

Mr. Patrick Keliher
Maine Dept. of Marine Resources
21 State House Station
Augusta, ME 04333-0021

RE: Comments of Friends of Sebago Lake on the
Presumpscot River Settlement Framework (PRSF)

March 7, 2008

Dear Pat,

Friends of Sebago Lake below presents its comments on the PRSF.

I. The Public Review Process is Not.

1. To our knowledge, the PRSF signatories had no plans to conduct any formal public hearing and comment process until Friends of Sebago Lake strongly objected to the lack of any public process in a Thanksgiving Day 2007 op/ed in the *Portland Press-Herald*. The joint signatory press statement from the July 10, 2007 press conference makes no mention of any public comment, hearing or review process. Newspaper stories about the July 10, 2007 press conference make no mention of a public comment, hearing or review process. The PRSF document itself requires, anticipates or makes any mention of any public comment, hearing or review process. The first mention of the existence of any public comment process was Maine DMR Commr. Lapointe's December 3, 2007 op/ed in the *Portland Press-Herald* which was a response to our public complaint that there was no public comment process.

2. FOSL is not aware of any publicity effort made by the State of Maine or other signatories to alert the general public to the existence of the February 28, 2008 "Public Scoping Meeting" on the PRSF. Signatories American Rivers and Friends of the Presumpscot River do not mention the existence of this meeting on their respective websites. Nowhere does the Maine DMR website announce or even mention the existence of the February 28, 2008 "Public Scoping Meeting." As far as we can discern, neither the State of Maine or any of the signatories did anything to mention the existence of the Feb. 28, 2008 public scoping anywhere -- not even on their own websites. How can the State of Maine hold a Public

Scoping Meeting on the PRSF and not inform the general public of the meeting's existence?

3. To our knowledge, the PRSF document itself has only been available to the public from the State of Maine beginning Feb. 27, 2008 when Maine DMR posted a link to a PDF of the document on their website (<http://maine.gov/dmr/rm/stockenhancement/sed.html>). This PDF was posted only *one day* before the "Public Scoping Meeting" on Feb. 28, 2008 -- and the meeting itself was never posted on Maine DMR's website ! Neither American Rivers or Friends of the Presumpscot River have *ever* made the PRSF document available through their websites or even announced its availability to the public. In contrast, Maine DMR's website states that on Nov. 30, 2007: "Draft Penobscot River restoration plan is available. Public scoping meeting Dec. 13. Comment deadline is Jan. 31, 2008." This entry at the Maine DMR website links to a press statement which says:

Draft Strategic Plan for the Restoration of Diadromous and Resident Fishes to the Penobscot River

This plan presents a long-term vision for restoration actions for multiple species over the next 25 years through the identification of shared goals, objectives and strategies for restoration, recovery, and management of multiple fish species and ecosystem processes. This plan includes four strategic goals: (1) coordinating management activities, (2) providing safe and effective upstream and downstream passage for diadromous and native freshwater fishes, (3) maintaining or improving abiotic (physical) and biotic habitat for diadromous and selected resident fishes, and (4) using adaptive ecosystem-based management.

There will be a public scoping meeting to discuss the plan on December 13, 2007 at the Eastern Maine Community College in Bangor, 6-8pm. For more information, download [Scoping meeting, December 13, pdf file, 17kb](#)

For a copy of the plan, download [Draft Strategic Plan for the Restoration of Diadromous and Resident Fishes to the Penobscot River, pdf file, 2.22mb](#)

The deadline for comments on the plan is January 31, 2008. Comments should be sent to:

Melissa Laser
Bureau of Sea Run Fisheries & Habitat
21 State House Station
Augusta, ME 04333-0021 melissa.laser@maine.gov

The above material from Maine DMR's website is interesting because the Nov. 30th Penobscot Restoration Plan announcement was posted well in advance of the actual Dec. 13th Scoping Meeting. The Nov. 30, 2007 Penobscot posting provides extensive information about the subject matter and date and place and time of the Public Scoping Meeting. The Nov. 30, 2007 Penobscot posting provides extensive contact information if the public has further questions and a mailing address and email address for submission of written comments. The Nov. 30, 2007 Penobscot posting provides a 60 day comment period (Nov. 30, 2007 to Jan. 31, 2008). The Nov. 30, 2007 Penobscot Scoping Meeting announcement (with detailed dates, locations and times) was prominently posted on Maine DMR's website well in advance of the actual meeting.

