

**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;)

Plaintiffs,)

v.)

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.)

COMPLAINT FOR
INJUNCTIVE AND
DECLARATORY
RELIEF

CIVIL ACTION NO. _____

COMPLAINT FOR INJUNCTIVE AND DECLARATORY RELIEF

For their complaint, 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 allege as follows:

I. Introduction

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

2. In this complaint, Plaintiffs allege that the proposed August 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.

3. 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.

4. Accordingly, Plaintiffs seek a declaratory judgment that the August dredging, as currently planned, violates NEPA and the CWA and an 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 upland or offshore disposal site that will have fewer adverse impacts on the environment and plaintiffs.

II. Jurisdiction and Venue

5. This action arises under Section 404 of the Clean Water Act (“CWA”), 33 U.S.C. § 1342; and the National Environmental Policy Act (“NEPA”), 42 U.S.C. § 4321, *et seq.*; and the implementing regulations for each statute.

6. This court has subject matter jurisdiction over the claims set forth in this complaint by virtue of 28 U.S.C. § 1331 (federal question jurisdiction); 28 U.S.C. §§ 2201-2202 (declaratory judgment and further relief); 28 U.S.C. § 1361 (mandamus); 28 U.S.C. § 2412 (equal access to justice); and the Administrative Procedures Act (“APA”), 5 U.S.C. § 701 *et seq.*, (judicial review of agency actions).

7. Venue is appropriate in the District of Maine pursuant to 28 U.S.C. § 1391(b).

III. Parties

8. The Phippsburg Shellfish Conservation Commission manages the shellfish resource in Phippsburg and represents 40 local commercial shellfish harvesters who depend on the shellfish flats on the Kennebec River for their livelihoods. In the seven years ending in 2007, Phippsburg’s harvesters dug an average of 225,543 pounds of clams each year. As explained in its March 25, 2011 comments to the Corps (Ex. 1), the Commission is deeply concerned that the dredging and disposal as currently permitted will cause high levels of pollution and/or sedimentation, shutting down the most productive shellfish flats in Phippsburg at the most profitable time of year. The Commission is also concerned that the suspended solids and siltation deposits caused by the dredging and disposal may kill or injure juvenile clams that in August are just emerging from their larval stage to “set” just below the surface of the mudflats. Shellfish harvesters’ past experiences with dredging and disposal events is that the silt component of the

dredged material does not fall to the bottom upon disposal; instead, re-suspended sediments are transported by the strong currents and tides of the Kennebec River and deposited on the shellfish flats, blocking the holes created by a clam's respiration and feeding process. This stresses clams and prevents the harvesters from identifying clam locations, and reduces harvests. The Commission is concerned that impacts from August dredging will severely harm Phippsburg's commercial shellfishing industry, both now and in the future. Landings and income generated in August support fishermen's families at other less productive times of the year. Damage caused to juvenile clams setting into the Kennebec River flats in August will disrupt future shellfish harvests and the long term sustainability of this fishery. (Ex.'s 3, 5.)

9. The Phippsburg Land Trust preserves and protects wild and natural places in Phippsburg for the benefit and education of current and future generations. The Trust is a Maine non-profit corporation that currently protects 800 acres of land in Phippsburg, including easements and fee interests on about 133 acres on or above Fiddler's Reach (also known as the Kennebec Narrows). The Greenleaf Preserve, which includes a small salt marsh wetland opposite Bluff Head, has experienced sedimentation from past dredging disposal. The Land Trust also owns approximately 10 acres at Cox's Head at the mouth of the Kennebec River, less than a quarter mile from the area where dredging is planned. The Land Trust sponsors guided walks each summer on its preserves and in other areas in Phippsburg; planned activities in the Fiddler's Reach area and Cox's Head will need to be rescheduled or moved due to the disruptive impact of dredging and disposal on enjoyment of our preserves. The Land Trust is deeply concerned with the potential environmental impact of changes that have been observed along the shores of the Kennebec Narrows, such as the influx of sand and mud on its shorelines, and decreased depth measurements in the channel due to extended use of the Kennebec Narrows as a disposal site for

dredge spoils. The Wilbur Preserve at Cox's Head serves in part as a public access point for Phippsburg shellfish harvesters to access the highly productive Cox's Head and Atkin's Bay mudflats, which extend from the preserve at the point of Cox's Head across to Fort Popham. The Land Trust is concerned that turbidity, siltation and pollution impacts from the dredging could shut down this important shellfish harvesting area. (Ex.'s 2, 3, 5.)

