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ENVIR. APPEALS BOARD

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Petition to the Environmental Appeals Board for Review of NPDES Draft Permit #  
MA0000272

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Petitioners:

Connecticut River Watershed Council, Inc.

Jamison E. Colburn, Associate Professor of Law,  
Western New England College, School of Law

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Before the United States Environmental Protection Agency  
Environmental Appeals Board  
Washington, D.C. 20005

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October 26, 2005

This is a Notice of Appeal in the matter of National Pollutant Discharge Elimination System ("NPDES") Permit No. MA0000272, for the Boston & Maine Corporation facility in East Deerfield, Massachusetts (hereinafter "the Facility"). The permit is to discharge into the waters of the United States under Sections 301 and 402 of the Federal Water Pollution Control Act, also known as the Clean Water Act (hereinafter "CWA" or the Act), 33 U.S.C. §§ 1251 *et seq.* This Notice is filed with the Environmental Appeals Board ("EAB"), pursuant to 40 C.F.R. § 124.19(a), and a copy has been served on the Regional Administrator and the Facility. For the reasons stated below, the petitioners respectfully submit that the laxity of the Draft Permit represents an abdication on EPA's part under the Act, especially in light of its stated purpose "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a).

Sampling results submitted by the Facility from a storm event on October 19, 2004, *see* Fact Sheet Addendum, March 28, 2005, show that, for the five storm water discharges (Outfalls 001, 002, 003, 005, and 006), metals including zinc, lead, and copper, as well as a variety of hydrocarbon compounds, are being discharged to the Connecticut River, a "navigable water[] of the United States" under CWA § 502(7), 33 U.S.C. § 1362(7). Yet the Region has established *no* discharge limitations for these outfalls. Indeed, the only control set for the storm water outfalls is an annual monitoring requirement for priority pollutants and a quarterly monitoring requirement for 14 heavy metals that the Facility may even be permitted to avoid in the future if it obtains the right analytical results from the samples taken. For the reasons that follow, the petitioners respectfully submit that the Region has failed to comply with the applicable requirements

of the CWA, the Massachusetts Water Quality Standards, and the Endangered Species Act.

**I. EPA's Authority to Permit Discharges of Pollutants to the Waters of the United States is Conditioned Upon the Setting and Enforcement of Strict Effluent Limitations Requiring the Discharge Be Controlled with the Best Practicable Control Technology and that the Discharge Not Cause or Contribute to Any Violation of Applicable Water Quality Standards.**

EPA's authority to issue NPDES permits under Sections 301 and 402 of the Act requires that permittees like the Facility be made to achieve the "best practicable control technology currently available" ("BPT"), 40 C.F.R. § 125.2(a)(2). Where no generally applicable BPT effluent limitation has been set, the facility must achieve the level of BPT that is, in the best professional judgment of the Region's permitting officials, "appropriate technology for the category or class of point sources of which the applicant is a member," and EPA must set this case-by-case standard "based upon all available information." 40 C.F.R. § 125.3(c)(2). See Natural Resources Defense Council v. U.S. EPA, 863 F.2d 1420, 1425 (9th Cir. 1988) ("[I]n issuing permits on a case-by-case basis using its "Best Professional Judgment," EPA does not have unlimited discretion in establishing permit effluent limitations. EPA's own regulations implementing this section enumerate the statutory factors that must be considered in writing permits."). The Region was required to set effluent limitations at the highest feasible level for the Facility and to document any factors that weighed against that stringency. From the face of the record of this proceeding, though, it is clear that the Region has failed to set the highest feasible effluent limitations in the Draft Permit and that the permit is therefore "arbitrary and

capricious” and “not in accordance with law” within the meaning of 5 U.S.C. § 706(2)(A).