Given the above, there is absolutely no reason or explanation for the State of Maine's failure on the Presumpscot to:

- a) Post a public notice about the existence of the PRSF Public Scoping Meeting well ahead of time.
- b) Post a public notice informing the public of the date, location and time of the PRSF Public Scoping Meeting well ahead of time.
- c) Post a public notice providing a link or mailing address for the PRSF document well

before the Public Scoping Meeting and end of the comment period.

d) Post a public notice providing a mailing and email address for written comments on the PRSF well before the Public Scoping Meeting.

e) Provide a 60 day comment period for written comments on the PRSF, as was done on the Penobscot (Nov. 30, 2007 to Jan. 31, 2008). There is absolutely no precedent for so-called "Public Scoping Meetings" on issues of this magnitude to be held without any public notification and with a 7 day comment period.

4. The Public Scoping Meeting failed to provide the public with all of the relevant and critical portions of the PRSF. The PRSF describes a number of critical "side agreements" that must be made between S.D. Warren and the State of Maine. FOISL has repeatedly asked to see these agreements and have been refused permission to see them. The PRSF states that these Side Agreements are integral to the entire Agreement. It is disingenuous and ludicrous for State of Maine to hold a "Public Scoping Meeting" on the PRSF and tell the public that it is not allowed to inspect and review substantial portions of the same Agreement.

RECOMMENDATION: The State of Maine conduct a real, proper and fully publicized Public Information Meeting identical to that held for the Draft Strategic Management Plan for the Penobscot River as referenced above when all of the documents and side agreements for the PRSF are available for public review; and the State of Maine conduct this Meeting with an Alternatives Analysis and a "No-Action Alternative" defined as Maine IF&W immediately resuming its fishway proceeding for Cumberland Mills Dam which has been stayed for the past 12 months.

II. Lack of Alternatives Analysis and a No-Action Alternative.

1. The phrase "Public Scoping Session" used by the State of Maine to describe its Feb. 28 meeting and 7-day comment period does not meet the plain language meaning of a "scoping" session, which is to "scope" and delineate the bounds of a detailed environmental analysis which the agency intends to conduct prior to making a final decision. The "Public Scoping Session" was not conducted or structured as, for example, a FERC scoping session under NEPA. In FERC scoping sessions, the public is invited to submit issues and areas of focus for detailed analysis in an Environmental Analysis (EA) or Environmental Impact Statement (EIS). A final proposed licensing decision is only made after the scoping document, draft EIS and final EIS documents are issued, with public comments allowed prior to and subsequent to each step. The PRSF attempts to turn the NEPA process on its head by spending the last 12 months secretly negotiating a final state and federal licensing decision, giving the public just seven days to comment on it, and including a proviso that Maine DMR and USFWS are legally bound to speak in favor of it.

2. Most notably absent from the "Public Scoping Session" is any framing document which

sets out the legal authority for the various public agencies to be involved in this enterprise in the first place. The only piece of paper offered at the "Public Scoping Session" on Feb. 28 is the PRSF document from June 2007. The very informational "side by side" PowerPoint slides presented by Patrick Keliher at the meeting were not provided in a printed version for the public or by download from Maine DMR's website.

3. FERC uses an alternatives analysis when conducting its relicensing and licensing amendment decisions under the auspices of NEPA (National Environmental Policy Act). At minimum, this analysis includes the Proposed Action, the No-Action Alternative and any Alternative Actions proposed by participants and intervenors during the Scoping process. Because of the "balancing" requirement imposed upon FERC by the U.S. Congress by the Federal Power Act (FPA) and the Electric Consumers Protection Act (ECPA), FERC is required to analyze and balance their recommended alternative against something else, including doing nothing (the 'no-action' alternative). The PRSF Signatories fail to do this in their 'Public Scoping Session.' The 'no-action alternative' here is to allow the Cumberland Mills Dam fish passage proceeding to continue, which will result in the State of Maine ordering S.D. Warren to construct, operate and maintain effective fish passage at its dam in perpetuity. This alternative will result in all of the fisheries restoration goals described in the PRSF to be attained 10, 20, 30, 40, 50 years sooner than in the PRSF. It is unclear why the PRSF Signatories have not performed a standard NEPA alternatives analysis which includes a formal scoping session, identification of alternatives (including the no-action alternative), and a side-by-side analysis of the various alternatives.

