16. Of these five takes, two sturgeon died on deck of the hopper dredge, and three were released alive. Two of the released sturgeon appeared to swim to depth. For this 2003 dredging operation, screens were installed on the hopper inflow pipes, based on an assumption that sturgeon pulled to the hopper dredge would not be alive and the screens would better allow sturgeon remains/parts to be collected by the sturgeon monitor. However, during operations it was found that sturgeon were still alive when pulled up to the hopper dredge. Upon learning this, the Corps quickly adjusted and removed the screens from the equipment, with the expectation that mortality of and injuries to sturgeon could be reduced by taking this action. Two of the sturgeon that had been taken after the screens were removed were released with only minor injuries, and were therefore more likely to have survived. Draft EA at 22. Based on this experience, the Corps will not be placing screens on the hopper inflow, with the expectation that impacts to entrained sturgeon will be less severe and hopefully such sturgeon can be released relatively unharmed. Notwithstanding Appellants' arguments that sturgeon monitors are ineffective, during the 2003 dredging, the sturgeon monitor (qualified and approved by NMFS) was able to safely identify and release entrained sturgeon, and assisted the Corps and NMFS in determining that removal of the screens was an appropriate adjustment to reduce mortality and injury to sturgeon.

It is worth noting that while the species remains listed as endangered, the shortnose sturgeon population in the Kennebec has been growing, with studies showing a 20% increase in population numbers between 1981 and 2000. In this context, DEP was entirely reasonable to conclude that the likely impacts to individual sturgeon did not constitute unreasonable harm under Standard 3.

III. There Will Not Be Impacts to Significant Wildlife Habitat.

Appellants argue that DEP should not have reached the conclusion that there will not be impacts to significant wildlife habitat. This term is defined in the NRPA, and the Corps refers the Board to the discussion and analysis of this issue in the Corps response to the Phippsburg appeal at pages 6-8. Appellants' argument here appears to be a disagreement over how the Maine Legislature has set up the process for designation of significant wildlife habitat, and how the state agencies charged with this responsibility have acted. However, disagreement with the policy choices made by the Legislature or other Maine state agencies does not constitute a basis

for an appeal of a DEP WQC. The NRPA established a process for such designations, and while there are areas in the Kennebec that Appellants would prefer to be designated as significant wildlife habitat, they have not been so designated in accordance with the NRPA. Appellants acknowledge as much, but would apparently still seek to have such areas be treated as significant wildlife habitat. The Board must reject this argument as it has no basis in law.

IV. The Federal Endangered Species Act Requirements Are Separate and Distinct from the Clean Water Act Section 401 Water Quality Certification of DEP.

Appellants suggest that the federal ESA should prevent DEP from issuing its WQC for the project due to impacts to endangered shortnose sturgeon, and further argues that impacts to sturgeon would violate requirements of the Clean Water Act ("CWA"). Appellants incorrectly characterize the requirements of the federal ESA and CWA, and blur these distinct legal frameworks together in a manner unsupported by law.

A. The Requirements of the Federal ESA are Satisfied by the Corps, not DEP.

Appellants suggest that because DEP's WQC does not include numeric limits on the amount of sturgeon that may be taken, that DEP has violated the ESA. Appellants' argument misstates the requirements of the ESA. Section 7 of the ESA imposes requirements on federal agencies to consult with NMFS or U.S. Fish and Wildlife Service to assess whether agency activities will jeopardize the existence of species listed as threatened or endangered. 16 U.S.C. § 1535. This is an obligation that the Corps, not DEP, must satisfy, and the Corps has engaged in Section 7 consultation with NMFS for the proposed dredging. This process was not complete at the time DEP issued its WQC, but there is no requirement that it be completed prior to DEP's WQC decision[1] in either the ESA or Section 401 of the federal CWA. Likewise, Section 9 of the federal ESA prohibits the take of species listed as endangered or threatened, unless procedural requirements of the ESA (such as Section 7 consultation for federal agencies) have first been satisfied. 16 U.S.C. § 1538. Section 9's prohibition on take, however, would apply to the Corps, not DEP, as it is the Corps, not DEP, that is engaging in the dredging activities that could result in the take of listed species. These provisions of the ESA simply do not impact or impose restrictions on DEP's ability to issue a WQC to the Corps.