10. Friends of Merrymeeting Bay ("FOMB") is a non-profit Maine corporation with over 450 members. FOMB undertakes research, advocacy, land conservation, education, and litigation activities in order to preserve the ecological, aesthetic, historical, recreational, and commercial values of Merrymeeting Bay, its watershed, and the Gulf of Maine. FOMB has members who live near, own property near, and recreate on and near Merrymeeting Bay, the rivers that flow into the Bay and the lower Kennebec flowing out of the Bay. Among other activities, FOMB members kayak and canoe, recreationally fish, hike, photograph, and observe aquatic life and wildlife in and around all of these waters. FOMB members receive economic value from these waters through, among other activities, commercial fishing and guiding. FOMB members are interested in maintaining the natural biodiversity of the Merrymeeting Bay watershed and the Gulf of Maine. FOMB "Healthy Rivers, Healthy Gulf Program" is devoted to educating the public and policy makers about the important connections between Maine's rivers and the Gulf of Maine. FOMB has successfully filed an Endangered Species Act petition to expand the Atlantic salmon listing to include the Kennebec and Androscoggin River salmon populations. FOMB is concerned that dredging and disposal in August will significantly impact water quality, recreation, and wildlife and thus harm the interests FOMB and its members have in these waters. (Ex.'s 3, 4, 5.)

11. Bob Cummings has lived on Drummore Bay since 1962, and has been a member of the Phippsburg Shellfish Conservation Committee for the last 20 years. Prior to serving on the Shellfish Committee, he served as a Phippsburg selectmen for 12 years. In these roles, he has spent years working to clean up the Kennebec River and reopen once-closed clam flats. He enjoys canoeing on Drummore Bay and the Kennebec River, watching the seals at play in the Kennebec and the eagles that reside on Lee Island. In summer, his canoe is joined by many other small boaters who are fishing and recreating on the Kennebec River. He is concerned that the wildlife in this portion of the Kennebec River will be disturbed by impacts from the dredge operations; that clam flats in the lower part of Drummore Bay will be contaminated; that his boating experience will be negatively affected by the noise and disruption of the dredging and reductions in water quality; and that the fishing and guiding businesses that depend on this stretch of the Kennebec River will be adversely affected by the full-time dredging and disposal operation planned for August, 2011. (Ex.'s 3, 5.)

12. Capt. Ethan DeBery is a Phippsburg resident and owner and operator of Fish 'n' Trips Charters. Capt. DeBery operates the ferry to Seguin Island and conducts fishing charters around the Popham Beach area and in the Kennebec River estuary. The proposed dredging would impact his ferry and charter fishing operations by obstructing and preventing use of impacted waters during the height of the boating and fishing season. Additionally, the proposed activity would create noise, air pollution, water quality impacts, and disturb fish, wildlife and habitat – all of which would degrade the experience for his customers and detract from his business. (Ex.'s 3, 5.)

13. Brett Gilliam is a Phippsburg resident and commercial lobsterman. Brett has fished for lobster since 1968 and during that time has regularly fished the waters surrounding

Jackknife Ledge (“JKL”) during the months of August and September. Brett generally runs at least 50 traps in the disposal area south of JKL, and plans to continue fishing this area in the future. Disposal of dredge spoils at JKL would prevent Brett from continuing to fish the area, and would result in destruction of lobster and lobster habit, burial of his lobster gear under the sand, and cut lines and lost and damaged gear due to dredge, barge, tug, and attendant boat traffic. Once displaced from JKL, Brett cannot move to other locations because the entire area is heavily fished. Loss of the ability to fish the area surrounding JKL in August and September would adversely affect Brett’s ability to make a living. (Ex.’s 3, 5, 6).

14. Peggy Johannessen is owner and operator of Popham Beach Bed & Breakfast. The B&B is located in the old lifesaving station on Popham Beach at the mouth of the Kennebec River, directly opposite the proposed dredge operations near North Sugarloaf Island. August is the B&B’s busiest month of the year, and accounts for roughly a third of its business. Generally, the B&B has a full house the entire month. Past dredging conducted during winter and spring months has been marked by very loud and persistent noise, night and day, but when few or no guests were present. Mrs. Johannessen is concerned that the proposed dredging during August will significantly affect her guests and deter business. In particular, she is concerned about noise impacts, which will occur night and day, as well as nighttime lighting and other impacts to the otherwise spectacular views of the ocean, islands and the Seguin Lighthouse. (Ex.’s 3, 5.)

