COUNTY COUNCIL OF DORCHESTER COUNTY
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September 16, 2014

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Corps of Engineers
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US FWS Chesapeake Bay Field Office
177 Admiral Cochrane Drive
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Joseph P. Gill
Secretary
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Peyton Robertson
Director
NOAA Chesapeake Bay Office
410 Severn Avenue
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Re: Permit (MD DNR/Alternate Material) 2007-03659-M24, as amended and revised
Coordination relative to USACE, NOAA, USFWS and MDNR oyster restoration project in the Chesapeake Bay

Dear Colonel Jordan, Ms. LaRouche, Mr. Robertson and Secretary Gill:

The United States Army Corp of Engineers ("USACE"), in consort with the U.S. Fish and Wildlife Service ("USFWS"), the National Oceanic and Atmospheric Association ("NOAA"), the Maryland Department of Natural Resources ("MDNR") and other federal and state agencies, stands in direct violation of federal law.

Your agencies have become heavily involved in the current oyster restoration program without coordinating your actions and planning with Dorchester County, Maryland. Your failure to coordinate violates the National Environmental Policy Act ("NEPA") and the economic, human and environmental rights of the citizens of Dorchester County. As the executive local elected officials of the County we insist that you immediately begin to rectify your violations and perform your clearly stated NEPA duties.

NEPA requires that prior to initiating a federal action such as your oyster restoration program your agency must meet with and COORDINATE WITH LOCAL GOVERNMENTS THAT WILL BE EFFECTED BY THE PROGRAM.

As a member of the Clean Chesapeake Coalition (the "Coalition") we are joined by Allegheny, Caroline, Carroll, Cecil, Frederick, Harford, Kent, Queen Anne's and Wicomico Counties in this demand that your agency coordinate with us regarding your oyster restoration program. Our requested coordination sessions will facilitate coordination also in furtherance of our County's restoration policy that is recognized as a best management practice for improvement of Chesapeake Bay water quality.

Dorchester County has scheduled a coordination meeting for either October 30 or November 13, 2014 to allow your agency the opportunity to meet our governing body and begin the coordination process that Congress has mandated by NEPA and two Presidents have ordered by Executive Orders 13352 (August 26, 2004) and 13508 (May 12, 2009). Please confirm the preferred date.

The harm being done by your failure to coordinate and by your program not being influenced by local policies consists of heavy adverse impact on multiple Maryland local governments, so we intend to invite Coalition member counties to join with us for a multi-County meeting. For your convenience we will issue the invitation so that you can engage in coordination with multiple counties during one meeting. The meeting will be held in Dorchester County, but each Maryland County Government that participates will convene an official meeting for government to government coordination.

The Sheriff of Dorchester County will also participate in the meeting as a local elected official because of the potential violation of sections 4-11A-13 (2014) and 4-008 (2014) of the Natural Resources Article of the Maryland Annotated Code by introducing into Maryland waters non-indigenous and untested materials.

What we expect of your agency is simple. We just expect you to follow the letter of the law just as you would demand of our citizens. We expect you to coordinate your program with us as you should have from the inception of the USACE environmental assessment (EA) analysis. Had you coordinated you would have been aware that your program is inconsistent with and in conflict with the specific oyster productivity policy of the County. Had you coordinated you could have complied with the President's Executive Order 13508 that directs you to closely coordinate your actions with local government actions and to build on the strengths of local governments rather than put in place programs in direct conflict with and in defiance of local policy.

Had you coordinated you would have been advised of the success of our local policy in achieving self-sustainable recovery of historic oyster bars without imposing a financial burden on the taxpayers. With such information and exchange of expertise at the local level, you could have discussed our policy in the EA in place of your unsound conclusions as to the inadequacy of use of natural shell from Maryland water.

The law, NEPA, requires that you coordinate with local governments prior to activating any major federal action such as your oyster restoration program.

CLEAN CHESAPEAKE COALITION

Your personnel are familiar with the legal protections provided by NEPA to local governments and their citizens. Repeatedly, federal agencies have been required to conform to them by courts of virtually every level of jurisdiction. But, you ignored them when you initiated the current restoration program.

Had you coordinated with us "early in the NEPA process" as directed by the Council on Environmental Quality (40 C.F.R. § 1501.2), you could have complied with NEPA and the CEQ's implementing regulations. Had you done so, you could also have complied with the President's directions to take into account and respect local interests and to closely "coordinate" your actions with those of our County and other Coalition counties. That compliance would have provided to you locally tested and verified information based on sound science and sound economics. You could have avoided violation of federal law, potential violation of state law and the expenditure of millions of taxpayer dollars on a program designed to fail.

For 45 years, NEPA has been the law. Its implementation regulations were issued by the CEQ, which operates at the highest level of the executive branch, in the White House Executive Department. Federal and state courts of every jurisdictional level have confirmed the requirements of NEPA and the CEQ regulations. The legal requirements we expect you to follow are not new; they are tried and tested, and they have remained consistently applicable to projects such as your Chesapeake Bay oyster restoration project in which you are involved.

In the coordination process CONGRESS ORDERS YOU, at a minimum to do the following:

1. Use every practicable means to "coordinate" your plans with local governments in order to "to create and maintain conditions under which man and nature can exist in productive harmony and fulfill the social, economic and other requirements of present and future generations."

2. Use every practicable means to "coordinate" your plans with local governments in order to "preserve important historic, cultural and natural aspects of our national heritage" and "achieve a balance between population and resource use which will permit high standards of living and a wide sharing of life's amenities and enhance the quality of renewable resources." In "coordination" with local governments you must prepare a "detailed statement" on:

    a. "the environmental impact of the proposed action,"

    b. "any adverse environmental effects which cannot be avoided should the proposal be implemented,"

    c. "alternatives to the proposed action,"

    d. "the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity," and

e. "any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented."

