UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

PHIPPSBURG SHELLFISH CONSERVATION COMMISSION; PHIPPSBURG LAND TRUST; FRIENDS OF MERRYMEETING BAY; BOB CUMMINGS; ETHAN DEBERY; DEAN DOYLE; BRETT GILLIAM; PEGGY JOHANNESSEN; DOROTHY KELLY; LAWRENCE PYE; LAURA SEWALL; and DOUGLAS WATTS;	)	AMENDED MOTION FOR A PRELIMINARY INJUNCTION
Plaintiffs,	)	
v.	)	CIVIL ACTION NO. 2:11-cv-259
U.S. ARMY CORPS OF ENGINEERS; COL. PHILIP T. FEIR, in his official capacity as District Engineer, New England District, U.S. ARMY CORPS OF ENGINEERS,	)	
Defendants.	)	

AMENDED MOTION FOR A PRELIMINARY INJUNCTION

NOW COME the Phippsburg Shellfish Conservation Commission, the Phippsburg Land Trust, Friends Of Merrymeeting Bay, Bob Cummings, Ethan Debery, Dean Doyle, Brett Gilliam, Peggy Johannessen, Dorothy Kelly, Lawrence Pye, Laura Sewall, and Douglas Watts to amend their motion for a preliminary injunction to prevent the Army Corps of Engineers from anything more than the minimum dredging of the Kennebec River necessary to enable safe transit of the USS Spruance on September 1, 2011, and to require the Corps to dump dredge spoils at an offshore location in order to minimize adverse impacts to Plaintiffs and the environment.

I. INTRODUCTION

Under existing state and federal permits, maintenance dredging of the Federal Navigation Project ("FNP") in the Kennebec River must occur between Nov. 1 and April 30. On June 16,

the Army Corps of Engineers approved "emergency" out-of-season maintenance *and* advanced maintenance dredging of 70,000 cubic yards of material from two locations of the FNP this August, with disposal at in-river and near shore dump sites. The purpose of this emergency dredging is to enable the newly built U.S.S. Spruance, DDG 109, to safely transit the river for delivery to the US Navy on Sept. 1, 2011.

In a complaint filed simultaneously with this motion, Plaintiffs allege that the proposed dredging violates the Clean Water Act ("CWA") and the National Environmental Policy Act ("NEPA") and will severely and adversely impact the environment and Plaintiffs' uses of the Kennebec River estuary. Nevertheless, Plaintiffs do not oppose any and all dredging in August. Plaintiffs fully support the Corps' and Navy's goal to enable safe transit of the USS Spruance this September. Full-scale maintenance and advanced maintenance dredging, however, is not necessary to clear the limited navigational hazards in the river. Accordingly, Plaintiffs seek a preliminary injunction to:

(a) Prevent August dredging of the Popham Beach reach of the FNP because there is no emergency in that location – a deep water lane of travel currently exists within the marked channel that is sufficient to allow safe transit of the USS Spruance in September;

(b) Prevent anything more than the minimal amount of August dredging of the Doubling Point reach of the FNP necessary to enable safe transit of the Spruance; and

(c) Require the Corps to use an offshore disposal site that will have fewer adverse impacts on the environment and plaintiffs.

II. Standard of Review

In determining whether to issue a preliminary injunction a court must consider:

> (1) the likelihood of the movant's success on the merits; (2) the anticipated incidence of irreparable harm if the injunction is denied; (3) the balance of relevant equities (i.e., the hardship that will befall the nonmovant if the injunction issues contrasted with the hardship that will befall the movant if the injunction does not issue); and (4) the impact, if any, of the court's action on the public interest.

LL Bean, Inc. v. Bank of America, 630 F. Supp. 2d 83, 86 (D. Me. 2009). The party seeking the preliminary injunction bears the burden of establishing that these four factors weigh in its favor. *Id*. Because a preliminary injunction is an extraordinary remedy, the right to relief must be clear and unequivocal. *Friends of Magurrewock, Inc. v. U.S. Army Corps of Engineers*, 498 F.Supp.2d 365, 369 (D. Me. 2007).

III. Likelihood of Success on the Merits

Plaintiffs allege that the proposed dredging violates both NEPA and the CWA.