15. Dot Kelly is a Phippsburg property owner, member of the Phippsburg Conservation Commission and FOMB, and direct riverfront abutter to the disposal area in the Kennebec Narrows at Bluff Head. Mrs. Kelly uses the river and shores to swim and wade, is an avid river kayaker and observer of wildlife. She highly values the river’s quiet, clean and natural setting, and likes to observe fishermen drifting with currents in the river. Past dredge and

dumping events have disrupted this natural setting, both during the day and at night and have been loud enough to wake her and her family up at night. Mrs. Kelly has also personally observed that during and after past dredging and disposal events, the entire river corridor in front of her house turned turbid and discolored, resulting in deposits of sand and silt along her shoreline and upstream and downstream areas. These impacts detract from her ability to use the area, and have driven away resident seals and other wildlife that she enjoys watching. (Ex's. 3, 5, 7.)

16. Lawrence Pye is a Phippsburg resident, Phippsburg Town Selectman, and commercial lobster fisherman. Lawrence traditionally fishes the waters surrounding JKL in August and plans to continue fishing this area in the future. Dredging of the Popham beach area and disposal of dredge spoils at JKL would prevent Lawrence from continuing to fish the area, and would result in destruction of lobster habit, burial of his lobster gear under the sand, and cut lines and lost and damaged gear due to dredge, barge, tug, and attendant boat traffic. Lawrence is also concerned that long term and cumulative impacts from dredging and disposal at JKL would degrade the habitat and lobster fishery in the waters surrounding JKL and the North Sugarloaf Island channel. (Ex.'s 3, 5.)

17. Laura Sewall is a Phippsburg resident who lives on the Sprague River Marsh, very near to Seawall Beach in the Small Point area. Laura is an avid swimmer and surf kayaker and enjoys the water at Seawall Beach and other area beaches on most August days. Laura greatly values the aesthetic experience of a clean, quiet, scenic, and natural coastline. She is also the director of the Bates-Morse Mountain Conservation Area (BMMCA). Every summer season, nearly 16,000 people walk over Morse Mountain to go to Seawall Beach. The trail ends just inshore of Jack Knife Ledge. The turbidity in the water, and concerns about potential toxins

stirred up by dredging and dumping would prevent Laura and the public users of BMMCA from engaging in recreational activities in and on the water at Sewall Beach and BMMCA, and would detract from their enjoyment of the scenic, quiet and natural experience that the area has to offer. (Ex.'s 3, 5, 8.)

18. Dean Doyle is a Phippsburg resident, commercial clam harvester, and chair of the Phippsburg Shellfish Conservation Commission. For the last 16 years, Mr. Doyle has harvested clams throughout Phippsburg, including clam flats in Drummore Bay, the Upper Flats, Parker Head, Wyman's Bay, Atkins Bay, and the Popham/Small Point Beach and Morse/Sprague River areas. During and immediately after prior dredging events, including the last time the FNP channel was dredged in 2003, Mr. Doyle has personally observed a layer of silt and sediment dispersed over productive clamflats and the filling of clam air holes due to such sedimentation. He is concerned that the silt and sediments from the proposed action will affect the above listed clam flats and force closure of shellfishing under state and federal public health protocols. A closure due to dredging in August would impose severe negative impacts on Mr. Doyle's business and all other shellfish harvesters in town: August is the most important month of the year for harvesters because it generally has the best weather (i.e. fewest rain-induced flats closures) and long days for harvesting. Not only is their harvest volume highest in August, but harvesters also get premium prices during the month – often double the price paid for clams in the winter and spring. Even short of a closure, deposition of silt and sediments on the clam flats will cover air holes, making it difficult to find clams and reducing harvests. In addition, siltation in August is likely to have severe negative impacts on clam spats (juvenile clams), which must set near the top of the flats until they mature sufficiently to survive at deeper levels. Mr. Doyle

is concerned that burial by a layer of silt and sediment will kill many of these juvenile clams, potentially eliminating an entire year class from future harvests. (Ex.'s 1, 3.)