You are more than aware that neither your agency nor any other agency involved in your program complied with this law. You did not meet with and coordinate with us prior to initiating your program. You did not meet with us and discuss your proposed program and our conflicting policy. So, it was impossible for you to comply with 40 C.F.R. § 1501.2 in which CEQ insists that:

> "Agencies shall integrate the NEPA process with other planning at the earliest possible time to insure that planning and decisions reflect environmental values, to avoid delays later in the process and to head off potential conflicts"
> ...
> Each agency shall:
> ...
> Study, develop and describe appropriate alternatives to recommended courses of action in any proposal which involves unresolved conflicts concerning alternative uses of available resources..."

To these ends, CEQ requires in 40 CFR § 1501.2 (d)(2) that every federal agency consult "early with appropriate ... local agencies,"

It was also impossible for you to comply with the purpose of Part 1501 of 40 CFR which calls for "emphasizing cooperative consultation among agencies before the environmental impact statement is prepared rather than submission of adversary comments on a completed document."

Had you coordinated with Dorchester County and other coalition counties like Kent, Queen Anne's, Wicomico, and Cecil and with commercial watermen, you would have heard and discussed the fact that the programs used by their watermen, consistent with County policies, have resulted in self sustainable natural oyster bars that enhance the entire human environment, *i.e.* the natural ecological, economic, cultural and social environments of Dorchester County and the other Coalition counties, the citizens of Maryland and beyond.

The CEQ has imposed on you an even higher requirement. In implementing NEPA, the CEQ has ruled that all federal agencies "TO THE FULLEST EXTENT POSSIBLE" must "encourage and facilitate public involvement in decisions which affect the quality of the human environment," issue a NEPA report to "identify and assess the reasonable alternatives to proposed actions that will avoid or minimize adverse effects of these actions upon the quality of the human environment," and "enhance the quality of the human environment and avoid or minimize any possible adverse effects of their actions upon the quality of the human environment."

By failing to meet with and coordinate with the local government of Dorchester County and other Coalition counties; by failing to discuss with local officials all the elements of discussion set forth in NEPA and the CEQ regulations, and by failure to issue an environmental report including all the findings required by Congress and the CEQ, including the input of Dorchester County, you have clearly, without doubt, violated the law.

In *Calvert Cliffs' Coordinating Comm. Inc v. U.S. Atomic Energy Comm'n*, 449 F.2d 1109, 1115 (D.C. App. 1971) the Court held that every federal agency must comply with NEPA as implemented by CEQ unless there is a specific statutory obligation that clearly precludes fulfillment of the NEPA requirements. There is no specific statutory obligation of your agency that precludes you from complying with the law.

Your agency will no doubt point to public informational meetings, publishing public notice of your intentions, sending notice of your intentions to the State Clearinghouse and issuing public notices as evidence that you did coordinate with Dorchester County and other Coalition counties. But all these symbolic gestures do not constitute "coordination."

The word "coordination" specifically chosen by Congress for the standard of communication and local involvement mandated by NEPA means far more than providing notice to local governments, far more than writing a letter or reviewing "comments" submitted by local governments. In California Native Plant Society v. City of Rancho Cordova, 172 Cal. App. 4th 603; 91 Cal Rptr. 3d 571; 2009 Cal. App. LEXIS 430 (Ct. App, 3rd California Appellate District 2009) the California Court analyzed what the word coordination entails in agency interdisciplinary and interagency planning:

> "That leaves us with the Society's challenge to consistency of the Project with the provision in Action NR.1.7.1 that required the mitigation to be "designed... in coordination with' the U.S. Fish and Wildlife Service (USFWS) and the California Department of Fish and Game (CDFG)." According to the Society, "The City did not coordinate with [the Service]. It approved the Project over [the Service's] repeated objections that the proposed biological resource mitigation measures were inadequate."
>
> In response, the City argues this provision in the general plan was satisfied because the Service was "consulted and [its] views made known during the EIR process." The City argues that to "coordinate" means "to 'negotiate with others in order to work together effectively,'" and "[t]he City satisfied its obligation of trying to work together with [the Service]" by "solicit[ing], carefully consider[ing], and respond[ing] to comments from [the Service]."

The definition of "coordinate" the City cites is a valid one (see New Oxford Dict. (2001) p. 378, col. 2), but we believe that even under this definition the concept of "coordination" means more than *trying* to work together with someone else. Even under the City's definition of the word, "coordination" means negotiating with others *in order to work together effectively.* To "coordinate" is "to bring into a common action, movement, or condition", it is synonymous with "harmonize." (Merriam-Webster's Collegiate Dict., *supra,* at p. 275, col. 1.) Indeed, the very dictionary the City cites for the definition of the word "coordinate" defines the word "coordination" as "cooperative effort resulting in an effective relationship." (new Oxford Dict., *supra*, at p. 378, col. 3.)

Although the City suggests "coordination" is synonymous with "consultation"—and therefore the City satisfied its "coordination" obligation under the general plan at the same time it satisfied its "consultation" obligation under the plan—that is not true. While the City could "consult" with the Service by soliciting and considering the Service's comments on the draft EIR, the City could not "coordinate" with the Service by simply doing those things. The City may be correct in asserting that "[c]consultation is not a synonym for 'agreement,' " but Action NR.1.7.1 required more than "consultation" with the Service; it required "coordination," and by definition "coordination" implies some measure of cooperation that is not achieved merely by asking for and considering input or *trying* to work together. Had the City intended the obligation under Action NR.1.7.1 to be one of mere "consultation," it could have used that word, as it did in Action to be one of mere "consultation," it could have used that word, as it did in Action NR.1.1.3. The fact that it did not do so supports the conclusion that the City intended "coordination" to have a different meaning than "consultation," consistent with the dictionary definitions of those words.

