STATE OF MAINE
DEPARTMENT OF INLAND FISHERIES AND WILDLIFE

IN THE MATTER OF

CUMBERLAND MILLS DAM FISHWAY PROCEEDING	))	FINAL ORDER

Pursuant to the provisions of 12 M.R.S.A. § 12760 and 5 M.R.S.A. §§ 9051-9064, the Commissioner of the Maine Department of Inland Fisheries and Wildlife (DIFW) has considered the testimony and exhibits of the dam owner and other parties, the record of the Department's public hearings in this matter, and other related materials on file, and hereby issues a *Final Order* in this matter, containing the following findings of fact and conclusions of law.

1. JUNE 29, 2009 FINDINGS OF FACT AND DECISION

   Following a hearing held in Phase I of this proceeding, I issued a *Findings of Fact and Decision* dated June 29, 2009 in which I concluded, pursuant to 12 M.R.S.A. § 12760, that fish passage should be constructed and maintained at the Cumberland Mills Dam in order to conserve, develop or restore anadromous or migratory fish resources. The Cumberland Mills Dam is located on the Presumpscot River in the City of Westbrook, Cumberland County, Maine, and is currently owned by S.D. Warren Company. Specifically, based on the evidence in the record, I concluded that:

   A. One or more species of anadromous or migratory fish, specifically alewife, blueback herring, American shad and American eel, can be restored in substantial numbers to the Presumpscot River watershed by construction and maintenance of a fishway at Cumberland Mills Dam; and

   B. Habitat in the Presumpscot River watershed above Cumberland Mill Dam is sufficient and suitable to support a substantial commercial or recreational fishery in the Presumpscot River watershed for anadromous or migratory fish, specifically river herring (alewife and blueback herring), American shad, striped bass and American eel.

   The June 29, 2009 Phase I *Findings of Fact and Decision* is hereby incorporated by reference and attached hereto.

2. MAY 12, 2010 FINDINGS OF FACT AND CONCLUSIONS OF LAW ON FISHWAY DESIGN

   Following a hearing held in Phase II of this proceeding, and after consideration of a conceptual fishway design jointly proposed by the dam owner and other parties to the proceeding, including the Maine Department of Marine Resources, the Maine

Department of Environmental Protection, American Rivers, and Friends of the Presumpscot River, I issued a *Findings of Fact and Conclusions of Law on Fishway Design* dated May 12, 2010 in which I found that the jointly proposed conceptual fishway design will provide safe, timely and effective passage of alewife, blueback herring, American shad and American eel at the Cumberland Mills Dam for the purpose of restoring substantial numbers of these fish species to the Presumpscot River watershed consistent with the population potentials contained in my June 29, 2009 Phase I *Findings of Fact and Decision*. This finding was based on evidence in the record that:

A. The mechanical flashboard system on the freshet channel spillway will virtually eliminate any attraction flow in the main channel;

B. The freshet channel Denil fishway and fish barrier dam are appropriately located and designed for upstream anadromous fish passage;

C. Appropriate upstream eelways will be installed in both channels;

D. Appropriate downstream passage facilities will be constructed;

E. A second Denil fishway will be constructed when the capacity of the first Denil fishway is reached; and

F. All fish passage facilities will be subject to post-construction effectiveness testing and operations and maintenance requirements.

Based on the evidence in the record, I concluded that the jointly proposed conceptual fishway design, fishway and channel monitoring and maintenance plan, effectiveness testing plan, construction schedule, and schedule for submittal of detailed final fishway design drawings for my consideration, as proposed by the parties, are adequate to conserve, develop or restore anadromous or migratory fish resources to the Presumpscot River, consistent with the provisions of 12 M.R.S.A. § 12760(6) and my June 29, 2009 Phase I *Findings of Fact and Decision* in this proceeding.

The May 12, 2010 Phase II *Findings of Fact and Conclusions of Law on Fishway Design*, which includes the Joint Proposal for Fish Passage, Fishway and Channel Monitoring and Maintenance Plan, and Effectiveness Testing Plan attached thereto, is hereby incorporated by reference and attached hereto.

Based on further information jointly provided by the parties, the requirements of Paragraph 6(M) of the May 12, 2010 Phase II *Findings of Fact and Conclusions of Law on Fishway Design* are supplemented by adding a separate expenditure cap of $25,000 only to the extent needed to address an eddy in the freshet channel between the fish barrier dam and the freshet channel spillway if DMR reasonably determines during the ten (10) year period, based on the results of effectiveness studies required

pursuant to the Cumberland Mills Dam Effectiveness Testing Plan dated April 8, 2010, that structural or operational changes to address such an eddy are needed to provide safe, timely and effective passage of alewife, blueback herring, American shad and/or American eel.

3. SUBMISSION OF FINAL DESIGN DRAWINGS AND OPERATIONS AND MAINTENANCE MATERIALS

In accordance with my May 12, 2010 Phase II *Findings of Fact and Conclusions of Law on Fishway Design*, the dam owner submitted proposed detailed final fishway design drawings and operations and maintenance materials on August 10, 2010 for my consideration and for review by the other parties. Following review by the other parties, on September 24, 2010, the following materials were submitted: (1) the dam owner submitted for my consideration revised detailed final fishway design drawings and operations and maintenance materials, (2) the other parties submitted a letter indicating their support for the revised detailed final design drawings and operations and maintenance materials, and (3) the dam owner and the other parties jointly submitted for my consideration proposed findings of fact and conclusions of law for a final order which would conclude this proceeding.

4. FINAL DECISION

Based on the evidence in the record, pursuant to 12 M.R.S.A. § 12760, I hereby order S.D. Warren Company, and its successors and assigns, to construct and maintain fish passage at the Cumberland Mills Dam in accordance with all design requirements and all other terms and conditions set forth in this *Final Order*, including all design requirements and other terms and conditions set forth in my June 29, 2009 Phase I *Findings of Fact and Decision*, my May 12, 2010 Phase II *Findings of Fact and Conclusions of Law on Fishway Design*, and the final fishway design drawings and operations and maintenance materials attached to this *Final Order*.

DATED AT AUGUSTA, MAINE, THIS 5th DAY OF October, 2010.

ROLAND D. MARTIN
Commissioner, Department of Inland Fisheries and Wildlife