



STATE OF MAINE
DEPARTMENT OF ENVIRONMENTAL PROTECTION

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June 3, 2011

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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:

Appeal by Dot Kelly:

- 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.
- 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.
- Page 10, paragraph 2. This discussion and the cited document US Army Corps’ document AD-A257826 are not part of the licensing record.
- Page 11, paragraph 2, beginning at sentence 6 with: “See <http://water.epa.gov/scitech/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.

- 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.
- 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.
- 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.
- 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.

Appeal by Doug Watts and Ed Friedman

- 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.
- 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.
- 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 time 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.

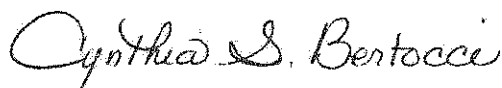
The licensee’s response to the appeal must be filed by Friday, June 17, 2011. In addition, since the licensee has also appealed the Commissioner’s licensing decision, the other appellants (Town of Phippsburg et al, Dot Kelly, and Douglas Watts / Ed Friedman) may respond to the issue regarding Condition 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, Executive Analyst
Board of Environmental Protection

cc: Service List