That the word "coordination," as used in the City's general plan, implies a measure of cooperation is apparent not only from the dictionary definition of the word, but also from the context in which the word is used in the plan. Essentially, the plan provides that when development projects will occur in areas where special-status species are found or likely to occur, the City will require mitigation for the impacts of development on those species, and the mitigation will be designed in coordination with the Service. Cooperation is important in this context—particularly with regard to this Project—because, as the City admitted in its response to the Service's comments on the draft EIR, "if the City approves the

> project, the applicants still need to obtain Clean Water Act permits from the Corps ... , which will consult with the ... Service, pursuant to Section 7 of the Endangered Species Act, as part of its process of considering those permits." Because the Service will have a role in the issuance of later permits of the Project, "coordination" between the City and the Service in designing mitigation for the impacts of the Project on special-status species like the vernal pool fairy and tadpole shrimp serves the laudable purpose of minimizing the chance the City will approve the Project, only to have later permits for the Project denied because of the Service's disapproval of the mitigation measures the City imposed on the Project in the absence of "coordination" with the Service.
>
> Unlike the City, we do not read this "coordination" requirement as "require[ing] the City to *subordinate* itself to state and federal agencies by implementing their comments and taking their direction." At the same time, however, we cannot reasonably deem this "coordination" requirement satisfied by the mere solicitation and rejection of input from the agencies with which the City is required to coordinate the design of mitigation measures for the Project."

Again, for your convenience and the convenience of the staff to whom you will refer this demand for response, we set forth in more detail the NEPA and CEQ requirements, as well as Presidential directives to your agency set forth in Executive Orders referenced in the Appendix. Suffice to say, here, that the President, in Executive Order 13508 (May 12, 2009) orders you to closely coordinate your actions with local governments and their actions and policies. The President also orders you to concentrate on cost effectiveness of programs while building on the strengths of local governments and their policies. You are well aware that your agency violated both Executive Orders by failing to meet with and coordinate with Dorchester County and other Coalition counties - you could not possibly "build on their strengths" without such coordination meetings.

Before you send a general brush-off of this demand by saying you did take into account the "human environment", please study carefully the definition of that term by CEQ. When the term is used in NEPA and CEQ regulations, it involves the whole "natural and physical environment and **the relationship of people with that environment."** In studying that relationship, you must include in your study direct and indirect effects on the "aesthetic, historic, cultural, economic and social aspects" of your action. You and all participating agencies failed to comply. For example, as to economic considerations in particular, you merely conclude, without study, analysis or statement of basis, that the economy will not be severely impacted on a long term basis. Even a cursory analysis defies the logic of that conclusion. There is even a failure of rational link between the statements in the EA as to the economy of the Counties and

the conclusion that your program will not create economic harm. And, by ignoring the Dorchester County policy, you fail to compare the economic gain from implementation of that policy with the harm to result from your program. As a result of failures of analysis such as this, your program is being operated in violation of federal law, and in violation of specific directives from your Chief Executive.

Your program which involves dumping of granite rocks and polluted sediment balls in the Little Choptank River is killing the oyster population that has naturally recovered on the historic oyster bars in that river. In addition, you have permitted and funded a MDNR program that is directed exclusively to spending tens of millions of dollars to create oyster sanctuaries that will do nothing to enhance the economic, cultural and social environments of the citizens of Dorchester County and other Coalition counties. Ultimately, due to their cost, severe funding limitations and the limited number of oyster bars susceptible to recovery, the sanctuaries will be non-sustainable and will not meaningfully improve either the short term or long term productivity included in the required NEPA study. Had you met with and coordinated with Dorchester County, we could have told you that based upon real life tried and true experience.

Significant effects/impacts recognized by USACE and undisputed facts:

Restoring a robust population of oysters in the Chesapeake Bay would yield significant environmental benefits. Oysters filter and remove sediments, nitrogen and phosphorus from the waters in which they live. (USACE Final Environmental Assessment and Finding of No Significant Impact, Chesapeake Bay Oyster Restoration Using Alternative Substrate dated May 2009 (2009 EA), § 3.4.7 at 22 (oysters remove suspended sediments from the water and deposit them as pseudo feces), § 5.3.1 at 34 (oysters feed on phytoplankton – nitrogen removal); Chesapeake Bay Oyster Recovery: Native Oyster Restoration Master Plan, Maryland and Virginia dated September 2012 (2012 MP) § 4.4 at 69 (oysters filter water while feeding and remove sediments and other solids depositing what they do not ingest as pseudo feces), § 4.4.2 (oysters eat phytoplankton), § 5.7.1 at 168-69.)

Oysters also remove carbon dioxide from the water, which is converted into the calcium carbonate ($CaCO_3$) that forms the oyster's shell. (2012 MP § 5.7.1 at 168-69.) USACE estimated that if oyster density in the Choptank River was increased to 10 per square meter over approximately 5,000 acres, 50% of the summer input of nitrates and 350% of the summer inputs of phosphates entering the Choptank River from stormwater runoff would be removed from the river. (*Id.*)

EPA estimates that 1,000,000 market sized oysters (3" oysters) remove between 700 and 5,500 pounds of nitrogen from the Bay/Bay tributaries annually. (Chesapeake Bay Total Maximum Daily Load of Nitrogen, Phosphorus and Sediment December 29, 2010 (2010 TMDL) Apx. U at U-2.) EPA set goals in the 2010 TMDL for oyster restoration. Specifically, EPA stated:

> Filter feeders play an important role in the uptake of nutrients from the Chesapeake Bay and have the potential to significantly

> improve water quality if present in large numbers. The current goal for the Chesapeake Bay is to increase the native Eastern oyster, Crassostrea Virginia, population tenfold. A population increase of that magnitude could remove 10 million pounds of nitrogen annually (Cerco and Noel 2005).
> ...
> Stephenson (2009) estimates that the cost of total nitrogen reduction from oyster assimilation at $0-$100 per pound. In comparison, agricultural best management practices (BMPs) costs in Virginia [in 2009] range from $4 to $200 per pound and urban stormwater BMPs can be $25 to more than $1,000 per pound or more (Stephenson 2009).