Appellants cite to an ESA case involving the incidental take of ESA listed Canada lynx by trappers permitted by the Maine Department of Inland Fisheries and Wildlife ("DIFW") in support of their argument that DEP cannot issue a WQC for activities impacting endangered species. Animal Welfare Institute v. Martin, 588 F. Supp. 2d 70 (2008). In the Martin case, however, neither DIFW nor the permitted trappers had engaged in an ESA process (in that case ESA Section 10) that would authorize the incidental take of listed species. Here, unlike in that case, the Corps is engaged in the Section 7 process, and by doing so the potential incidental take of ESA listed species is being addressed in accordance with that statute.

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[1] To the extent that the Section 7 process results in conditions that DEP wished to incorporate into the WQC, BEP presumably could modify the WQC in accordance with the procedures set forth at 06-96 C.M.R. Ch. 2 § 27.

B. The Clean Water Act Does Not Prohibit Take of Endangered Species.

Appellants argue that the take of an ESA species disqualifies an activity from a CWA Section 401 WQC, suggesting that sturgeon are an "existing in stream use" which must be protected, and therefore a take of such species violates the CWA. Appellants' argument is entirely unsupported by law, and ignores the federal statutory provisions applicable to DEP's WQC review.

Section 401 of the CWA, 33 U.S.C. § 1341, requires an applicant for federal approvals for an activity involving a discharge to provide certification from the state where the activity is occurring that such discharge will comply with applicable effluent limitations or with state water quality standards.[2] The Corps administers the permitting program for CWA Section 404 discharges, and while the Corps does not issue Section 404 permits to itself, the Corps authorizes its own discharge of dredged material by applying the 404(b) guidelines to its activities and seeks a WQC for such discharges into waters of the United States. 33 C.F.R. § 336.1(a). Thus, because the Corps will be disposing of dredged material in the waters of the Kennebec--a discharge pursuant to Section 404--the Corps was required to obtain certification from DEP that its discharge will comply with Maine water quality standards.

Section 401 WQC does not prohibit discharges of dredged material that may involve the take of endangered species. Rather, Section 401 requires a certification that a discharge will not violate state water quality standards. The applicable water quality standards for Maine Class SB waters make no mention of a prohibition on taking endangered species. 38 M.R.S. § 465-B(2). Rather, these standards focus on the suitability of such waters for fishing, aquaculture, habitat, navigation, and other uses of such waters. Unless the taking of sturgeon can be shown to impact the quality of water to reduce the ability of such waters to be used in the manner described in the statute—which Appellants do not claim to be the case—the taking of individual fish is simply not a matter that implicates a Section 401 WQC.

V. Atlantic Salmon Will Not Be Impacted by the Kennebec Dredging.

Appellants make several references to the Atlantic salmon. This species is listed as endangered pursuant to the federal ESA, and was analyzed as part of DEP's review of this project. Because of the time of year that the dredging will occur, Atlantic salmon are not expected to be present at the dredge or disposal sites and therefore no impacts to this species are expected. Atlantic salmon move upriver in the spring to breed in the fall, and return to the marine environment in early winter. Draft EA at 16. After spending approximately two years in freshwater, juvenile Atlantic salmon migrate to sea in the spring. Id. Where the Atlantic salmon is not expected to be present in the project area, there will not be unreasonable impacts to this species.

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[2] As discussed more fully at pages 1-2 of the Kelly appeal, the discharge of dredged material is regulated by Section 404 of the CWA and is not subject to effluent limitations. Therefore, the WQC for such discharges is based on water quality standards, not effluent limitations.

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CONCLUSION

Appellants' arguments are not based on the relevant conditions of the NRPA, which the record shows have been satisfied. Rather, Appellants present unsupported and untenable legal theories that conflate the framework of Maine's NRPA with the federal ESA. These frameworks are distinct as a matter of law, and Appellants' arguments must be rejected. Appellants to not present any evidence that contradicts DEP's factual findings or undermines DEP's reasoned conclusions. Rather, Appellants simply take issue with the conclusions reached by DEP, and this fails to satisfy the high burden required to overturn the reasonable WQC decision of DEP. BEP should affirm the WQC in its entirety.

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Respectfully submitted,

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