A. NEPA Violations

"Under NEPA, federal agencies are required to 'study, develop, and describe appropriate alternatives to recommended courses of action in any proposal which involves unresolved conflicts concerning alternative use of available resources,' 42 U.S.C. § 4332(2)(E) (1982), even if an EIS is not required." *Sierra Club v. Marsh*, 701 F. Supp. 886, 920 (D. Maine 1988). *See also* 15 C.F.R. § 1508.9(b) (environmental assessment must briefly discuss the need for the proposal, alternatives, and the environmental impacts of the proposed action and alternatives).[1]

In the First Circuit, an agency's duty to review alternatives under NEPA is bound by the rule of reason:

> [The Corps'] duty under NEPA is to study all alternatives that 'appear reasonable and appropriate for study at the time' of drafting the [NEPA

[1] The Corps' regulations require that "where the district engineer determines that there are unresolved conflicts concerning alternative uses of available resources, the EA shall include a discussion of the reasonable alternatives which are to be considered by the ultimate decision-maker." 33 C.F.R. Part 325, App. B(7)(a). *See also id*. § 230.19 (same).

> document], as well as 'significant alternatives' suggested by other agencies or the public during the comment period. In order to preserve an alternatives issue for review, it is not enough simply to make a facially plausible suggestion; rather, an intervenor must offer tangible evidence that an alternative site might offer 'a substantial measure of superiority' as a site.

Roosevelt Campobello Intern. Park v. USEPA, 684 F. 2d 1041, 1047 (1st Cir. 1982); *see also Sierra Club v. Marsh*, 701 F. Supp. 886, 921 (D. Maine 1988).

The range of reasonable alternatives is defined with regard to the project purpose. Here, the Corps already has state and federal permits to conduct maintenance dredging of the FNP in the Kennebec River. (Army Corps of Engineers, *Environmental Assessment Finding of No Significant Impact and Section 404(b)(1) Evaluation for Maintenance Dredging, Kennebec River, Sagadahoc County, Maine*, at 1 (June 2011), hereinafter as "EA", Complaint Ex. 9.) But those permits limit dredging to the winter months in order to avoid adverse impacts to the environment and to other users of the resource. (Complaint, ¶¶ 33-38, Ex. 10.) Thus, as the Corps concedes, the sole purpose and need for emergency, *out-of-season* dredging in August is to enable safe transit of the USS Spruance on Sept. 1, 2011. (EA at 5-6.)

The Corps has authorized August dredging of two locations in the FNP to allow passage of the Spruance: the Doubling Point reach ("DP") just south of the City of Bath in the vicinity of Coast Guard buoys 28, 29, and 31; and the Popham Beach reach at the mouth of the river in Phippsburg in the vicinity of buoy 6. (EA at 2-4, Figs. 2-3.) But instead of dredging to the minimum width and depth necessary to enable the Spruance to safely transit the FNP, the Corps authorized both maintenance (-29') *and* advanced maintenance dredging (-32')[2] of the entire 500' width of the channel at Doubling Point. At Popham Beach, despite the presence of a lane of

[2] Maintenance dredging authorizes excavation to the approved FNP channel depth of -27 feet mean lower low water ("MLLW"), plus two feet of allowable overdreging. Advanced maintenance dredging authorizes excavation to -30 feet, plus two feet of allowable overdredging.

travel with water at sufficient depths to allow safe transit of a DDG Destroyer, the Corps authorized maintenance dredging of all areas shallower than -29'. (EA at 6; *see also* EA, App. G, Revised Drawings C-101 to C-103, Complaint Ex. 17.)

In all, the Corps will remove 50,000 cubic yards from the Doubling Point channel and dispose of those spoils in-river at the Kennebec Narrows dump site north of Bluff Head (EA at 6), and 20,000 cubic yards of material from the Popham Beach reach and dispose of those spoils at a near-shore dump site 0.4 miles south of Jackknife Ledge ("JKL") immediately offshore of Popham Beach State Park. (*Id.*) All work will be done by hopper dredge over a three to five week period beginning on or about August 1, 2011. (*Id.*)

The Corps' EA violates NEPA because it failed to consider reasonable alternatives that will enable safe passage of the USS Spruance in September yet also minimize impacts to the environment and to Plaintiffs. Those alternatives include:

(1) No action (no dredging) at Popham Beach;

(2) Minimal dredging at Doubling Point and, if necessary, Popham Beach; and

(3) Assuming reduced volume of work and spoils from minimal dredging scenario, use of alternative dredging methods (mechanical clamshell bucket) and upland or offshore disposal sites (Seguin Island or Portland).

1. NO ACTION AT POPHAM BEACH

In the EA, the Corps dismissed the no action alternative as impracticable due solely to the Navy's navigational concerns at Doubling Point. (EA at 8-10 and 42-44.) The Corps failed to separately consider a no dredge alternative at Popham Beach. Tangible evidence that emergency dredging is not necessary at PB to enable safe transit of the Spruance on Sept. 1st includes the fact that Bath Iron Works ("BIW") and the Navy successfully completed five transits of a DDG

Destroyer through this reach over the last year without mishap or delay, including four transits this spring. (Complaint, ¶¶ 39, 46, Ex.'s 14, 11.)