III. The PRSF is markedly inferior to the No-Action Alternative.

1. The No-Action Alternative is the Commissioner of Inland Fisheries and Wildlife immediately lifting his stay and issuing a fishway order to S.D. Warren in 2008. If Warren appeals this fishway order to the Maine Law Court, this litigation would add 12-15 months to the schedule (given that Warren's entire appeal of its Maine BEP §401 certifications for five dams to the Law Court took 15 months, Oct. 31, 2003 to Feb. 15, 2005). The No-Action Alternative would result in a fully litigated fishway order in late 2009 or early 2010, fishway construction in summer and fall 2010, and the fishways in operation for the 2011 spring migration season. This is identical to the PRSF schedule for Cumberland Mills. This would result in fish passage at the Saccarappa Dam in 2012 -- a full three years ahead of the PRSF schedule.

2. We have been told by PRSF parties that building fishways at the Cumberland Mills dam will be difficult, expensive and their initial and long-term effectiveness is doubtful. This claim is specious on numerous levels and unsupported by evidence. All of the S.D. Warren Presumpscot River dams present difficult fishway design and maintenance issues and will probably require multiple fishways. The Cumberland Mills Dam is by no means unique in this respect. Fishways at the Cumberland Mills dam will be designed by the same consulting fish passage experts (Maine DMR, USWFS, others) who will design all of the

other fishways on the Presumpscot River dams. If these experts cannot be trusted to design effective fishways at Cumberland Mills, why does the PRSF claim they can build effective fishways at Saccarappa and the other dams?

3. We have been told by PRSF signatories that a fishway order at the Cumberland Mills will be "difficult" to enforce. This is absurd and unsupported by evidence. Maine's fishway law allows the IF&W Commissioner full discretion to require multiple fishways at the twin Cumberland Mills Dam spillways of whatever design, type and size are deemed necessary and to place extensive, permanent conditions in the fishway order to fine-tune and ensure these fishways achieve their stated design and performance goals. See *Hallissey*, 2000 ME 143, ¶11, 755 A.2d, 1072. (Public bodies may exercise the powers granted to them by law either expressly or by necessary inference as an incidence essential to the full exercise of powers specifically granted).

4. Thus far, the only explanation we have heard why State of Maine officials support the PRSF is because they believe the Maine Dept. of Attorney General cannot be trusted to defend a lawful fishway order in Maine Court; and Maine's natural resources agencies and the Dept. of Attorney General cannot be trusted to craft a lawful and effective fishway prescription. We believe they can.

IV. Specific Issues in the PRSF

Friends of Sebago Lake does not believe the specific terms and conditions in the PRSF serve the public interest for the following reasons.

1. The PRSF calls for breaking state and federal law on the Presumpscot River for the next 50 years.

The PRSF calls for removing all requirements for upstream and downstream fish passage (except for American eels) at the Dundee Falls Dam that are now contained in the FERC license and Maine water quality certification and affirmed by state and federal courts. Removing these fish passage requirements would violate the standards of classification established by the Maine Legislature for the Presumpscot River, which require the Presumpscot River above Dundee Dam to be suitable habitat for all of its indigenous fish species, including sea-run Atlantic salmon, American shad, river herring and sea lamprey.

The plain language of the PRSF holds that migratory fish passage at Presumpscot River hydroelectric dams is not an integral component of the Presumpscot River's water quality standards. This is exactly the opposite of what the State of Maine, American Rivers and Friends of the Presumpscot River asserted before the Maine BEP, Maine's Superior Court and Maine's Supreme Court in 2002, 2003, 2004 and 2005. The argument that fish passage at hydro dams is not an integral part of Maine's water quality standards was first forwarded by Bangor Hydro-Electric Company and was refuted by Maine's Supreme Court in a

landmark 1991 opinion:

"We cannot conclude that the designated uses in Section 465 are mere surplusage. The level of detail bespeaks a considered determination of public interest. This legislative determination would be rendered a nullity if the agency responsible for reviewing compliance could consider only the numerical criteria and not whether the designated uses actually were achieved in a particular river. (FN4). Although there may be some ambiguity in the requirement that waters be "suitable for" the designated uses, we conclude that this language contemplates the designated uses actually be present. Our interpretation is reinforced by the legislative history, which reveals an intent that designated uses "are supported" in water meeting the classification standards. See Report of the Joint Standing Committee on Energy and Natural Resources, on Water Reclassification 6, 10, 80 (March, 1986)." *Bangor Hydro-Electric Co. v. Maine BEP*, 595 A.2d 438, 442.

In 2005, the Maine Supreme Court reaffirmed this opinion as it specifically pertains to fish passage for Atlantic salmon, American shad and river herring at the Dundee Falls Dam ("Maine's law is settled in this area.") *S.D. Warren v. Maine BEP*, 2005 ME 27, ¶21.

The Maine Superior Court stated in *S.D. Warren v. Maine BEP* (Maine Super. Ct., Cole, J., CUM-03-70) : "[T]he record supports the BEP's finding that 'phased installation of upstream and downstream anadromous fish passage facilities at each of the project dams is necessary to ensure that the project waters will be suitable for the designated uses of fishing and habitat for fish, and that the project waters will be of sufficient quality to support all species of fish indigenous to these waters ...' Consequently, this court finds that the BEP's condition regarding fish passage was not clearly erroneous since, 'all aquatic species indigenous to the receiving water' should be supported. 38 MRSA §465(3)(C) (2003); *Bangor Hydro-Electric Co.*, 595 A.2d at 433."

In its Order Denying Appeal of *S.D. Warren*, dated Sept. 30, 2003, the Maine BEP stated regarding the Dundee Dam:

"Nowhere, as appellant suggests, does the statute state that 'some' of the waters be suitable for the designated uses; that 'some' of the aquatic species indigenous to the waters be supported; or that 'some' of the habitat must be unimpaired or natural. On the contrary the terms 'receiving waters' and 'habitat' are unqualified and the statute specifically states that the water quality must be such to support 'all' indigenous aquatic species.

"In its April 30, 2003 Order, the Department determined that the Presumpscot River historically supported self-sustaining populations of various anadromous fish species, and that, over time, these fish were extirpated from the river by the construction of dams that blocked passage and pollution. The Department also determined that the State's fisheries agencies had developed a draft plan for the restoration of various anadromous fish to the river basin, and that the plan included the following order-of-magnitude estimates of annual anadromous fish production potential in the river basin: 73,900 American shad; 450,200 blueback herring; 147,700 alewife; and 386 Atlantic salmon. Finally, the Department determined that the phased installation of upstream and downstream anadromous fish passage facilities at each of the project dams is necessary to ensure that the project waters will be suitable for the designated uses for fishing and habitat for fish, and that the project waters will be of sufficient quality to support all species of fish indigenous to these waters, subject to the other provisions of this order."

RECOMMENDATION: The PRSF retain the Dundee Dam fishway prescription as it is contained in the FERC License, USFWS fishway prescription and Maine water quality certification.

2. The PRSF will cause violations of the water quality classification of Sebago Lake and the Crooked River for the next 50 years.

For thousands of years, anadromous Atlantic salmon swam up the Presumpscot River into Sebago Lake each spring and summer and spawned in the Crooked River as far as Albany Township, just south of Bethel, Maine. This biological connection with Sebago Lake and

Casco Bay was destroyed by impassable dams built in complete violation of Colonial law, Massachusetts law, and Maine law. During the short period in the 1880s when the State of Maine required fishways to be built and operated at all of the Presumpscot dams, large Atlantic salmon were documented swimming up to Sebago Lake from Casco Bay and spawning in its tributaries.