**A. The Draft Permit Is Not As Stringent as the Clean Water Act and EPA Regulations Require and the Region Has Failed to Explain What Factors or Information It Weighed in Determining that the Permit’s Stringency Should Be Compromised.**

The Region maintains that it employed its best professional judgment (“BPJ”) in setting the level of stringency in the Draft Permit. *See* Boston & Maine East Deerfield Rail Yard Response to Comments on Draft National Pollutant Discharge Elimination System (NPDES) Permit No. MA0000272 (undated, unsigned) at 10 (hereinafter “Response to Comments”) (“EPA has determined that not enough data exists to establish numeric effluent limitations for the five storm water outfalls.”). Contamination problems at the Facility have been documented, underscoring the need for stringent controls on its discharges. For example, there are three releases at the Facility currently being tracked by the Massachusetts Department of Environmental Protection (“MADEP”) under the Massachusetts Contingency Plan. Groundwater at the Facility is contaminated in some areas with petroleum products and solvents. Petroleum non-aqueous phase liquid (“NAPL”), a long-term source of ground- and surface water contamination, is floating on the water table surface beneath the Facility. The Region has acknowledged that, “due to an aging storm water system it is likely that groundwater is infiltrating.” Response to Comments at 6.

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**A. The Draft Permit Is Not As Stringent as the Clean Water Act and EPA Regulations Require and the Region Has Failed to Explain What Factors or Information It Weighed in Determining that the Permit’s Stringency Should Be Compromised.**

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Thus, the site’s history of documented fuel product and solvent spills raises a distinct possibility of contaminant infiltration and inflow. Given this possibility, which



the Region has acknowledged, the Draft Permit's sampling regime for hydrocarbons and solvents in storm water hardly seems appropriate. That the analysis of the Facility's storm water discharges for priority pollutants should take place only once per year, and then only during March when snowmelt and groundwater infiltration is likely to dilute any runoff sample to the maximum extent likely of any seasonal period in New England, begs the inference that effluent limitations requiring the "best practicable control technology" have not been set.

Moreover, the Region has refused to disclose the information or data that formed the basis for its judgments to forego discharge limitations of any kind for the storm water outfalls. The only requirements at all for these outfalls are sampling requirements, some only once per year, and even these can be cancelled entirely if the Facility obtains the right test results in its first two years of sampling. *See* Draft Permit at 5 & nn. 10-11. This amount of data collection (two data points in some cases) is hardly sufficient to characterize contaminant trends or seasonal variations in storm water discharges.

Though the statute's definition of "effluent limitation" is broad, *see* 33 U.S.C. 1362(11), it hardly seems possible that the Draft Permit's treatment of the storm water outfalls at the Facility qualifies. For the Region to claim that a lack of data prevents it from setting any numeric discharge limitations while allowing the Facility to sunset the monitoring requirements on its discharges after only two years highlights a peculiarity in the Region's approach to this permit. In maintaining how little data were available for the Facility and the railroad sector in general, the Region ignored comments received during the comment period and seemingly ignored data from EPA's own research. For example, Comment # 3 by GeoInsight, Inc., an appendix to the comments of the

petitioner CRWC, *see* Comments of the Connecticut River Watershed Council, Inc. (attached hereto as Attachment A), specifically listed the chemicals released and subsequently identified at the site pursuant to the Massachusetts Contingency Plan. In fact, in its comments GeoInsight specifically referenced EPA's guidance document, *Technical Approaches to Characterizing and Cleaning Up Brownfields Sites: Railroad Yards* (2002), as a source for identifying the types of contaminants typically present at railroad yards. In EPA's *Federal Register* notice regarding its Multi-Sector General Permit, EPA listed storm water sampling results from 103 different railyard facilities. *See* U.S. EPA, Final National Pollutant Discharge Elimination System Storm Water Multi-Sector General Permit for Industrial Activities, 60 Fed. Reg. 50804, 50829 (1995) (hereinafter "1995 MSGP"). These data were never acknowledged and, from the face of the Draft Permit and the Region's other notices and documentation, apparently never considered.

The Region has vaguely suggested that cost considerations were "[p]art of the decision to only monitor on an annual basis . . . ." Response to Comments at 7. But the Act requires specific EPA findings when cost is used to reduce the stringency of *any* effluent limitation, *especially* in this context where no categorical effluent limitation exists and the permit must be written on the basis of BPT. *Cf. Association of Pacific Fisheries v. EPA*, 615 F.2d 794 (9th Cir. 1980):

When considering different levels of technology, it must be shown that increased costs are wholly disproportionate to potential effluent reduction before the Agency is permitted to rely on a cost-benefit comparison to select a lower level of technology as the BPT. This conclusion is consistent with the interpretation of [CWA] section 304(b)(1)(B) given in the Conference Report on the bill which ultimately became the Act. The Report states: The balancing test between total

cost and effluent reduction benefits is intended to limit the application of technology only where the additional degree of effluent reduction is wholly out of proportion to the costs of achieving such marginal level of reduction for any class or category of sources.