Second, the Navy has never declared a navigational emergency with regard to the PB reach in the vicinity of buoy 6. Rather, in a series of dredge requests to the Corps by Captain Dean Krestos, USN, on Nov. 23, 2010 (after the delayed passage of the USS Jason Dunham), Jan. 19, 2011 (after review of the January 2011 bottom survey results), and June 3, 2011 (after review of the May 2011 survey results), the Navy found that navigational hazards had created an emergency in the DP reach in the vicinity of buoys 28, 29, and 31. None of these letters mention shoaling or navigational concerns at PB. (Complaint, ¶¶ 39-40, 48, Ex. 11.)

Third, there is no current barrier to navigation at PB. The beam of a DDG Destroyer is 60'. (Complaint, ¶ 42, Ex. 13.) The February and May surveys of PB show that a 450' to 300' lane of travel with water of adequate depth to allow safe transit of a DDG Destroyer exists within the full length of the marked channel at PB in the vicinity of buoy 6. (EA at App. G.) Moreover, at the most constricted point – south of North Sugarloaf Island – the controlling depth is over 26'. (*Id.*) BIW has stated that the minimal depth for safe transit of a DDG Destroyer is 25' at high tide of 6', which still allows an extra two feet of clearance. The planned transit of the Spruance on Sept. 1, 2011 is for an extra high tide of 10.3'. (Complaint, ¶¶ 54, 59, Ex. 16.)

Based on the above facts, the no dredge alternative at PB is without question a practicable solution to meet the project purpose (delivery of the Spruance on Sept. 1, 2011). Or put another way, there is no emergency and thus no need for out-of-season dredging at PB. To the extent normal maintenance dredging is deemed necessary, it can occur during the winter months as authorized under the Corps' existing 10-year permit issued in 2002. Nothing in the EA contradicts the above facts. Rather, the Corps' rejection of the no action alternative is based

solely and exclusively upon a determination that shoals in the Doubling Point Reach form a barrier to navigation in the FNP. (EA at 8-10 and 42-44.)

Although the Corps may respond that it is logistically impracticable not to dredge PB and DP at the same time, the record shows otherwise: of the last 10 times the Corps dredged the FNP in the Kennebec River, four times it dredged DP only. (EA at 7-8; Complaint ¶¶ 31-32.) While it may be *expedient* for the Corps to dredge both locations at once, that alone does not make a no PB dredge alternative unreasonable for purposes of the NEPA alternatives analysis – particularly given the express prohibition on summer dredging in the current permits. Moreover, deferring dredging of PB to winter is not likely to result in unreasonable costs since the cost of dredging later (if it eventually becomes necessary) will be offset by the savings from not dredging now. At any rate, there is no evidence of any kind in the EA justifying elimination of this alternative from consideration: rather, the Corps simply ignored it altogether.

2. Minimal Summertime Dredging and Alternative Dredging Methods and Disposal Sites

Next, the EA failed to consider a minimal dredge solution, either at DP or PB. Plaintiffs and others repeatedly suggested that the Corps evaluate a dredging alternative that minimized work in summer and deferred high impact dredging to winter. (Complaint, ¶¶ 65-70, 72, 75-76.)

During the review period, in the face of extended controversy, the Corps conceded that dredging in August has the greatest impact of any month. Army Corps project manager Bill Kavanaugh, wrote to the Maine Departments of Environmental Protection ("DEP") and Marine Resources ("DMR"), "As discussed with you at the meeting, we're all in agreement that August isn't the best month for dredging – in fact it probably can't get any worse relative to the Kennebec." (Complaint, ¶¶ 71, 73, Ex.'s 21, 23.) Yet, the EA evaluated only two scenarios,

both of which involved full scale dredging: (1) "Maintaining the Channel to Authorized Dimensions" at both PB and DP and (2) "Maintaining the Channel to Authorized Dimensions, Plus Advance Maintenance Dredging at Doubling Point." (EA at 10-11).