(*Id.*, Apx. U at U-1, U-2.) EPA contemplated and discussed Bay restoration programs that would give credits to jurisdictions undertaking the restoration of oyster beds in the Bay. (*Id.* at U-3 - U-4.) Oyster bed reclamation and restoration, therefore, is a viable and preferred method for restoring the water quality of the Bay and Maryland Bay tributaries.

The sediments deposited in the Bay during and in the aftermath of Hurricane Agnes in 1972 destroyed the oyster beds north of the Bay Bridge. (2012 MP § 4.6.3 at 83-84.) Sediments smother and kill oysters and prevent oyster spat from seeding because spat require hard clean shell on which to attach in order to grow new oysters. (2009 EA § 3.3.1 at 13 (sediments now cover most historic oyster beds and planted shell becomes covered in an average of 5.5 years); 2012 MP § 2.1.1 at 17 ("Shell is being lost due to burial by sediments. Larval oysters require hard substrate on which to settle to grow."), § 4.1.1 at 49 (sediments eliminate oyster habitat), § 4.1.1.4 at 56 (sediment smothers oysters), § 5.5.4.5 at 150 (oyster growth must exceed sedimentation rates in order for oysters to survive).)

Your EA totally ignores Hurricane Agnes (1972) and her long-lasting devastation; one who reads the EA would have not a clue that the destruction of oysters by sediment began in earnest the year after Agnes smothered the floor of the Bay. Your report includes agricultural practices and storm run-off as among the causes, but combined they cause only a small fraction of add-on to Agnes' damage.

The USACE has repeatedly recognized the significant economic, cultural and social importance that the commercial harvesting of oysters has on the human environment in Maryland counties such as Dorchester and other Coalition counties. More specifically, USACE has observed and concluded:

> The Eastern oyster is highly valued as a source of food, a symbol of heritage, an economic resource supporting families and businesses, and a contributor to the health of the Chesapeake Bay ecosystem. Harvesting, selling and eating oysters has historically been a central component and driver of social and economic development in the region. From the colonial period to the 20th

> century, oyster harvests supported a vibrant regional industry, which in turn supported secondary industries, fishing communities, and a culinary culture centered in the bivalve.
>
> Oysters are an economic resource that supports unique communities and an industry that is an important component of the region's heritage and identity. Within these communities, oysters are a source of income for families of watermen and those employed in the processing of oysters (*e.g.*, shuckers); they support multigenerational businesses and contribute to a regional economy.
>
> The seafood industry contributes approximately $400 million each year (State of MD 2006) to Maryland's total gross domestic product of $257.8 billion (http://www.bea.gov/regional/gsp/). In 2005, commercial fisheries landings (*i.e.*, the weight, number and/or value of a species of seafood caught and delivered to port) alone earned $63,699,831 million in the State of Maryland (NMFS, 2006). Direct users include watermen, oyster growers, and oyster processors, packagers, shippers and retailers.
>
> More than 6,600 watermen work Chesapeake Bay, providing seafood to 74 seafood processing plants in Maryland; these plants employ more than 1,300 people (Md. Seafood 2005). These jobs represent an assortment of positions, including day laborers, sales representatives, managers, maintenance workers, delivery personnel, and others.

(2009 EA § 3.4.5 at 20-21.)

> The historic watermen's communities along the Chesapeake's western and eastern shores offer an aesthetic charm and have contributed greatly to tourist-based industries in these areas. Traditional workboats operating in these areas bring aesthetic appeal to the region as well as cultural value.

(2009 EA § 3.4.7 at 22.)

> Oysters give people the opportunity to interact with the marine environment in the most salient way possible – through work. These communities have helped to shape the character of the Chesapeake Bay region. Oysters are also a natural resource that carries cultural meaning as one symbol of a productive, healthy, beautiful Chesapeake Bay. ... To incorporate cultural meaning into policy, all groups' knowledge and values (implicit and explicit) must be recognized and evaluated based on an

> understanding of (1) how each group understands and uses oysters, and (2) how each group's perception of oysters affects its understanding of, support for, or resistance to policies and programs designed to manage and sustain the Bay's natural resources.

(2012 MP § 4.7, Cultural and Socioeconomic Conditions at 85-87.)

After crediting the importance of oysters, one would expect that your agency's EA would credit the watermen and their use of the best management practice of dredging in accord with the Dorchester County policy---credit them for demonstrating the dramatic increase in oyster production in those areas where they have power dredged. A reading solely of your EA would lead a decision maker to conclude that oyster numbers are in virtual and continuing decline. That is not true where the County policy is allowed to be implemented.

In the 2012-2013 season, 341,000 bushels of oysters were harvested by Maryland watermen. 62% or more of the oysters were harvested where MDNR has permitted oyster dredging with power boats. Tarnowski, Mitchell and Staff, Maryland Oyster Population Status Report 2013 Fall Survey at 1, MDNR Publ. No. 17-8192014-723 (Aug 2014) (2013 MDNR Oyster Survey). This was the highest harvest since the 2000-2001 season. (*Id.*) The dockside value of the 2012-2013 harvest was $10.9 million dollars. (*Id.* at 15.) This was a $6.3 million dollar increase over the dockside value of the 2011-2012 harvest. (*Id.*)

The harvest in 2013-2014 was even more robust and profitable than the 2012-2013 harvest. In the 2012-2013 season, the average dockside price for oysters was $30 per bushel. With over 500,000 bushels being harvested and sold, the dockside value of the 2013-2014 harvest was over $15 million dollars. Again, this was another significant increase in the economic value provided by oysters to the local economy of Maryland counties.