Id. at 805 (citing Congressional Research Service, A Legislative History of the Water Pollution Control Act Amendments of 1972 at 170 (1973)). Section 304(b)(1)(B) of the Act provides, in relevant part, that “[f]actors relating to the assessment of best practicable control technology currently available to comply with subsection [CWA §301(b)(1)] shall include consideration of the total cost of application of technology in relation to the effluent reduction benefits to be achieved from such application.” 33 U.S.C. § 1314(b)(1)(B). On the face of the record, the Region has done no such calculation.

As the court in Assn. of Pacific Fisheries stated in construing this duty, “Congress intended BPT standards to be based primarily on employment of available technology for reducing effluent discharge, and not primarily on demonstrated changes in water quality.” Association of Pacific Fisheries v. EPA, 615 F.2d at 805 (citing EPA v. California, 426 U.S. 200, 204-05 (1976)). The Region’s vague justification for the Draft Permit is therefore inadequate. The Region says that sampling is “costly,” Response to Comments at 7, citing internet sources and the permittee’s one round of sampling that it maintains cost some \$3,000 and an incredible \$10,000 in additional “consultant fees.” But this makes a mockery of “best professional judgment.” The Region nowhere explains what the other “parts” of its decision were and does not acknowledge that the permittee’s alleged costs are very likely inflated. Thus, the public is left to guess why the Region chose not to curb five documented discharges of pollutants to the Connecticut River. By the text of the CWA, EPA regulations implementing it, and established precedent

interpreting both, the Region has given a legally insufficient explanation of the relaxed stringency of the Draft Permit.

**1. The Region Misrepresents What Phase of the “Phased Approach” to Storm Water EPA Has Entered, Ten Years After EPA Began Regulating Storm Water Runoff Discharges Like Those at the Facility.**

The Region has said that it lacks pertinent information about the railroad sector to use in setting effluent limitations for the storm water outfalls at the Facility and that the minimal monitoring requirements of the Draft Permit constitute the first step in a “phased approach.” Response to Comments at 8. This misrepresents the actual “phased approach” toward storm water runoff EPA began in 1995 with the first MSGP and which it later adjusted in 2000 with the second MSGP. As early as 1995, EPA directed facilities in the railroad sector to start monitoring their storm water discharges and collecting data for future use. Today, a decade later, the Region maintains that EPA is still just beginning the process of regulating runoff pollution like that documented to exist at the Facility and that the principal justification for its failure to write discharge limitations in the Draft Permit is the agency’s lack of data with which to do so. Failure to gather available data and analyze it, however, is not the same thing as a lack of data.

EPA’s original 1995 MSGP required the Facility to conduct quarterly “visual examinations of storm water quality” according to a low-cost, simple protocol intended to generate information at an acceptable cost to permittees like the Facility. *See* 1995 MSGP, 60 Fed. Reg. at 50829. The Facility, as a member of industry sector P, was directed to collect grab samples from representative discharges at all storm water outfalls

during runoff events, to record its visual examinations of the samples, including observations of color, odor, clarity, floating solids, foam, oil sheen, or other “obvious indicators of storm water pollution,” and to estimate “probable sources of any observed storm water contamination.” *Id.* Furthermore, the Facility was under a duty to keep records from these inspections with its MSGP Storm Water Pollution Prevention Plan (“SWPPP”) since 1995. In 1995, the pollutants EPA found were most commonly discharged from storm water runoff at installations like the Facility were fuel, oil, metals such as lead and zinc, detergents, suspended solids, and nutrients. *Id.* at 50978-979.

In the 2000 Multi-Sector General Permit for storm water discharges, *see* U.S. EPA, Final Reissuance of National Pollutant Discharge Elimination System (“NPDES”) Storm Water Multi-Sector General Permit for Industrial Activities, 65 Fed. Reg. 64746 (2000) (“MSGP”), EPA required holders of the MSGP to monitor their storm water discharges for the express purpose of aiding EPA in its eventual setting of comprehensive effluent limitations for discharges of the kind. There, EPA *explicitly* committed itself “to using data from the 1995 and 2000 permits to evaluate the effectiveness of management practices on an industry sector basis and to evaluate the need for changes in monitoring protocols for the next permit.” 65 Fed. Reg. at 64679.