The Corps omitted any analysis of dredging to lesser widths or depths at each location. As noted above, the PB reach is currently passable for DDG Destroyers and in fact five such passages have been safely made in the last year. To the extent that any specific shoal is deemed unsafe – and none have – the Corps should have evaluated use of pin-point dredging to eliminate the hazard yet also keep summer dredging and disposal, and thus the adverse impacts of summer dredging and disposal, to an absolute minimum.[3]

In the DP reach, the May survey indicates that spring runoff scour resulted in an improvement over January conditions in that controlling depths have increased from -19.7' to -22.4'. (EA at 8-9; App. G). Additionally, although there may be a minute increase in shoaling east of the marked channel, the May 2011 survey shows that a wide (300' to 500') deep water lane of travel (-27' or deeper) still exists east of the marked channel.[4] On request of the Navy, the Coast Guard relocated the channel markers in this reach and BIW safely transited the USS Spruance through this area four times this spring. (Complaint, ¶¶ 45-46, Ex.'s 11, 14.) The Navy successfully transited the USS Jason Dunham through this area once last fall. (Complaint,

[3] The PB reach has a 450' to 300' deep water lane of travel within the marked channel. The only location that presents any potential hazard to navigation of a DDG Destroyer is a small keyhole shaped shoal just south and west of North Sugarloaf Island, which constrains the deep water lane of travel to 300' *within* the channel. Even then, given its depth (over 26') this shoal does not appear to be a hazard to travel on a 10' high tide. (EA, App. G, Revised Drawings C-103, C-301.) Nonetheless, pinpoint excavation of this shoal only, if necessary, would minimize impacts from both dredging and disposal.

[4] The minimal safe level for transit for a DDG Destroyer on a 6' high tide is 25'. (Complaint ¶ 43, Ex. 14.) Transit of the Spruance is scheduled for a 7.8' high tide. (Complaint ¶ 54, Ex. 16.)

¶ 39, Ex. 11.) Plaintiffs do not raise this point to contest the Navy's determination that use of a temporarily marked channel is unsafe for its less experienced captain (even with a BIW pilot on board) (EA at 9-10). Rather, the issue is that by dredging a few small areas in the eastern third of the marked channel in the Doubling Point reach (*see* EA, App. G, Revised Drawings, C-101 and C-301), the Corps could keep August dredging to a minimum yet still create a broad lane of travel (in and outside the marked channel) with sufficiently deep water to enable safe transit of the USS Spruance.

The Corps, however, refused to even consider a minimal dredge approach. (EA at 9-10.) Such an alternative could plainly meet the navigational "emergency" while reducing the amount of dredging at DP to a minor fraction – thus significantly reducing the impacts from both dredging and filling.[5] Combined with no or minimal dredging at DP, the Corps could potentially reduce the amount of August dredging from 3-5 weeks and 70,000 cy (the preferred alternative) to a few days and 10,000 to 20,000 cy, or less. (EA, App. G, Revised Drawings C-101, C-301.) Given the Corps' acknowledgement of the severe environmental harms from dredging in August compared to other months (Complaint ¶¶ 71, 73), failure to review a low-impact alternative violates NEPA.

A minimal dredge approach would also change the analysis of less impactful dredging methods, including mechanical clamshell bucket, and alternative disposal sites, including upland and offshore disposal. Mechanical dredging is clearly practicable: it is used by BIW to dredge its facility and sinking basin, and Reed and Reed contractors has a full suite of deck barges, clamshell buckets and work boats at its Woolwich Dockyard on the Kennebec. (Complaint, Ex 3, 5.) Mechanical dredging has environmental benefits over hopper dredging, including reduced

[5] The vast majority of the volume of material to be dredged has built up in the western two thirds of the DP reach. (*See* EA, App. G, Revised Drawing C-301.)

water quality impacts and lower turbidity. (*Id.*) Mechanical dredges also reduce the chance of entraining fish in the hopper dredge's impellers, screens, pipes and hoppers. (*Id.*) For this reason, although less efficient than a hopper dredge, the Corps' permit application to the State of Maine notes that a "mechanical dredge has also been considered if work is urgently needed during the warmer months, to reduce potential impacts to shortnose sturgeon." (Complaint, Ex. 3 at 14, *quoting* Army Corps of Engineers, *NRPA Permit Application Attachment 9* (Draft Kennebec River Environmental Assessment) at 3.) This is why, on recommendation of Maine DMR, the last permit issued to the Corps limited use of a hopper dredge to the period from Dec. 1 to March 15. For dredging in November or April, the permit required the Corps to "use a mechanical dredge with clamshell bucket, which is less likely to capture sturgeon." (Complaint ¶ 37, Ex. 10 (License # L-16281-4E-D-N at 2 (March 15, 2002)).)

Although the Corps dismissed mechanical dredging, it did so based on proposed full-scale maintenance and advanced maintenance dredging of 70,000 cubic yards of material and based on concerns about use of a mechanical dredge at the mouth of the river. (EA at 12-13.) These concerns are inapplicable to a minimal dredge alternative with a low volume of spoils. The efficiency benefits of a hopper dredge decreases proportionally to the reductions in the needed volume of dredging. In such a case, a clamshell bucket dredge may be both environmentally, economically, and technically preferable. Safety concerns at the mouth of the river are also eliminated if dredging in PB reach can be deferred until the normal winter dredging window.