Your EA makes a point that shucking houses once had an important place in the economics of the Bay, but that they have disappeared. Had you been coordinating with the County, you would not be relying on ancient news, but would know that there is presently a plan for opening a shucking house because of the increasing oyster production.

J. M. Clayton, a Cambridge, Maryland seafood processor, announced that it is opening a shucking house later this year for the 2014-2015 oyster harvest. This will be the first Maryland shucking house to do business in Dorchester County since the prior shucking houses closed almost 40 years ago (a few years after the devastation of Hurricane Agnes). In addition to being a boon to the Dorchester County economy, such a shucking house would provide a source of shell to be returned to the Bay to expand natural habitat.

The oyster harvest by Maryland watermen has been essential to the sustainability of their businesses and the economic, cultural and social survival of Dorchester County and other Coalition counties.

Oyster dredging with power boats by watermen is responsible for the revival of historic oyster bars in the Tangier Sound, just as it was the revival of the historic bars of Great Wicomico River in Virginia.

In 1997, MDNR allowed Maryland Watermen to resume oyster dredging with power boats in the area known as the Tangier Sound portion of the Maryland Chesapeake Bay (*i.e.*, the Honga River, Fishing Bay, the lower Nanticoke River, the lower Wicomico River, the lower Manokin River, the Big Annemessex River, the Little Annemessex River and Tangier Sound areas). The dredging accomplished the following:

1. Historic oyster bars and the oysters and oyster shells on those bars had been buried in sediments. The process of dredging those bars cleaned the oysters and oyster shells of sediments by:

   (a) The tines on the rake of the dredging apparatus pulled buried shells above the sediments that covered the oysters and the pseudo feces that were caked around the oysters and flipped them into the water just above the floor of the Bay, where they were captured in the bag apparatus behind the rake;

   (b) The oysters and shells were washed during the process of lifting the bags through the water to be dumped on the working deck of a waterman's boat;

   (c) The oysters and shells were culled by hand further removing sediments;

   (d) Many of the oysters and all of the shell were dumped from the working deck of the boat back into the Bay, where they were again washed as they settled back to the floor of the Bay;

   (e) The cleaned oysters and shell were fluffed by the culling and return process. Upon return to the floor of the Bay, they now sat above the sediments and pseudo feces that previously covered and had caked around them. The shell was clean and available for spat to strike during the spawning seasons.

As oysters and shells were unburied, washed of smothering sediments, and pseudo feces and returned to settle on top of the sediments and pseudo feces that formerly covered them, the habitat on the historic oyster bars was restored through the dredging and culling process. More surface area was made available on which spat could strike.

Recovery started slowly and has continued to accelerate. For the first four years, watermen would dredge the bars over a period of 10 or more hours and cull only 3-4 bushels of oysters large enough to harvest. However, during those 4 years, the watermen observed that

more and more oysters were growing and that it was only a matter of time before the biomass exploded where oyster dredging was occurring. There was a record harvest in 2001.

From 2002-2010, the diseases of Dermo and MSX took a toll on all of the oysters in the Tangier sound and reduced oyster population. Watermen continued to power dredge the Tangier sound, cleaning and fluffing the oysters through the dredging process, so that their habitat was conducive to spat strike. The wild oysters on those bars that survived the disease gradually developed resistance thereto. Again, production and biomass gradually began to increase. Since the 2010-2011 harvest season, the biomass of oysters, particularly were dredging was occurring and increased at an accelerated and dramatic pace. As DNR reported, "the 2013 Oyster Biomass Index, a measure of oyster abundance and weight, increased for the third consecutive year and is at its highest point in 21 years." (2013 MDNR Oyster Survey at 1, 14.) This was the third consecutive year that the biomass increased. (*Id.* at 14.) There was a 32% gain in biomass between 20011-2012 and 2012-2013. (*Id.*)

During the 2012-2013 season, 341,000 bushels of oysters were harvested by Maryland watermen. (2013 MDNR Oyster Survey at 1, 15.) During the 2013-2014 season, over 500,000 bushels of oysters were harvested by Maryland watermen, and again, the vast majority of the harvest occurred on bars in the Tangier Sound that had been dredged. (Statement by MDNR Shellfish Czar Mike Naylor based on the catch reports submitted by Maryland watermen.) The recovery of historic oyster beds in Maryland is attributable to the dredging by Maryland watermen.

USACE acknowledges that oyster dredging pulls and cleans shell buried in sediments and has rehabilitated oyster beds that have been smothered by sediments and are dying. (2009 EA § 4.1 at 25; *see also* 2009 EA § 5.6 at 40.) USACE acknowledged that the oyster dredging program conducted by Virginia watermen in the Great Wicomico River restored the oyster beds in the Bay and the mouth of that river bed. (2012 MP § 5.2.3.1 at 100.)

Oyster dredging was first legalized in the 1860s and occurred for over 100 years with millions of bushels of oysters being harvested in the Bay through the 1960s. It was not until Hurricane Agnes and the massive quantity of sediments (in many cases over a foot of sediments) killed the oyster beds, and oyster dredging by sail provided insufficient power to unbury the smothered beds; resulting in a massive dye-out of the oyster biomass in the Bay and a massive degradation of water quality and oyster habitat. (2012 MP § 2.1.4 at 21, § 2.2.4 at 28, § 4.4 at 70, § 4.6.3 at 83-84.)