In fact, *all* facilities in the railroad sector have been under this duty since 1995 when EPA first issued its MSGP. The initiation of EPA’s “phased approach” to stormwater pollution was explained in that rulemaking as beginning the process of collecting data. To take what EPA said in 1995 and 2000 seriously, holders of its MSGP should have been collecting such qualitative data for over a decade. It is, therefore,

arbitrary and capricious for the Region—in its use of BPJ to set this individual NPDES permit—to neglect to use such data from the Facility and/or like facilities.

Rationally, such data should form a firm basis for chemical monitoring, numeric discharge criteria, and/or other practicable NPDES permit conditions. Yet the Region has neglected to employ anything EPA has learned over the decade of its experience with transportation sector storm water dischargers under the MSGP. In its Draft Permit conditions for the five storm water outfalls at the Facility, the Region argues that no discharge limitations are necessary or appropriate under the Act, even though the Act itself dictates that *all* discharges must “meet applicable provisions of . . . [Section 301].” 33 U.S.C. § 1342(p)(3). The Draft Permit is therefore based upon factual findings and assumptions that are arbitrary and capricious.

**B. The Lack of Any Water Quality-Based Effluent Limitations in the Draft Permit’s Treatment of the Storm Water Outfalls Shows that the Region Neglected to Fulfill a Core Responsibility under Sections 301 and 402 of the Act: to Ensure that No Discharge Has the Potential to Cause or Contribute to an Excursion Above Any State Water Quality Standard**

The Region has failed to incorporate even the most minimal controls in the Draft Permit based upon the water quality of the Connecticut River. Massachusetts has designated the Connecticut River a Class B Warm Water Fishery. But besides the specific criteria for Class B waters, Massachusetts has also set narrative water quality criteria applicable to all surface waters. In relevant part, these provide that “[a]ll surface waters shall be free from pollutants in concentrations or combinations or from alterations that adversely affect the physical or chemical nature of the bottom, interfere with the propagation of fish or shellfish, or adversely affect populations of non-mobile or sessile

benthic organisms.” 314 C.M.R. § 4.05(5)(b) (2004). When EPA was confronted with data to suggest that discharges of metals and other pollutants from the Facility may actually contribute to the riverbed sediment pollution that is toxic to local fish and shellfish, it simply ignored the comment. *Compare* Response to Comments at 20-21 with Comments of Jamison E. Colburn, Associate Professor of Law, Western New England College, School of Law, Letter to Steven Calder of April 29, 2005 (attached hereto as Attachment B).

Under 40 C.F.R. § 122.44(d)(1)(vi), EPA was under a duty to interpret the narrative water quality criteria in Massachusetts’ Water Quality Standards and to translate the above criterion into chemical specific discharge limitations for this permit. According to EPA’s own regulations governing the setting of effluent limitations in NPDES permits, “[l]imitations must control all pollutants or pollutant parameters . . . which the Director determines are or may be discharged at a level which will cause, have the reasonable potential to cause, or contribute to an excursion above any State water quality standard, including State narrative criteria for water quality.” 40 C.F.R. § 121.44(d)(1)(i). This precautionary approach for the setting of effluent limitations, especially in a receiving water currently failing to meet several state water quality standards, dictates that at least some enforceable discharge limitations be set for the five storm water outfalls for the pollutants that pose a “reasonable potential” to “contribute” to the nonattainment of the water quality standards in the Connecticut. Nothing in the record reflects the Region’s effort to fulfill this duty under CWA §§ 301 and 402 and, from the face of the Draft Permit, the Region’s behavior has thus been “not in accordance with law.”

**C. The Region's Approach to the "Public Hearing" in this Proceeding Has Been Inconsistent with the Clean Water Act, EPA Regulations on Public Participation in NPDES Permitting, and With General Principles of Administrative Law.**

Throughout this permit proceeding the Region has equivocated regarding the bases of its determinations and has resisted sharing information with the public, rendering the "hearing" in this case unworthy of the name. This is a violation of CWA § 402(a) requiring that EPA conduct a "public hearing" before amending an NPDES permit. EPA well knows that this legal requirement is non-discretionary. Yet the Region's approach to the "public hearing" in this case has tested and, petitioners respectfully submit, pushed beyond EPA's authority to conduct such hearings.