Second, with reduced volume of spoils, upland and offshore disposal (Seguin or Portland) are clearly viable. The Corps categorically rejects these solutions because its policy is to keep sand within the littoral system. (EA at 12, 15). Yet, elsewhere, the Corps concludes that "retention of [20,000 cy of] sand within the local sediment budget represents a minimal impact to

the overall system . . . ." (EA at 50.) Applying this same logic, a one-time removal of a small amount of sand for the current emergency will have "minimal impact" – particularly if it comes from sources 13 miles upstream of the beaches.[6] Moreover, the cost and duration of offshore or upland disposal would be dramatically less with reduced volume of spoils to haul.

For the reasons above, Plaintiffs contend that the Corps failure to consider a minimal dredge alternative combined with mechanical dredging methods and/or alternative disposal sites also violates NEPA.

The Corps failure to consider reasonable no dredge and low impact alternatives is not a mere technical violation of NEPA. Concerns over the timing and volume of emergency dredging are at the heart of the "unresolved conflicts concerning alternative use of available resources" in this case. 42 U.S.C. § 4332(2)(E). The current 10-year permit and prior permits specifically prohibit dredging in summer in order to minimize impacts to anadromous fish runs, endangered fish, shellfish spawning, lobster migration and shedding, and lobster fishing. (Complaint ¶¶ 33-38, Ex. 10.) Applying political and economic muscle rather than new studies and data, the Corps has simply ignored alternatives that address these concerns and instead given state and federal decision makers, and the public, two bad choices: full scale maintenance dredging *or* full scale maintenance dredging, plus advanced maintenance dredging.

This rigs the outcome and unlawfully deprives decision makers of the ability to make an informed decision about the true range of possible solutions and thus the impacts of their choices. "NEPA is designed to influence the decision-making process; its aim is to make

[6] The Corps other rationale to reject disposal off Seguin Island is no longer true: unlike 1971, there is no longer any real fishing activity in the area. (EA at 15.) Additionally, as the Corps admits, lobster tend to move to shallower inshore waters during summer months, so a deeper offshore site is likely to reduce impacts to lobsters or lobster fishing during August. (EA at 28.)

government officials notice environmental considerations and take them into account. Thus, when a decision to which NEPA obligations attach is made without the informed environmental consideration that NEPA requires, the harm that NEPA intends to prevent has been suffered." *Sierra Club v. Marsh*, 872 F. 2d 497, 500 (1st Cir. 1989) (J. Breyer), citing *Commonwealth of Massachusetts v. Watt*, 716 F.2d 946 (1st Cir.1983). Accordingly, the Court should find that Plaintiffs are likely to succeed on the merits of their NEPA claims.

B. CWA Violations

The Corps Section 404(b)(1) Guidelines provide that "no discharge of dredged or fill material shall be permitted if there is a practicable alternative to the proposed discharge which would have less adverse impact on the aquatic ecosystem…" 40 C.F.R. § 230.10(a) (known as the less environmentally damaging practicable alternative, or "LEDPA", standard). *See also* 33 C.F.R. § 336.1(a) (Corps' discharges of dredged or fill material must meet all applicable substantive legal requirements, including the section 404(b)(1) Guidelines). "An alternative is practicable if it is available and capable of being done after taking into consideration cost, existing technology, and logistics in light of overall project purposes." *Id*. § 230.10(a)(2).

Here, the Corps evaluated only full scale summertime dredging and overdredging even though the Corps' project manager readily concedes that "August isn't the best month for dredging – in fact it probably can't get any worse relative to the Kennebec" (Complaint ¶ 71, Ex. 21) and that summer dredging should be avoided if practicable: "Be assured that the USACE concurs with NMFS that maintenance dredging (whenever practicable) should be performed during the recommended time of year in order to protect managed species and to avoid the most biologically productive times." (Complaint ¶ 73, Ex. 23, *quoting* H. Farrell McMillan, Army Corps Northeast Region Chief of Engineering/Planning.)

Given Defendant's admissions that dredging in August is significantly more environmentally damaging than winter, the only question under the LEDPA standard is whether it is "practicable" to defer some (in the case of DP), or all (in the case of PB) dredging to winter when the Corps has an existing permit to dredge. Since the no PB dredge solution, by definition, requires no discharge to the waters, it is the Corps' burden to demonstrate by clear and convincing evidence that it is impracticable. 33 C.F.R. § 230.10(a)(3). Here, for the reasons noted in the NEPA discussion above, Plaintiffs have already demonstrated the opposite: there is clearly no navigational emergency and thus no need to dredge PB this summer. To the extent that long-term maintenance is necessary, it can be done in winter when it will be less environmentally damaging. A winter dredging alternative is clearly practicable: indeed that is the norm and the Corps in fact possesses a permit to do so. Moreover, past practice shows that it is common for the Corp to dredge DP but not PB.