19. Douglas Watts resides in Augusta, Maine frequently visits the lower Kennebec River and its beaches and intends to do so regularly in the future. Mr. Watts fishes the dredging and disposal areas for striped bass, recreates and swims on the beaches, and hikes in the BMMCA. Mr. Watts is a professional wildlife photographer and videographer with a focus on the native fish species of the Kennebec River. Mr. Watts' videography of Atlantic sturgeon leaping in the Kennebec River is now on permanent display at the Hudson Highlands Nature Museum in Cornwall, NY. His underwater photography of alewives and blueback herring in the Kennebec River is now on permanent display at the Cape Cod Museum of Natural History in Hyannis, MA. Mr. Watts earns a portion of his annual income from licensing his photographs of the Kennebec River and its native fish and wildlife and allows free licensing of his work to state and federal fisheries restoration agencies and non-profit organizations. His ability to continue practicing this economic activity is directly dependent on the preservation and recovery of the native fish species of the Kennebec River watershed, including shortnosed sturgeon, Atlantic Sturgeon, Atlantic salmon and other native fish. (Ex. 14.)

20. Defendant United States Army Corps of Engineers ("Corps") is the federal agency charged with maintaining the "Federal Navigation Project" ("FNP") in the Kennebec River, including keeping the FNP open for navigation by deep draft Navy ships. The Corps is simultaneously responsible for implementing Section 404 of the CWA, including compliance with the Corps' Section 404(b)(1) Guidelines, 40 C.F.R. § 230.10, for all dredge and fill activities affecting waters of the U.S.

21. Defendant Col. Philip T. Feir is District Engineer for the Corps' New England District. In that capacity, Col. Feir is the federal official responsible for ensuring that projects of the district comply with NEPA and the CWA. Col. Feir is sued in his official capacity.

IV. Legal Background

A. The National Environmental Policy Act

22. Pursuant to the National Environmental Policy Act ("NEPA"), before approving a proposed dredge and fill project, the Corps must determine whether the action will significantly affect the quality of the human environment. 42 U.S.C. § 4332(C).

23. 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). *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.)

24. NEPA requires the Corps to take a "hard look" at a proposed project, alternatives, and impacts. *Kleppe v. Sierra Club*, 427 U.S. 390, 410 n. 21 (1976); 45 Fed. Reg. at 85339. The hard look doctrine requires the permitting agency to "set forth sufficient information for the general public to make an informed evaluation, and for the decisionmaker to consider fully the environmental factors involved and to make a reasoned decision after balancing the risks of harm to the environment against the benefits to be derived from the proposed action." *Sierra Club v. U.S. Army Corps of Eng.*, 701 F. 2d 1011, 1029 (2d Cir. 1983) (quotations and citations omitted). The Corps review must ensure "the integrity of the process of decision by giving assurance that stubborn problems or serious criticisms have not been 'swept under the rug.'" *Id.*

(citing *Silva v. Lynn*, 482 F.2d 1282, 1285 (1st Cir. 1973)). “[W]here comments from responsible experts . . . disclose new or conflicting data or opinions . . . these comments may not simply be ignored. There must be good faith, reasoned analysis in response.” *Silva*, 482 F.2d at 1285.

B. Section 404 of the Clean Water Act

25. “Congress enacted the Clean Water Act to ‘restore and maintain the chemical, physical, and biological integrity of the Nation’s waters.’” *Town of Norfolk v. U.S. Army Corps of Engineers*, 968 F.2d 1438, 1445 (1st Cir. 1992) (quoting 33 U.S.C. § 1251(a)). Section 301 of the CWA prohibits discharge of pollutants, including dredged or fill materials, into navigable waters unless authorized by a permit. 33 U.S.C. §§ 1311(a), 1362(6). Navigable waters includes all “waters of the United States,” *id.* at 1362(7), including adjacent and interconnected wetlands. 40 C.F.R. § 230.3(s)(7).

26. Section 404 of the CWA authorizes the Corps to issue or deny permits for the discharge of dredged and fill materials into waters of the United States at specified disposal sites. 33 U.S.C. § 1344(a). Before issuing a permit, the Corps must ensure that the proposed action complies with CWA Section 404(b)(1) Guidelines issued by the Environmental Protection Agency (“EPA”) in conjunction with the Secretary of the Army. *Id.* § 1344(b)(1); *see also* 33 C.F.R. § 320.4(a)(1) (section 404 permits will be denied for projects that do not comply with the EPA’s 404(b)(1) Guidelines), *id.* § 336.1(a) (the Corps authorizes its own discharges of dredged or fill material by applying all applicable substantive legal requirements, including the section 404(b)(1) guidelines).

27. The 404(b)(1) Guidelines provide that:

[N]o 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, so long as the alternative does not have other significant adverse environmental consequences.

40 C.F.R. § 230.10(a) (known as the less environmentally damaging practicable alternative, or “LEDPA”, standard). “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).