It is FOSL's goal to restore the historic connection between Casco Bay and Sebago Lake for its native Atlantic salmon and American eel during our lifetime. Restoring sea-run Atlantic salmon to their native home in Sebago Lake and the Crooked River is a key reason for our intervention and ongoing participation in the FERC relicensing of the Eel Weir Dam, which began in 1999. We are advocating for full fish passage for Atlantic salmon American eel at the Eel Weir Dam and all of the Presumpscot River dams. Our efforts to restore passage for Atlantic salmon to Sebago Lake at the Eel Weir Dam will be rendered null and void if fish passage requirements for Atlantic salmon are removed at the Dundee Dam. Maine's water quality standards require sea-run Atlantic salmon to have access to their indigenous habitat in the entire Presumpscot River (including the "Eel Weir Reach"), Sebago Lake, and Sebago Lake's tributaries. All historic evidence indicates that sea-run Atlantic salmon historically migrated into Sebago Lake and its tributaries until they were shut by impassable dams on the Presumpscot River.

RECOMMENDATION: The PRSF retain the Dundee Dam fishway prescription as it is contained in the FERC License, USFWS fishway prescription and Maine water quality certification.

3. There is No Biological Justification for Fish Passage Delays.

In the Dec. 3, 2007 edition of the Portland Press-Herald, Maine DMR Commissioner Lapointe said:

"The document spells S.D. Warren's responsibility to remove the Cumberland Mills Dam in 2011 and to build a fish lift at the Saccarappa Dam in Westbrook, the next upstream dam, in 2016. As the population of sea run fish continues to increase, S.D. Warren would begin building fish lifts on the upriver dams as early as 2026. That period is biologically justified based on the life histories of the target species."

This statement is provably false. If Maine DMR used its existing tank trucks and annually transferred a modest number of river herring from the Kennebec drainage to the Presumpscot above Westbrook, the 18,000 river herring target for the Mallison Falls dam would be achieved in approx. 4-5 years, ie. 2011-2012. We do not understand why DMR has not been transporting alewives from the Kennebec to the Presumpscot above Westbrook since 2000. Had this been done (even at the extremely modest level of one truckload per year), the 2008 alewife/river herring run in the Presumpscot would now meet or exceed the numerical triggers for Mallison Falls, Little Falls, Gambo Falls and Dundee Falls. River herring populations are not increasing quickly in the Presumpscot today solely because DMR has not taken specific steps to increase them, ie. by transporting river herring from

donor watersheds. The only reason Presumpscot river herring populations will expand very slowly over the next 30 years is there is no plan or program to expand them quickly. The PRSF should call for SAPPI to purchase a tank truck now and begin transport of river herring from other, donor rivers to the Presumpscot beginning immediately. By doing so, the numerical river herring triggers for all the dams will be easily met in 2011-2015.

RECOMMENDATION: The PRSF retain the Mallison Falls, Little Falls and Gambo Falls fishway prescriptions as they are contained in the FERC Licenses, USFWS fishway prescriptions and Maine water quality certifications.

4. The PRSF contains no restoration goals, objectives, measurable restoration benchmarks or funding for Atlantic salmon restoration on the Presumpscot River and fails to mention or discuss the goals and objectives of the 2002 Draft Fisheries Management Plan for the Presumpscot River.

In the July 11, 2007 edition of the Central Maine Morning Sentinel, attributes the following statement to Maine DMR official Patrick Keliher: *"Small numbers of Atlantic salmon also will begin to stray back up the river, [Keliher] said, although there are no plans in the near future to re-establish a migratory population of salmon in the Presumpscot."*

In the Dec. 3, 2007 edition of the Portland Press-Herald, Maine DMR Commissioner Lapointe said: *"The framework is designed to restore all sea run fish, most notably alewives, shad and blueback herring, but including any stray Atlantic salmon as well."*

Several speakers at the PRSF Public Hearing on Feb. 28th stated that it appears there are no Atlantic salmon in the Presumpscot River today and *there may never be* any Atlantic salmon in the Presumpscot River in the future.

The PRSF contains no funding or requirements or plans for restoring Atlantic salmon to the Presumpscot River. This is odd, give that the Kennebec and Saco River comprehensive settlement agreements contain clear restoration goals, objectives, plans, benchmarks and *funding* for active restoration of Atlantic salmon to those rivers.

FOSL does not understand the value or wisdom or utility of a PRSF that does not contain any funding for active restoration efforts for Atlantic salmon. A comprehensive 50-year restoration settlement is a contradiction in terms if it lacks lacks any restoration goals, objectives and measurable benchmarks and adequate funding to accomplish them.