The NEPA discussion above also demonstrates that other alternatives, including a minimal dredge solution at DP, mechanical dredging, and use of the offshore disposal site at Seguin are also practicable.

Accordingly, the Court should find that Plaintiffs are also likely to succeed on the merits of their CWA claims.

IV. Irreparable Harm

The Corps' violation of NEPA is procedural; its failure to select the "less environmentally damaging practicable alternative" under the CWA § 404(b)(1) Guidelines is both procedural and substantive. But, given the impending start of dredging in August, harms under both statutes are irreparable.

Regarding procedural harms under NEPA, the First Circuit has explained that government decisions made without the informed environmental consideration that NEPA requires may be irreparable because

> [o]nce large bureaucracies are committed to a course of action, it is difficult to change that course — even if new, or more thorough, NEPA statements are prepared and the agency is told to "redecide." It is this type of harm that plaintiffs seek to avoid, and it is the presence of this type of harm that courts have said can merit an injunction in an appropriate case.

Sierra Club v. Marsh, 872 F. 2d at 500. Here, the Corps' decision (as well as the review and input from other federal and state agencies and the public, all of which relied upon the Corp's presentation of viable alternatives) was based solely upon review of a limited range of alternatives – full scale dredging and overdredging – that have the greatest environmental impacts. Reasonable alternatives that would permit safe passage of the Spruance yet minimize impacts to other users were excluded. This unduly narrow perspective increases the risk that the "real environmental harm" that NEPA seeks to prevent "will occur through inadequate foresight and deliberation." *Id.* at 504. In this case, since the Corps' plans to dredge next month, without an injunction the opportunity to correct the record and then to require the Corps and consulting agencies to 'redecide', will be lost. This is irreparable harm and warrants an injunction.

For the same reason, once dredging begins, the opportunity to require the Corps to consider "less environmentally damaging practicable alternatives" under the CWA will also be lost. As the First Circuit noted, generally where a statute "not only requires decisionmakers to follow certain procedures, but it also curtails the range of their permissible choices," *id.* at 502, a procedural violation is not necessarily irreparable since a court may later "require the decisionmaker to chose a new action." *Id.* at 503. Here, where the Corps has left no time between its decision and initiation of dredging, there is no time to correct the procedural

violation under the CWA, and thus, as with NEPA, without an injunction the opportunity to cure the violation will be lost. This also is irreparable harm.

The substantive violations of the CWA represent a separate and independent violation that, if not enjoined, would also result in irreparable harm to the environment. The goal of the CWA is to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U. S. C. § 1251(a). Under Section 404, this purpose achieved by strict compliance with the LEDPA standard required by the Section 404(b)(1) Guidelines. 40 C.F.R. § 230.10(a). Thus, the pending implementation of an alternative that excessively and unnecessarily damages waters of the U.S. would cause, by statutory definition, irreparable harm.

Finally, the direct and cumulative impacts of excessive dredging in August will also irreparably harm the environment and Plaintiffs. As noted above, the Corps has conceded that dredging has by far the greatest impact in August than any other month and should be avoided whenever practicable. (Complaint ¶¶ 71, 73). The adverse impacts of dredging during the most biologically productive times include higher impacts to virtually every aspect of the ecosystem and the human economies that depend upon the ecosystem, including benthic organisms (EA at 44, 47, 50-51, 58); finfish, including adults, eggs and larvae (EA at 51-52, 54); lobster (EA at 40-41, 52, 54, 57, 58), shellfish (EA at 53, 55-57); threatened and endangered piping plovers, common terns and roseate terns (EA 58); endangered shortnose sturgeon (EA at 61-62); Atlantic sturgeon (EA at 61-62); essential fish habitat for 15 species of anadromous and marine fish (EA at 39, 62-63); lobster fishermen (EA at 63); shellfish harvesters (EA at 63-64); recreational users of the beaches, state parks and waters (EA at 64-65); and patrons of local hotels, inns and restaurants (EA at 64-65).