The USACE Master Plan describes precisely what local counties and watermen want to do:

> In trap estuaries, a thin layer of shell could be applied to certain areas prior to spawning and if needed, fresh shell could be applied to some areas that have been previously shelled by ... MDNR or private leaseholders. ... Once these spat grow large enough to survive handling, the thin-shelled areas could be harvested using

> traditional methods by local watermen and moved to areas outside the trap estuary, but within the same or higher salinity regime, in order to plant them on other bar bases.
>
> For this purpose, trap estuaries are referred to as 'incubator systems,' and could potentially become the seed source used to enhance populations of native oysters throughout the Chesapeake Bay.

(2012 MP § 5.2.2.1e at 97.) Again, this strategy has been successfully employed in Virginia (USACE's Great Wicomico restoration project) – 42,000 bushels of spat on shell were moved from that trap estuary (sanctuary) to publically leased bars in the Great Wicomico. (2012 MP § 5.2.2.1f.) USACE recommends such stocking with spat on transported shell. 2012 MP § 5.2.3.1 at 100.) Dorchester County and other Coalition counties seek to restore this program in the Choptank River, the Little Choptank River, the mouth of the Chester River, and the historic oyster beds off of the shores of Kent County and throughout the Upper Bay.

USACE proposes a defeatist restoration project that will cost taxpayers between $870 million and $6.5 billion. For less than one tenth of that projected cost the Coalition counties and their watermen will restore thousands of acres of historic bars through power dredging. The oyster bars will restore water quality in the rivers and shores of the counties because such oyster colonies will be capable of filtering the waters in the rivers and shores. Such projects will benefit the natural environment, the economic environment, the cultural environment and the social environment of Dorchester County and the Coalition counties.

A major flaw in your process leading to implementation of the restoration program is that the EA does not demonstrate that either your agency or any one of those in your consortium has complied with, or even attempted to comply with, the Data Quality Act (the "Act").

Congress passed the Act in order to force agencies to provide transparency to the process of developing data, reviewing that data for veracity and credibility, and using it accurately and in an unbiased, objective fashion. Discussions that lead to the passage of the Act clearly showed that Congress believed that agencies decided on a project and then created the data to support its adoption----often ignoring counter data. The Act requires the agencies to respond to local governments that request verification of data, thus providing one more means of resolving conflicts between federal and local plans, interests and policies.

Section 515 of the Treasury and General Governmental Appropriations Act for Fiscal Year 2001 (Public Law 106-554) directed the Office of Management and Budget to issue guidelines to "provide policy and procedural guidance to Federal agencies for ensuring and maximizing the quality, objectivity, utility and integrity of information (including statistical information) disseminated by Federal agencies."

The guidelines issued by the OMB require that each federal agency establish a procedure by which requests for data quality verification are processed. It is clear from the OMB guidelines that actions based on un-verified data are not valid until verification is accomplished.

In the long list of compliances in the appendix to the EA, there is no indication that the Data Quality Act was within the realm of your claimed compliance.

By this letter demanding that your agency and the other consortium agencies coordinate with Dorchester County, we also request and insist on verification of the data upon which your restoration program is based. Had you coordinated as the law requires the discussion of the Data Quality Act and its requirements would already have taken place. So, now, in coordination let us begin that discussion.

Summary

Your own studies and findings support a course of action that Dorchester County and the Coalition counties seek to implement. Your program is expensive, has not been timely implemented, and is not sustainable. Your program is destroying natural habitat and wildlife.

The program that the counties seek to continue implementing has been successful and is sustainable.

This letter is being written to request that you fulfill your obligations under NEPA with respect to Dorchester County and, the other impacted Coalition counties with respect to the oyster recovery program that you have approved and are funding in Maryland. USACE has issued Permit (MD DNR/Alternate Material) 2007-03659-M24 (the "Permit") to the MDNR and, more significantly, continues to materially revise and alter the Permit without coordinating with the local government most directly impacted by the Permit. While failing to comply with its NEPA obligations as amplified by the regulations adopted by the CEQ. It is believed that USFWS and the NOAA continue to fund MDNR, directly and indirectly, in implementing oyster programs that are contrary to the policy of Dorchester County and other Coalition counties, and that are harming the members of the watermen associations in the counties, the businesses that support the seafood industry and fishing communities.

Dorchester and other Coalition counties have longstanding policies of promoting the seafood industry. The industry is one of the lynchpins to the welfare of the human environment in Dorchester County and other Coalition counties. The economic vitality of our County is dependent on a thriving seafood industry. The industry provides direct employment to a large community of watermen and secondary employment to seafood buyers, packagers and processors and their employees, seafood transporters and their employees, and the businesses and marinas that service the watermen, buyers, packagers, processors and transporters and their employees and equipment.

The culture of Dorchester County and other Coalition counties is directly linked to a viable seafood industry. Fishing communities have long been vital to the culture of the County. Tourism is dependent on the maintenance of quaint fishing communities and the restaurants, pubs and businesses that serve and sell seafood harvested from the Bay by such fishing communities. Artisans who have moved to the Coalition counties earn a living selling works that depict the activities and culture of such fishing communities.

The social fabric of Dorchester County and other Coalition counties is dependent on the seafood industry. The volunteer fire departments depend on the services provided by the men and women who earn a living in the seafood industry. Police, local school teachers and other public servants who provide essential public services often have secondary employment in the seafood industry or in a business tied to the seafood harvesting culture of those counties. Many community events and services would be lost or greatly diminished without the support of residents who are directly and indirectly dependent on the seafood industry.