The CWA's undeniable characterization of the "hearing" for NPDES permits is that they be "public." For many years, in fact, EPA maintained that the Act required formal adjudication pursuant to the Administrative Procedure Act ("APA"). The agency made a very careful judgment in 2000 that the CWA's use of the term "public hearing" in connection with NPDES permits did not *necessarily* trigger the APA's formal adjudication requirements under 5 U.S.C. §§ 554, 556-557. *See* U.S. EPA, Final Rule, Amendments to Streamline the National Pollutant Discharge Elimination System Program Regulations: Round Two, 65 Fed. Reg. 30886, 30896-30900 (2000). Much of that judgment, though, rested on the sufficiency of the informal hearings EPA committed itself to conducting to guard against the risks of erroneous agency actions in NPDES permitting. *Id.* at 30899-30900.



The Region has not taken this commitment seriously. Illustrative is the Region's Response to Comments. In its response to comments proposing to finalize the Draft Permit, the Region argues that "the SWPPP is considered a non-numerical effluent limitation for the [facility's] storm water discharges." Response to Comments at 6. But if this is true, then EPA has in fact deprived the public of its right to a "hearing" on the NPDES permit in this case in violation of CWA § 402(a)(1), 33 U.S.C. 1342(a)(1), because the "effluent limitations" to be put in place for the storm water outfalls are not subject to public comment or participation. The storm water outfalls, as noted above, are not put under any discharge limitations in the Draft Permit, despite comments drawing attention to this omission. When CWA § 402(a)(1) allows that EPA "may, after opportunity for public hearing, issue a permit for the discharge of any pollutant" notwithstanding CWA § 301(a)'s prohibition on such discharges, it does so only "upon condition that such discharge will meet . . . all applicable requirements" under CWA § 301. "All applicable requirements" have *not* been met in EPA's issuance of this permit because, by EPA's own admission, it is relying on "effluent limitations" not yet written and has closed the "public hearing" it was required to provide before such "effluent limitations" have been made available for public comment.

More generally, anything that is part of the "record" in an NPDES permit proceeding should be made "available" to the public to the maximum extent practicable. Under 40 C.F.R. § 25.4, EPA explicitly acknowledges that "[p]roviding information to the public is a necessary prerequisite to meaningful, active public involvement. . . . Whenever possible, [permitting] agencies shall provide copies of documents of interest to the public free of charge." There is no information more necessary to meaningful public

participation than the actual effluent limitations themselves. It is, thus, inconsistent with the CWA and EPA's own access and transparency rules to call the SWPPP part of the Facility's "effluent limits," *see* Response to Comments at 8, but then to refuse to release it to the public for comment or critique.

Lastly, the apparent secrecy enshrouding the SWPPP is inconsistent with at least one other EPA rule on public input and transparency in NPDES permitting. *See* 40 C.F.R. § 124.17(b) (requiring documents referenced anywhere in a permit or Fact Sheet be made part of the administrative record of the permit).

The lack of transparency and the failure to disclose the SWPPP in this "public hearing," 33 U.S.C. § 1342(a)(1), therefore, not only calls into question EPA's decision in 2000 that informal hearings would suffice in the NPDES program. It also runs counter to EPA rules on basic requirements for public participation.

## **II. The Endangered Species Act Requires that EPA "Consult" with the Fish and Wildlife Service and National Marine Fisheries Service in Permitting Actions Like This in Order to "Insure" that the Permit Is "Not Likely to Jeopardize the Continued Existence" of Any Listed Species.**

Section 7 of the Endangered Species Act of 1973 (hereinafter "ESA"), as amended, 16 U.S.C. § 1536, requires EPA, in consultation with and with the assistance of the United States Fish & Wildlife Service and/or the National Marine Fisheries Service within the National Oceanic and Atmospheric Administration (hereinafter "the Services"), to insure that any action it authorizes, funds, or carries out, is not likely to jeopardize the continued existence of any listed species or result in the destruction or adverse modification of critical habitat. *See* 50 C.F.R. § 402.01(a). The relevant segments

of the Connecticut River are habitat for at least two listed endangered aquatic species, the shortnose sturgeon (*Acipenser brevirostrum*) and the dwarf wedge mussel (*Alasmidonta heterodon*). The Services have promulgated joint regulations to govern these “consultations.” See 50 C.F.R. Part 402. The joint regulations place great reliance on determinations made by action agencies like EPA that any proposed action(s) are not “likely to jeopardize the continued existence of” listed endangered species.