For the plaintiff lobstermen, the potential harms are severe. As the EA acknowledges, "the Kennebec River Estuary including the vicinity of the mouth of the river at Popham Beach is heavily fished for lobsters during the summer, with numerous lobster traps set throughout the area including in the proposed [PB] dredging and [JKL] disposal areas and travel/haul routes of the dredge." (EA at 63.) The proposed work will not only displace trapping in the immediate footprint of the project area, but also a large buffer surrounding the disposal zone (due to dispersion of the dumping of dredge slurry by the area's notoriously strong currents and tides (Complaint ¶¶ 13, 16, 84-87, Ex. 6). Additionally, dredging and dumping will directly kill and displace both juvenile and adult lobsters, including keepers and non-legal lobsters (notched females, oversized, and undersized), and wipe out prey species. (*Id.*)[7]

[7] The Corps finds that there will be no significant impacts to lobster or lobster fishing from dredging PB and disposal at JKL on grounds that the disposal site is "an open sandy area" which is not used by juveniles; that its sandy bottom does not provide habitat for adults; that the only adults present are those that might be moving across the area in search of food and shelter (EA at 58); and that lobsters are expected to be closer to shore during the period of disposal. (EA at 41.) Those conclusions are arbitrary and capricious in light of the Corps simultaneous acknowledgement of the overwhelming evidence that the disposal site and surrounding areas contain highly productive lobster habitat and are heavily fished throughout August (EA at 40-4; *see also* Complaint ¶¶ 13, 16, 69, 84-87, Ex. 6;).

The Corps' finding that no cobble lobster habitat would be impacted (EA at 52) is also contradicted by the National Marine Fisheries Service:

> In the NMFS' 2003 letter, we provided comments regarding the disposal option for the dredged material from Popham Beach, which is a nearshore site south of Jackknife Ledge. According to the 2003 draft EA and the USACE's letter, dated January 15, 2004, this site was chosen by the Maine Department of Environmental Protection because of its close proximity to the Popham Beach dredging site and because they believe the disposal at this location would allow the sand to remain in the littoral system and potentially indirectly renourish nearby beaches. Although the nearby beaches may receive sand nourishment from a gyre in this area, we continue to have concerns that due to the presence of gravel/rubble sediment and ledge outcropping in this area (see Appendix 4, Summary of Side-scan sonar survey of the Jackknife Ledge Area for the nearshore disposal site), this disposal site may not represent the least-

In previous dredge events, such impacts were unnoticeable because lobster migrate out of the area by the end of October and fishing ceases (EA at 40-41). August, on the other hand, is traditionally the height of the lobstering season with the best harvests, best fishing weather, and best prices. The disposal site at JKL is at the very center of the traditional fishing grounds for the Small Point, Popham and Bay Point lobstermen, including Plaintiff Brett Gilliam. (Complaint ¶ 13, Ex. 6.) Gilliam has testified that approximately 20 boats fish the area and will be adversely impacted if they loose the ability to fish the area in August and September. (*Id.*) Once it starts, dredging and dumping will eliminate Plaintiffs' and others' ability to trap these area for the duration of the season and may degrade productivity in future seasons. (*Id.*) While the EA blithely contends that fishermen displaced by dredging can set their traps elsewhere (EA at 63), nothing could be further from the truth. As the Corps acknowledges, the entire area is "heavily fished" and fishing grounds are carefully allocated among communities and among boats within each community – with the greatest competition for the best locations, such as JKL. There is no other place to go that is not also heavily fished. Displacement of a large number of

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> damaging alternative for disposal of dredge material. Specifically, the dredged material from Popham Beach area of the river may not be compatible with the gravel/rubble sediment and ledge found at Jackknife Ledge.… NMFS considers gravel and cobble habitat to be an aquatic resource of national importance. … In addition, American lobster use cobble substrate (ASMFC 1997) and macroalgal covered bedrock for shelter from predation and for feeding during early benthic phase (Barshaw and Bryant-Rich 1988; Wahle and Steneek 1991).
>
> Based upon the information available, we have concluded that the proposed project may have adverse effects on [Essential Fish Habitat] used for spawning, forage, and shelter for several of the species listed above. In addition, the proposed project may have potential adverse impacts on a number of diadromous fish and shellfish that are NMFS trust resources, including the federally listed endangered shortnose sturgeon and Atlantic sturgeon, which have been proposed for listing.

(Complaint ¶ 70, Ex. 20.)

traps from the best fishing grounds during the best months of the year will severely and directly harm the ability of Plaintiffs and other lobstermen to earn a living. (Complaint ¶¶ 13, 16, 69, 84-87, Ex. 6.) Because the Corps has refused compensation to lobstermen for lost gear or lost harvests, this harm is irreparable.

V. Balancing the Equities

From an economist's perspective, the Corps' attempt to externalize the cost of its dredge pollution upon unwilling third parties would be considered inefficient and a market failure, since the Corps will not be paying the true and full cost of its activities. From a legal perspective, imposing such costs on others is considered inequitable.

