

IN THE MATTER OF

U.S. ARMY CORPS OF ENGINEERS)	WATER QUALITY CERTIFICATION
Bath and Phippsburg, Sagadahoc County)	APPEAL—U.S. ARMY CORPS OF
MAINTENANCE DREDGING)	ENGINEERS RESPONSE TO
L-16281-4E-E-N (approval))	SUPPLEMENTATION OF RECORD.

INTRODUCTION

On June 3, 2011, the Board of Environmental Protection (“BEP”) sent a letter to the parties of the appeals of the Department of Environmental Protection’s (“DEP”) April 14, 2011 Water Quality Certification (“WQC”), seeking the parties’ positions on various materials submitted in support of appeals. The U.S. Army Corps of Engineers (“Corps”) provides the following in response to BEP’s request. As discussed more fully below, the extrarecord materials submitted in support of the three appeals should not be considered by BEP, and the portions of the appeals relying on such materials should be stricken. Redacted versions of the appeal submissions are provided as exhibits to this document, and these should be used as BEP considers the appeals in this matter. In addition to the materials cited in the June 3, 2011, the Corps objects to any and all materials cited in Appellants’ filings that have failed to satisfy the requirements of 06-096 C.M.R. Ch. 2 § 24(b)(5).

**APPELLANTS FAILED TO SATISFY THE REQUIREMENTS
OF DEP’S ADMINISTRATIVE RULES**

The DEP administrative rules found at 06-096 C.M.R. Ch. 2 § 24(b)(5) set forth requirements that parties to an appeal must satisfy in order to introduce supplemental materials that were not part of the administrative record before the agency when it made its decision. Here, none of the Appellants have satisfied the requirements of the administrative rules. First, the rules require that “any person seeks to supplement the record, that person shall provide copies of all new documents... to the Board, Department staff and all other persons notified of the appeal.” *Id.* Here, none of the materials described in BEP’s June 3, 2011 letter were provided to BEP, DEP staff, or the parties, instead Appellants simply cite to them in their appeal documents. This fails to satisfy the requirements of the administrative rules.

Next, the rules require a showing that “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 that “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.” 06-096 C.M.R. Ch. 2 § 24(b)(5)(a)-(b). Here, Appellants have not made or even

attempted to make such a showing for any of the cited materials. As discussed further below, most of the extrarecord materials were in existence at the time DEP was considering the Corps WQC application, yet the Appellants failed to provide such materials to the agency during the public comment period. Appellants have not, and indeed cannot plausibly claim that such materials were not available through the exercise of due diligence. Other items provided that post-date the DEP permit decision fail to satisfy the administrative rule's requirement of relevance and materiality, and Appellants failed to show that they brought the materials to DEP's attention at the earliest possible time. It is illogical and inherently unfair to argue that DEP's WQC decision was flawed based on materials that were not before the agency when it made its decision, and BEP should not countenance such tactics by Appellants.

I. Appellant Dot Kelly

On page 3 at paragraph 2, sentence 2 of her appeal, Appellant Kelly cites to testing that was allegedly conducted on materials located on her shoreline. These test results were not provided to DEP, and were plainly not part of the record before the agency. Perhaps more troubling, the actual test results were not provided in support of the appeal, only in the form of Appellant Kelly's characterization of the results. BEP should disregard these alleged test results and any argument based upon them. To the extent Appellant Kelly should argue that BEP should consider these test results because they were not conducted until after the WQC was issued, such an argument should be disregarded, as it was entirely within the control of Appellant Kelly when such tests would be performed, and if they had been performed earlier they could have been provided to DEP as part of the public comment process. Thus, Appellant Kelly has failed to satisfy the administrative rules' requirement of reasonable diligence. Moreover, as Appellant Kelly seemingly acknowledges, the relevance of such test results to disposal events 16 months prior to sampling is lacking, particularly where there is no discussion as to what other events have taken place in the river during that timeframe. Finally, there is no explanation of the methodology of sampling, whether the samples were taken randomly or were "cherry-picked" to get the results most favorable to the agenda Appellant Kelly was trying to satisfy.

On page 10 at paragraph 1 sentences three and four, Appellant Kelly cites to testimony and evidence presented to a legislative committee. Appellant Kelly does not provide transcripts of such testimony, nor the evidence in any form and thereby fails to satisfy the administrative rules' requirement that materials should be provided to BEP, DEP staff, and appellants. Instead, Appellant Kelly provides her characterization of such testimony and evidence. BEP should disregard these sections of Appellant Kelly's appeal, as the legislative hearing occurred after the WQC decision and could not have been part of the administrative record. Moreover, Appellant Kelly's characterization of testimony and evidence is not the best evidence of such, but instead is simply an argumentative casting of post-decisional events.

On page 10 at paragraph 2, Appellant Kelly characterizes, but does not provide, a Corps document she calls “AD-A257,” “Sand Wave Shoaling,” Douglas R. Levin et al., Improvement of Operations and Maintenance Techniques Research Program, Technical Report HL-90-17 Report 1 (Sept. 1992). This document was not provided to DEP and was not part of its record, so it should not be considered as part of the appeal. This document, created in 1992, was plainly in existence at the time DEP made its decision, so there is no reason why it could not have been presented by Appellant Kelly during the public comment process with the exercise of due diligence, as the administrative rules require. These portions should be stricken from the appeal.