From the face of the records EPA has released pursuant to a March 2005 request under the Freedom of Information Act of 1966, as amended, 5 U.S.C. § 552 *et seq.*, for any communications between the agencies for purposes of this consultation, it is evident that the Region has failed to discharge this responsibility under the ESA. See Jamison E. Colburn to Patricia Leahy, EPA Region I FOIA Officer, Letter of March 18, 2005 (attached hereto as Attachment C). The Region was apparently unaware of the two species’ recovery plans and took no account of how metals or other constituents of the Facility’s storm water discharges might cause or contribute to the very degradation of the river that compromises it as habitat for these species.

**A. Continued Pollution of the Connecticut River Through Storm Water Discharges Carrying Even Small Amounts of Metals and Other Toxins is Inconsistent with the ESA.**

The dwarf wedge mussel is a small freshwater mollusk that has been reduced to just a few extant populations in the United States, down from an historic range throughout many rivers along the East Coast, including the Connecticut River. In the Region’s letter to Michael Bartlett of the Ecological Field Services office of the U.S. Fish & Wildlife Service of December 22, 2004 (hereinafter “Bartlett Letter”) (attached hereto

as Attachment D), the Region made prominent mention of the fact that the precise segment to which the Facility discharges has not had a documented dwarf wedge mussel population for some time. Bartlett Letter at 3. This is, of course, irrelevant for purposes of suitable habitat for the species or its recovery. The Region has admitted that this segment of the river “may have potential to be useable habitat for th[e] mussel if it recolonizes sections of the Connecticut River where it historically occurred.” Bartlett Letter at 4.

Indeed, the basis of EPA’s conclusion that the Facility’s discharge will not “jeopardize the continued existence” of this listed species ultimately appears to be the dilution potential of the Connecticut River. *See* Bartlett Letter at 5. But the Region nevertheless failed to give any consideration to (1) the cumulative effects of discharges like the Facility’s on the mussel’s capacity to recolonize this segment of the river; or (2) the necessity that discharges like that of the Facility’s be *reduced* in pollutant loadings in order for this segment of the river to again be suitable as habitat for the mussel.

Furthermore, the record reflects no consideration of the terms of the Dwarf Wedge Mussel Recovery Plan by the Region. This recovery plan was finalized by the Fish & Wildlife Service in February 1993 (hereinafter “Mussel Recovery Plan”) (attached hereto as Attachment E). The Mussel Recovery Plan in several places emphasizes how significant a role pollution has played in this species’ decline. *See, e.g.*, Mussel Recovery Plan at 13-16. Indeed, the recovery plan makes clear that metals like zinc, lead, and copper are among the most acute threats to this species given its physiology and the manner in which it concentrates such pollutants by filtering water for its nutrition in the benthic layers of the river. *See, e.g.*, Mussel Recovery Plan at 14

(“Several studies have investigated the effects of specific chemicals and heavy metals on mussels. . . . Of the heavy metals, zinc was noted as the most toxic . . . .”) (citations omitted).

Zinc and other metals were the pollutants most often recorded in the sampling work the Facility did from its storm water outfalls in October 2004. Furthermore, in recording his observations made during a site visit in May of 2004, Mr. Steven Calder—the permit writer for this permit—noted that metal grindings from the facility’s brake service operation were being carelessly handled in at least one location at the facility, allowing shavings and other masses of metal simply to lay about on the ground.

Nevertheless, the Region has failed to include any discharge limitation for zinc, lead, copper, or other metals as pollutants being discharged from the Facility. The Region reasons that the river will naturally dilute this Facility’s discharge because of its high volume. But the Mussel Recovery Plan makes clear that in studies done to this point “[m]ussels concentrated zinc to a greater degree than fishes or tubificids,” *id.* at 15, and that restoration of viable habitat for this mussel, especially through the *reduction* of contaminants such as zinc, is pivotal to its long-term survival. *See id.* at 19-33.