The improvement of the water quality of the Bay and its tributaries has long been a goal and objective of not only the counties but the State and federal authorities. The recovery and revitalization of the historic oyster bars located along the shores of each county has long been an objective and aspiration of the counties. The United States Environmental Protection Agency (EPA) has imposed the 2010 Chesapeake Bay Total Maximum Daily Load (TMDL) on the State of Maryland. The State has directed the counties to devise plans for the implementation of the TMDL. One component of the watershed implementation plan (WIP) of Dorchester County and other Coalition counties is the restoration of the historic oyster beds along their shores and the shore of Maryland counties that border the Bay and Bay tributaries. This provides a win-win to every component of the human environment of each county. The natural environment benefits from the improvement to water quality affected by thriving oyster beds. The economic environment prospers through the harvesting of oysters and the direct and indirect local employment associated with a vibrant oyster harvest. The social and cultural environments are enhanced by vibrant fishing communities and a vibrant seafood industry.

When the federal agencies and MDNR initiated the oyster recovery program in the late 1990s, the program employed power dredging by local watermen to restore oyster beds and the excavation and recovery of shell buried in sediments for reuse in restoring and enhancing the habitat of historic oyster bars. Again, such activity was a win-win for every component of the human environment. Such a program was affordable and sustainable.

Over the past decade and a half, the conception of oyster bar recovery has dramatically changed. The Maryland program that you have permitted and funded now is directed exclusively to the expenditure of tens of millions of dollars to create oyster sanctuaries that will do nothing to enhance the economic, cultural and social environments of the counties and, ultimately, due to their cost, funding limitations, and the limited bars for which funding is targeted, such sanctuaries will be non-sustainable and will not meaningfully improve the natural environment. No environmental assessment, let alone a NEPA compliant environmental impact statement has been prepared or approved for the program currently being implemented by MDNR through the Permit and with substantial Federal monetary aid.

We request that you to fulfill your statutory and regulatory obligation to coordinate with Dorchester County and other Coalition counties in the development of an oyster bar reclamation program that allows harvesting and power dredging of some if not all historic oyster bars by the Dorchester County Seafood Harvesters Association and the watermen associations in other Coalition counties.

We request that you immediately halt the dumping of polluted non-indigenous mudballs in the Little Choptank River that is killing the oyster population that has naturally recovered on the historic oyster bars in that river and that such dumping not be expanded to any other historic oyster bars in the waters off of the shores of Dorchester County and other Coalition counties.

We request that you immediately cease funding MDNR oyster projects and activities that have not been approved pursuant to a NEPA environmental impact statement.

We request that you fund and permit a Chesapeake Bay oyster bar restoration program that is consistent with the policies and plans of Dorchester County and other Coalition counties.

Sincerely,
DORCHESTER COUNTY COUNCIL

Jay L. Newcomb, President

William V. Nichols, Vice President

Ricky C. Travers

Rick M. Price

Tom C. Bradshaw

cc: Distribution List – see attached

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APPENDIX

NEPA and CEQ Regulations:

NEPA declares "that it is the continuing policy of the Federal Government, **in cooperation with ... local governments** [e.g., Dorchester and Kent counties] **to use all practical means and measures**, including financial and technical assistance, in a manner calculated ... to create and maintain conditions under which **man and nature can exist in productive harmony**, **and fulfill the social, economic and other requirements of present and future generations** of Americans. (Emphasis added.) 42 U.S.C. § 4331(a). Congress requires "the Federal Government to use all practicable means ... to ... **coordinate** Federal plans, functions, programs and resources to ... attain the widest range of beneficial uses of the environment ... ; preserve important historic, cultural and natural aspects of our national heritage ... ; achieve a balance between population and resource use which will permit high standards of living and a wide sharing of life's amenities; and enhance the quality of renewable resources...." 42 U.S.C. § 4331(b). Each federal agency must comply with the requirements of NEPA as expounded upon by CEQ unless there is a specific statutory obligation that clearly precludes fulfillment of the NEPA requirements. *Calvert Cliffs' Coordinating Comm., Inc. v. U.S. Atomic Energy Comm'n*, 449 F.2d 1109, 1115 (D.C. App. 1971)

NEPA requires each Federal agency to "include in every recommendation or report on proposals for **major Federal actions significantly** affecting the quality of the **human environment**, a detailed statement by the responsible officials on:

(i) the environmental **impact** of the proposed action;

(ii) any adverse environmental **effects** which cannot be avoided should the proposal be implemented;

(iii) alternatives to the proposed action;

(iv) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and

(v) any irreversible and irretrievable commitments of resources which be involved in the proposed action should it be implemented."

(Emphasis added.) 42 U.S.C. § 4332(C).

The CEQ has clarified the policy of NEPA and the duty of federal agencies charged with its implementation, providing:

> Federal agencies shall to **the fullest extent possible:**

> (a) Interpret and administer the policies, regulations, and public laws of the United States in accordance with the policies set forth in the Act and in these regulations.
>
> (b) Implement procedures to make the NEPA process more useful to decision makers and the public; to reduce paperwork and the accumulation of extraneous background data; and to emphasize real environmental issues and alternatives. Environmental impact statements shall be concise, clear, and to the point, and shall be supported by evidence that agencies have made the necessary environmental analyses.
>
> (c) Integrate the requirements of NEPA with other planning and environmental review procedures required by law or by agency practice so that all such procedures run concurrently rather than consecutively.
>
> (d) **Encourage and facilitate public involvement in decisions which affect the quality of the *human environment*.**
>
> (e) Use the NEPA process to **identify and assess** the **reasonable alternatives** to proposed actions that will **avoid or minimize adverse effects** of these actions **upon the quality of the *human environment.***
>
> (f) **Use all practicable means,** consistent with the requirements of the Act and other essential considerations of national policy, **to restore and enhance the quality of the *human environment* and avoid or minimize any possible adverse effects of their actions upon the quality of the *human environment*.**

(Emphasis added.) 40 C.F.R. § 1500.2.