On page 11 at paragraph 2, from sentence 6 through the end of the paragraph, Appellant Kelly provides argument supported by citations to a document and a website¹ that were not provided to DEP or part of DEP’s record when it made its WQC decision, so it should not be considered as part of the appeal. The document cited had been in existence for eight years at the time DEP made its decision, so there is no reason why it could not have been presented by Appellant Kelly during the public comment process, with the exercise of due diligence, as the administrative rules require. As such, they should not be considered by BEP as part of the appeal.

II. Appellant Town of Phippsburg et al.

On page 11 at the last sentence and footnote 8, Appellant Phippsburg cites to testimony before a Maine legislative committee. Appellant Phippsburg does not provide transcripts of such testimony, nor the evidence in any form and thereby fails to satisfy the administrative rules’ requirement that materials should be provided to BEP, DEP staff, and appellants. Instead, Appellant Phippsburg provides characterization of the testimony and argument supported by such characterization. BEP should disregard these sections of Appellant Phippsburg’s appeal, as the legislative hearing occurred after the WQC decision and could not have been part of the administrative record. Moreover, Appellant Phippsburg’s characterization of testimony is not the best evidence of such, but instead is simply an argumentative casting of post-decisional events.

On page 14 at the last sentence and footnote 14, Appellant Phippsburg cites to a 1998 U.S. Fish and Wildlife Service document. This document was not part of the DEP administrative record, and as such any citation to or argument made from citation to this document should not be considered. The document had been in existence for thirteen years at the time DEP made its WQC decision, so there is no reason why it could not have been presented by Appellant Phippsburg during the public comment process with the exercise of due diligence as the administrative rules require. As such it should not be considered by BEP as part of the appeal.

¹ When attempting to view the USEPA web page at the URL address provided by Appellant Kelly, the undersigned received the message: “The requested page does not exist. Please check your URL.”

On page 18 at footnote 18, Appellant Phippsburg cites to a 1998 Corps document. This document was not part of the DEP administrative record, and as such any citation to or argument made from citation to this document should not be considered. The document had been in existence for thirteen years at the time DEP made its WQC decision, so there is no reason why it could not have been presented by Appellant Phippsburg during the public comment process, with the exercise of due diligence as the administrative rules require. As such it should not be considered by BEP as part of the appeal.

On page 28 at the second sentence of the first full paragraph, Appellant Phippsburg cites to testimony before a Maine legislative committee. Appellant Phippsburg does not provide transcripts of such testimony, nor the evidence in any form and thereby fails to satisfy the administrative rules' requirement that materials should be provided to BEP, DEP staff, and appellants. Instead, Appellant Phippsburg provides characterization of the testimony and argument supported by such characterization. BEP should disregard these sections of Appellant Phippsburg's appeal, as the legislative hearing occurred after the WQC decision and could not have been part of the administrative record. Moreover, Appellant Phippsburg's characterization of testimony is not the best evidence of such, but instead is simply an argumentative casting of post-decisional events.

III. Appellant Watts et al.

On pages 4 to 5 of their appeal, Appellant Watts cites to and quotes from a 1998 U.S. Fish and Wildlife Service document. This document was not part of the DEP administrative record, and as such any citation to or argument made from citation to this document should not be considered. The document had been in existence for thirteen years at the time DEP made its WQC decision, so there is no reason why it could not have been presented by Appellant Watts during the public comment process, with the exercise of due diligence as the administrative rules require. As such, it should not be considered by BEP as part of the appeal.

On page 5 at footnote 3, Appellant Watts cites to a 2007 U.S. Fish and Wildlife Service document. This document was not part of the DEP administrative record, and as such any citation to or argument made from citation to this document should not be considered. The document had been in existence for four years at the time DEP made its WQC decision, so there is no reason why it could not have been presented by Appellant Watts during the public comment process, with the exercise of due diligence as the administrative rules require. As such it should not be considered by BEP as part of the appeal.

On page 6 at the first sentence of the final paragraph and footnote 5, Appellant Watts cites to a 2007 U.S. Fish and Wildlife Service document. This document was not part of the DEP administrative record, and as such any citation to or argument made from citation to this document should not be considered. The document had been in existence for four years at the time DEP made its WQC decision, so there is no reason why it could not have been presented by

Appellant Watts during the public comment process, with the exercise of due diligence as the administrative rules require. As such it should not be considered by BEP as part of the appeal.

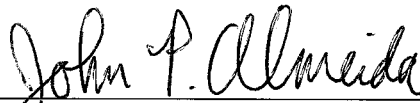
CONCLUSION

For the reasons set forth above, the materials from Appellants' appeals identified in the June 3, 2011 BEP letter should be stricken from the record, and arguments citing to such materials should be disregarded.

DATE: June 8, 2011

Respectfully submitted,

FOR U.S. ARMY CORPS OF ENGINEERS,



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