RECOMMENDATION: The PRSF contain a clear statement of fisheries restoration goals, objectives, measurable benchmarks, proposed materials and methods, required funding levels and description of funding sources for Atlantic salmon, American shad, alewife, blueback herring, sea lamprey and American eel.

5. The five year delay between fish passage at Cumberland Mills and fish passage at Saccarappa is unnecessary, unlawful and biologically harmful.

There is no biological reason for delaying passage at Saccarrapa for five years after passage is available at Cumberland Mills. Fish will be at the base of Saccarrapa awaiting passage as soon as they can pass Cumberland Mills. Leaving them stuck below this dam for five years makes no sense. This five year delay is a five year violation of the Presumpscot River's narrative water quality standards. The Maine BEP and DEP would not issue a permit or water quality certification which allows a five year violation of the Presumpscot River's dissolved oxygen standards. This is no different.

RECOMMENDATION: The PRSF retain the Saccarappa Dam fishway prescription as it is contained in the FERC License, USFWS fishway prescription and Maine water quality certification.

6. Language in the PRSF granting sole discretion to Maine DMR regarding Trap and Transport is unlawful.

The PRSF states: "Trap and truck operations will commence at the direction of the Maine DMR upon 18 months notice, but no earlier than Nov. 1, 2017."

This stipulation unlawfully grants to Maine DMR sole discretion for deciding when and if Trap and Transport will ever occur at the Saccarappa Dam. Because of the massive fish passage construction delays in the PRSF, the Trap and Transport program is the only method to insure compliance with water quality standards for migratory fish in the Presumpscot River above the Mallison Falls, Little Falls and Gambo Falls dams. Maine DMR has no statutory authority to decide for itself when and if water quality standards for indigenous migratory fish will be attained in the Presumpscot River.

The PRSF stipulates that S.D. Warren will provide annual funding to Maine DMR for Trap and Transport "for so long as the State conducts such operations." This unlawfully grants Maine DMR sole discretion to cease Trap and Transport whenever it wants to and for whatever reason it wants to. Cessation of Trap and Transport prior to any fish passage construction at the Mallison, Little and Gambo dams would cause the Presumpscot River above these dams to be in violation of its water quality standards. Maine DMR has no statutory authority to decide for itself if the water quality standards for the Presumpscot River will or will not be met.

RECOMMENDATION: The PRSF be amended to require Trap and Transport for the entire license term of all dams unless and until effective fish passage is otherwise provided at the dams which allows for full attainment of Maine narrative water quality standards for all indigenous migratory fish species.

7. The delay in Trap and Transport until no earlier than spring 2018 is *ad hoc* and biologically harmful.

The Trap and Transport program in the PRSF was devised for the sole purpose of justifying the decadal delays in fish passage construction at the Mallison Falls, Little Falls and Gambo Falls Dams. If this were not the case, the Trap and Transport program would begin

immediately upon approval of the PRSF, using river herring and/or shad stocks from donor rivers to jump-start these populations in the Presumpscot River in anticipation of removal of Cumberland Mills Dam in 2011 and installation of fish passage at Saccarappa in 2015. This is what the State of Maine did with the 1987 Kennebec River Hydro Developers Group (KHDG) Agreement. Under this program, aggressive trap and transport began as soon as the Agreement was signed in 1987 and continued for many years before dam removal and mechanical fish passage was completed. If this model was followed on the Presumpscot in the PRSF, modest trap and transport would begin in spring 2008 (using DMR's existing equipment) and expand in each subsequent year. Under such a program, all of the numerical triggers for Mallison Falls, Little Falls and Gambo Falls and Dundee Falls would be achieved many years before the spring 2018 "earliest" start date for Trap and Transport in the PRSF. Were it not for the massive delays in fish passage construction at Mallison, Little and Gambo in the PRSF itself, this program would render moot the entire need for a Trap and Transport program after 2018.

A July 10, 2007 press release from PRSF signatory American Rivers states: "*Portions of the preliminary agreement include removing all components of the Cumberland Mills Dam, installing fish lifts at Saccarappa Dam and initiating a trap and truck program to jump-start the restoration of native sea-run species in the upper Presumpscot River.*"

This statement is false. If it was the goal of the PRSF signatories to "jump-start" migratory fish populations, you don't wait an entire decade after the Agreement is signed to begin "jump-starting" them. Waiting ten years to do anything is not "jump-starting." It is deliberately delaying restoration to coincide with the massive *ad hoc* delays in fish passage construction. The PRSF is the exact opposite of the successful trap and transport program begun on the Kennebec River in 1987. It is designed to delay fish restoration -- not to hasten it.