The CEQ provides consistent definitions for the terms appearing in NEPA and used by the CEQ. 40 C.F.R. § 1508 (which provides that the NEPA terminology "shall be uniform throughout the Federal Government"). The term human environment is more inclusive that just the natural or physical environment in which we live. The term includes all aspects affecting the human quality of life including aesthetic, historic, cultural, economic, and social impacts as well as impacts to the natural or physical environment. The CEQ defines the term "human environment as follows:

> '**Human environment**' shall be **interpreted comprehensively** to include the natural and physical environment and the relationship of people with that environment. (**See the definition of 'effects' (§1508.8).**) ... When an environmental impact statement is

> prepared, and **economic** or **social** and natural or physical environmental effects are interrelated, then the environmental impact statement will discuss all of these effects on the human environment.

(Emphasis added.) 42 C.F.R. § 1508.14.

The CEQ defines "effects" synonymously with "impacts" to include direct and indirect effects and to include **aesthetic**, **historic**, **cultural**, **economic**, and **social impacts** of proposed agency actions. (Emphasis added.) 42 C.F.R. § 1508.8.

The CEQ defines "major Federal action" as that term is used in 42 U.S.C. § 4332 and its regulations as follows:

> 'Major Federal Action' includes actions with effects that may be major and which are potentially subject to federal control and responsibility. Major reinforces but does not have a meaning independent of significantly (§ 1508.27). Actions include circumstances where the responsible officials fail to act and that failure to act is reviewable by courts or administrative tribunals under the Administrative procedure Act or other applicable law as agency action.
>
> (a) Actions include new and continuing activities, including projects and programs entirely or partially financed, assisted, conducted, regulated, or approved by federal agencies; new or revised agency rules, regulations, plans, policies, or procedures; and legislative proposals (§§ 1506.8, 1508.17). ...
>
> (b) Federal actions tend to fall within one of the following categories:
> ...
> (2) Adoption of formal plans, such as official documents prepared or approved by federal agencies which guide or prescribe alternative uses of Federal resources, upon which future agency actions will be based.
> ...
> (4) Approval of specific projects, such as construction or management activities located in a defined geographic area. Projects include actions approved by permit or other regulatory decision as well as federal and federally assisted activities.

40 C.F.R § 1508.18.

Finally, the CEQ defines significantly as that term is used in 42 U.S.C. § 4332 and its regulations as follows:

> *Significantly* as used in NEPA requires considerations of both context and intensity:
>
> (a) *Context.* This means that the significance of an action must be analyzed in several contexts such as society as a whole (human, national), the affected region, the affected interests, and the locality. Significance varies with the setting of the proposed action. For instance, in the case of a site-specific action, significance would usually depend upon the effects in the locale rather than in the world as a whole. Both short- and long-term effects are relevant.
>
> (b) *Intensity.* This refers to the severity of impact. Responsible officials must bear in mind that more than one agency may make decisions about partial aspects of a major action. The following should be considered in evaluating intensity:
>
> (1) Impacts that may be both beneficial and adverse. A significant effect may exist even if the Federal agency believes that on balance the effect will be beneficial.
>
> (2) The degree to which the proposed action affects public health or safety.
>
> (3) Unique characteristics of the geographic area such as proximity to historic or cultural resources, park lands, prime farmlands, wetlands, wild and scenic rivers, or ecologically critical areas.
>
> (4) The degree to which the effects on the quality of the **human environment** are likely to be highly controversial.
>
> (5) The degree to which the possible effects on the **human environment** are highly uncertain or involve unique or unknown risks.
>
> (6) The degree to which the action may establish a precedent for future actions with significant effects or represents a decision in principle about a future consideration.

> (7) Whether the action is related to other actions with individually insignificant but cumulatively significant impacts. Significance exists if it is reasonable to anticipate a cumulatively significant impact on the environment. Significance cannot be avoided by terming an action temporary or by breaking it down into small component parts.
>
> (8) The degree to which the action may adversely affect districts, sites, highways, structures, or objects listed in or eligible for listing in the National Register of Historic Places or may cause loss or destruction of significant scientific, cultural, or historical resources.
>
> (9) The degree to which the action may adversely affect an endangered or threatened species or its habitat that has been determined to be critical under the Endangered Species Act of 1973.
>
> (10) Whether the action threatens a violation of Federal, State, or local law or requirements imposed for the protection of the environment.

40 C.F.R. § 1508.27.

Executive Orders:

Executive Order 13352:

Executive Order 13352 of August 26, 2004 (69 Fed. Reg. 52989) directs the Departments of the Interior, Defense, and Commerce, as well as EPA, to implement laws relating to the environment and natural resources in a manner that promotes cooperative conservation with emphasis on inclusion of local participation in Federal decision-making. (Section 1.) The Executive Order defines cooperative conservation as actions relating to the use, enhancement and enjoyment of natural resources that involve collaborative activity among Federal, State and local governments and other non-governmental entities and individuals. (Section 2.) The Executive Order requires Federal agencies and Federally funded State agencies implementing such funded projects to take account of and respect the interests of persons with ownership or other legally recognized interests in land and other natural resources and to accommodate local participation in Federal decision-making. (Section 3(a).)

Executive Order 13508:

Executive Order 13508 of May 12, 2009 wisely observes that progress in restoring the Chesapeake Bay will depend on the support of local governments such as Dorchester and Kent

counties, as well as the enterprise of the private sector. (Part 1.) To cultivate that support, the order directs Federal implementing agencies to closely coordinate their actions with those of local agencies. (Section 204.) The order further directs Federal implementing agencies to apply innovative and cost-effective pollution control measures and to build on the strengths of local governments, the private sector and citizen organizations. (Sections 301(d) & (f).)

DISTRIBUTION LIST

Dorchester County Coordination Letter Addressed to USACE, NOAA, USFWS and MDNR; dated September 16, 2014.

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