Dredging at PB and dumping of 20,000 cy of spoils at JKL in August would harm Plaintiffs and cause significant environmental damage to the Kennebec River estuary during the most biologically productive time of year. In contrast, deferring dredging of PB to winter (if dredging becomes necessary at all) would cause no harm to the Navy or BIW since there is no navigational emergency and a safe lane of travel for the USS Spruance currently exists. Similarly, enjoining anything more than the minimum dredging necessary to allow safe transit of the Spruance through DP reach (and PB, if necessary) would also significantly reduce the adverse environmental and economic impacts of August dredging without harm to the Navy or BIW. Likewise, using the offshore Seguin dump site instead of JKL would avert environmental and economic damage without impact to BIW or the Navy (and without impact to the Corps, since it is almost the same distance from the PB dredge site as JKL).

For the Corps, an injunction may impose some logistical and economic costs. But the so-called "emergency" is one of its own making. The Corps has an existing permit to dredge in winter. (Complaint ¶ 38.) The river channel is surveyed monthly. (Complaint ¶ 44.) The Corps

was aware or should have been aware of the impending need to dredge DP long before the difficult transit of the USS Jason Dunham last November. The Navy is quite frank in acknowledging that it finally declared a navigational emergency last November to force the Corps to allocate dredge funds to the Kennebec. (Complaint ¶39-40, Ex. 11.) Even then, the Corps failed to act within the time frame of its existing permit. The environment and the local community should not be required to endure unnecessary harms because of the Corps' failures.

To the extent that the Corps claims that an injunction would cost the government money because it has already bid and, potentially, entered into contracts to implement the preferred alternative, that too is a problem of its own making. From the initial public hearing on February 24, 2011 to today, Plaintiffs have repeatedly sought consideration of a low-impact dredging solution for August. (Complaint ¶¶ 65-69, 72, 75-76.) The Corps rebuffed all entreaties. On June 1, 2011 Plaintiffs sent a letter to the Corps District Engineer protesting premature issuance of the bid solicitation without consideration of reasonable minimal impact alternatives. (Complaint ¶75.) After getting no response, on June 13, 2011, Plaintiffs notified the Corps that without inclusion of bid items for low impact alternatives, its bid solicitation for the August dredging "will unlawfully limit the range of reasonable alternatives to this dredging project." (Complaint ¶75.) That letter was also ignored.

This entire dispute is an issue of timing. Dredging in August is necessary only because the Corps has made it so. Yet, instead of considering solutions for an emergency dredge that would enable safe transit of the USS Spruance while minimizing impacts to others, the Corps has focused solely and exclusively on the alternative with the greatest impacts. It is patently unfair to force the Phippsburg community – which depends upon a clean and healthy river environment

and is dedicated to restoring and preserving its water quality – to pay the price for the Corps' bureaucratic inefficiency and intransigence.

VI. Public Interest

Plaintiffs have intentionally structured their request for a preliminary injunction to ensure safe transit of the USS Spruance on Sept. 1, 2011. Plaintiffs have no desire to negatively impact the Navy's readiness to respond to military emergencies, nor to harm shipbuilding activities at BIW. Rather, Plaintiffs seek only a compromise solution that will reduce, as much as possible, harm to the environment and to their livelihoods and way of life. As every Mainer understands, August is the critical month for the tourism, fishing, lobstering and clamming industries. In a community such as Phippsburg, where these are the dominant industries and the summer is so short, it is contrary to the public interest to ask them to bear the burden of a major dredge and fill project at the height of their season.

Plaintiffs' common sense approach to solving the problem is not only fair and reasonable, but also meets the statutory definitions of the public interest. In cases involving unresolved conflict over use of available resources, Congress has determined that it is in the public interest to ensure full and adequate consideration of alternative solutions. 42 U.S.C. § 4332(2)(E). Likewise, in order to preserve and maintain the integrity of the nation's waters, Congress has established that the public interest requires the Corps to implement the dredge and fill alternative with the least environmental impact. 33 U.S.C. § 1344; 40 C.F.R. § 230.10(a). These two legislative definitions of the public interest should control in this situation.

VII. Conclusion

For the above reasons, Plaintiffs motion for a preliminary injunction should be granted.

Respectfully Submitted, July 12, 2011

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UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

CERTIFICATE OF SERVICE:

I hereby certify that on July 12, 2011, I electronically filed **PLAINTIFFS' AMENDED MOTION FOR A PRELIMINARY INJUNCTION** with the Clerk of Court using the CM/ECF system which will send notification of such filing(s) to:

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