Unlike the Kennebec River program, the PRSF deliberately delays Trap and Transport for an entire decade (2018) in order *to slow down and delay* the pace of fish restoration so that the delays in fish passage at Mallison, Little and Gambo will *not look like* delays. The PRSF calls for deliberately retarding the pace of fisheries restoration on the Presumpscot in order to justify the massive delays in fish passage deadlines in the PRSF. It cites one *ad hoc* set of delays as the justification for another set of *ad hoc* delays which is then cited as justification for the first set of *ad hoc* delays.

For example, the only reason for the delay in Trap and Truck until after 2018 is that the Agreement itself allows a minimum three year delay in T&T after passage is available at Saccarappa (2015) and a four year delay in passage at Saccarappa from when passage is available at Cumberland Mills (2011). There is no biological justification for this seven (or more) years of delay. There is no biological reason for Trap and Transport not beginning when the PRSF is approved by regulators, or at any date afterwards and before 2018. There is no justification for this enormous delay whatsoever, except that the PRSF requires it. The delay is entirely *ad hoc*. The only reason why there will not be 30,000 river herring at the base of the Saccarappa Dam in 2015 is that the PRSF signatories are going to stubbornly sit on their hands and do nothing to restore river herring to the Presumpscot until some time

"no earlier than" spring 2018.

RECOMMENDATION: The PRSF be amended to require any Trap and Transport to be conducted from the date of regulatory approval of the Agreement and for the entire license term of the requisite dam(s) unless and until effective fish passage is otherwise provided at the dam(s) which allows for full attainment of Maine narrative water quality standards for all indigenous migratory fish species.

8. Language in the PRSF requiring Maine DMR and U.S. Fish & Wildlife Service and their staff to support and defend the SA before the FERC, the Maine BEP and Maine's and U.S. Courts is unlawful and ludicrous. The PRSF states: "The Parties agree to support the following ... (b) Amendment of the water quality certifications for the Saccarappa, Mallison Falls, Little Falls, Gambo Falls and Dundee Projects by the Maine DEP to reflect the terms of the SA, without material deletion, addition or modification."

This Gag Order is unlawful and insulting. It would prevent USFWS and Maine DMR staff from telling the truth in regulatory proceedings connected to the PRSF. As public servants, Maine DMR and the U.S. Fish & Wildlife Service cannot legally obligate their staff to slavishly adhere to a certain predetermined position of fact, science and law if and when staff are asked to provide testimony, technical comments or sworn affidavits in a FERC proceeding, a Maine BEP water quality certification proceeding or subsequent Maine or federal court proceeding involving modifications of the water quality certifications and federal licenses for these dams. This entire stipulation appears designed to intimidate and prevent Maine DMR and USFWS staff from speaking the truth. It creates a Catch-22 where the FERC and Maine BEP approve the PRSF on the basis of comments from DMR and USFWS experts, while at the same time, the PRSF explicitly prohibits DMR and USFWS staff experts from expressing anything to FERC or the BEP except full support for the PRSF.

RECOMMENDATION: This language be struck from the PRSF.

V. Conclusion.

The PRSF is the only obstacle delaying installation of fish passage on the Cumberland Mills and other Presumpscot River dams. The claim that the PRSF is good because it will have averted 12-15 months of potential litigation has been mooted by the slow progress of the PRSF itself. The PRSF/SA negotiations have consumed the past 12 months and are still not anywhere near complete. Large portions of the SA have still not been negotiated yet and are not available for public review or comment. PRSF signatories cannot predict when the final SA will be ready for public comment and regulatory review by FERC and the Maine BEP; or how long this public review and regulatory process might take. Any potential time savings from the PRSF averting litigation over a 2007 State of Maine fishway order at the Cumberland Mills Dam have been used up. The PRSF is now the problem, not the solution.

Sincerely,

Roger Wheeler, president
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Fryeburg, ME 04037