The shortnose sturgeon is found in rivers, estuaries, and the sea, and is considered a “benthic omnivore.” In rivers like the Connecticut, it is considered “amphidrimous” because adults spawn in freshwater but, when allowed, willingly enter salt water habitats. Freshwater mussels are the adult sturgeon’s major prey item. *See Final Recovery Plan for the Shortnose Sturgeon*, National Marine Fisheries Service 16-17, 28 (December 1998) (hereinafter “Sturgeon Recovery Plan”) (attached hereto as Attachment F). Like its prey, the shortnose sturgeon is especially affected by contaminants in rivers like the

Connecticut because they tend to concentrate pollutants to harmful levels just by virtue of their physiology. The contaminants of specific concern named in the Sturgeon Recovery Plan include metals such as zinc, lead, and copper, polynuclear-aromatic hydrocarbons (“PAHs”), and polychlorinated biphenyls (“PCBs”). *Id.* at 47-48. Yet PAHs and PCBs are to be sampled from the storm water outfalls but once a year and then only during March, a month of heavy snowmelt and precipitation in New England (potentially diluting the samples and making them less representative of an annual interval). In its Letter to Mary Colligan of the Protected Resources Division, National Marine Fisheries Service, of December 21, 2004 (hereinafter “Colligan Letter”) (attached hereto as Attachment D), the Region “recognizes that the river adjacent to the facility is an important habitat for shortnose sturgeon” and that the “natural movement pattern” of the species could cause members of the distinct population segment in the relevant portions of the river to “come in contact with the discharge. . . .” Colligan Letter at 4.

Importantly, the recovery plans for both species make the *reduction* of pollutants like those being discharged from the facility a priority for their recovery. Yet the Region set no discharge limitations for *any* of the Facility’s six outfalls for metals such as zinc, lead, and copper, PAHs, or PCBs. Indeed, it even concluded that the discharge from outfall 004 ought to be exempted from the anti-backsliding requirement, both as to the volume of and the pollutants in the discharge, citing 40 C.F.R. § 122.44(l)(2)(i)(A). *See* Response to Comments at 19. How the Region could rationally conclude that a discharge of contaminants known to represent toxicity hazards to a listed species—a species known to concentrate such pollutants by virtue of its physiology—will not “jeopardize the continued existence” of the species is a mystery. Indeed, the Region seems to conclude

that the Connecticut River's dilution potential renders an ESA § 7 consultation on discharge limitations essentially unnecessary. *See, e.g.*, Response to Comments at 20 (“[A]cute (short-term) level of exposure is more relevant than [sic] the chronic (long-term) level of exposure to these metals because storm water is intermittent and therefore, poses a short-term exposure.”). Of course, the two species' bioaccumulation of metals in toxic amounts occurs as much or more from precipitated and sediment-based sources as it does from acute exposures, rendering the Region's response factually wrong. *See, e.g.*, Mussel Recovery Plan at 15.

**B. The “Consultation” by the Region in this Case Failed to Provide the Services With Necessary Information and EPA has Not “Insured” Its Actions Will Not Further Jeopardize the Two Species.**

The Region reached a rushed judgment that its actions would not jeopardize the two aquatic species at issue. More importantly, though, the Region has again chosen to place decisive weight on a set of controls (the SWPPP) out of public view and also out of the two Services' considerations in the “informal consultation.” *See* Response to Comments at 20 (“Th[e] monitoring at the outfalls and the implementation of a comprehensive SWPPP should minimize the threat to federal and state endangered species in the area of the facility.”). The Services' joint regulations specify that a “formal consultation” is required in this case unless EPA finds that its proposed action “is not likely to adversely affect listed species or critical habitat.” 50 C.F.R. § 402.13(a). The regulations make clear that this “jeopardy” threshold includes any “action that reasonably would be expected, directly or indirectly, to reduce appreciably the likelihood of both the survival and recovery of a listed species in the wild by reducing the

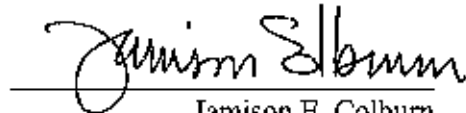
reproduction, numbers, or distribution of that species.” 50 C.F.R. § 402.02 (emphasis added). If it is the SWPPP that will “insure” these species face no greater jeopardy, then the Region should reopen the informal consultation once the SWPPP is actually drafted and, thus, reopen the proceeding to public scrutiny.



For the foregoing reasons, petitioners respectfully request that the EAB vacate the Draft Permit and remand with instructions to the Region that it comply with all EPA responsibilities under the Act, EPA rules, the Massachusetts Water Quality Standards, and the Endangered Species Act.



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