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. The 1998 Final Recovery Plan for shortnosed sturgeon states:

> "Maintenance dredging of federal navigation channels can adversely affect or jeopardize shortnose sturgeon populations. In particular, hydraulic dredges (e.g., hopper) can

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.

lethally harm sturgeon by entraining sturgeon in dredge dragarms and impeller pumps. In addition to direct effects, dredging operations may also impact shortnose sturgeon by destroying benthic feeding areas, disrupting spawning migrations, and filling spawning habitat with resuspended fine sediments. Potential impacts from hydraulic dredge operations may be avoided by imposing work restrictions during sensitive time periods (i.e., spawning, migration, feeding) when sturgeon are most vulnerable to mortalities from dredging activity. In 1991, the National Marine Fisheries Service concluded that an Army Corps of Engineers' (ACOE) maintenance dredging operation in the lower Connecticut River was likely to jeopardize the continued existence of the Connecticut River shortnose sturgeon population. This conclusion was based on the season in which the project was scheduled (early summer), the proposed use of a hydraulic hopper dredge, and in-river disposal within high use feeding areas. To avoid jeopardy, the NMFS recommended that the ACOE use alternative dredge types (i.e., clamshell, hydraulic pipeline) and/or reschedule the project when sturgeon were unlikely to be in the project area."[2]

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

2 U.S. Department of Commerce, National Oceanic and Atmospheric Administration, National Marine Fisheries Service. 1998. Final Recovery Plan for the Shortnose Sturgeon (*Acipenser brevirostrum*). Accessed on-line on May 14 at: http://ecos.fws.gov/docs/recovery_plan/sturgeon_shortnose_1.pdf.

3 [redacted]

[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] The instant Permit contains no similar protections and rejects the Maine DMR radio-tagging proposal to determine if sturgeon are present at the dredging site during operations.

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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.

5 [redacted]

[redacted]

[redacted]

8. The 2004 Biological Opinion ('BO') issued by NOAA-Fisheries for a dredging project in the lower Kennebec River, 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.[6] None of this information is referenced or mentioned in the Permit. A 2009 BO issued by NOAA-Fisheries for maintenance dredging at the 'sinking basin' at Bath Iron Works on the lower Kennebec River prohibits dredging from June 1 to September 30 of each year to avoid harm to sturgeon and Atlantic salmon. In this 2009 BO, NOAA-Fisheries limits the 'take' of shortnosed sturgeon by the BIW dredging operations to a total of 6 animals for the 10-year term of the permit. In contrast, the instant Permit contains no limits on the number of sturgeon the applicant is allowed to kill during the August dredging operation.[7]

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."

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6 NOAA-Fisheries. 2004. Biological Opinion for Emergency Dredging, Lower Kennebec River, F/NER/2003/01461. NOAA-Fisheries, Northeast Region, Gloucester, Mass. Accessed on-line on May 14 at: http://www.nero.noaa.gov/prot_res/section7/ACOE-signedBOs/KennebecRiver2004-signedBO.pdf

7 NOAA-Fisheries. 2009. Biological Opinion for Bath Iron Works, Kennebec River, Bath Maine, F/NER/2009/04518. NOAA-Fisheries, Northeast Region, Gloucester, Mass.

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

[redacted]