V. Factual Background

A. History of Dredging in the Kennebec River

28. The designated Federal Navigation Project (“FNP”) in the lower Kennebec River is a 500-foot wide channel with an authorized depth of 27 feet below mean low low water (“MLLW”) that stretches 13 miles from shipbuilding facilities at the Bath Iron Works (“BIW”) in the City of Bath to the mouth of the Kennebec River at Popham Beach in Phippsburg. (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 1-2, Fig. 1 (June 2011), (hereinafter as “EA”), Ex. 9.)

29. The Corps occasionally dredges the FNP to enable transit of deep draft Navy ships. The two locations dredged most often are:

- a. South of the City of Bath at Doubling Point in the vicinity of Coast Guard buoys 28, 29, and 31 (hereinafter as “Doubling Point” or “DP”), and

- b. At the mouth of the Kennebec River between Popham Beach and north Sugarloaf Island in the vicinity of Coast Guard buoy 6 (hereinafter as “Popham Beach” or “PB”). (EA at 1; *id.* at 2-4, Figs. 2-3.)
30. Spoils from dredging at PB and DP were originally dumped either at an approved disposal site in the Atlantic ocean near Seguin Island or at an in-river dump site in the Kennebec Narrows (also called Fiddler’s Reach) just north of Bluff Head. (EA at 15.) In 1989, 2000, 2002 and 2003, PB spoils were dumped in 40 to 50 feet of water 0.4 miles south of Jackknife Ledge, approximately 1 mile south of Popham Beach State Park. (EA at 2-4, 13-14.)
31. Over last forty years, the Corps dredged Doubling Point and Popham Beach as part of the same project in 1971, 1989, 1997, 2000, 2002, and 2003. (EA at 7-8, Table 1.)
32. The Corps dredged Doubling Point only in 1975, 1980, 1986, and 1991. (*Id.*)
33. In order to minimize adverse impacts to endangered species, anadromous fish runs, lobster migration and shedding, shellfish spawning, inshore feeding of schooling fish, and commercial and recreational fishing (including shellfishing and lobster fishing), state and federal permits for dredging of the FNP have consistently prohibited any dredging during the summer months when the river is most biologically productive and when commercial and recreational fishing is at its height. (*See, e.g.*, MDEP Order, #L-16281-4E-A-N (Corrected) at 3-5 (Nov. 30, 1989), Ex. 10).
34. In 1989, in order to minimize adverse environmental and economic impacts to anadromous fish runs, lobster migration and shedding, lobster fishing, shellfish spawning, and inshore feeding of schooling fish, the Maine Department of Environmental Protection allowed dredging of DP only between Sept. 10 and Oct. 10 or Nov. 1st and April 30th (but prohibited use of the in-river disposal site between Nov. 1st and March 1st) and allowed dredging of PB only

between Nov. 1st and April 30th. (MDEP Order, #L-16281-4E-A-N (Corrected) at 3-5 (Nov. 30, 1989), Ex. 10).

35. In 1997, MDEP found that dredging in November should minimize adverse impacts to migrating anadromous fish, shellfish spawning in the river, and lobstering at the mouth of the river. In order to protect endangered shortnose sturgeon, however, dumping at the in-river disposal site was prohibited until after Nov. 15, when the sturgeon typically relocated upstream. (MDEP Order, #L-16281-4E-B-N at 2-3 (Oct. 22, 1997), Ex. 10).

36. In 2000, MDEP approved emergency dredging in December to enable transit of a Navy destroyer based, in part, on comments from the Maine Department of Marine Resources that dredging in December would minimize potential adverse impacts to migrating anadromous fish, shellfish spawning in the river, and lobstering at the mouth of the river. (MDEP Order, #L-16281-4E-C-N at 2-3 (Nov. 30, 2000), Ex. 10).

37. In 2002 – which permit authorized both emergency dredging in April 2002 and a long term 10 year maintenance dredging permit – MDEP found that dredging would not unreasonably harm estuarine or marine fisheries provided that long term dredging using a hopper dredge was limited to the period between Dec. 1 and March 15 and long term dredging using a mechanical dredge was limited to the period between Nov. 1 and April 1. (MDEP Order, #L-16281-4E-D-N at 2-3 (Nov. 30, 2000), Ex. 10).

38. The 2002 permit is still in effect. (*Id.*)

B. Conditions at Doubling Point

39. In October 2010, shoaling of the river bottom in the vicinity of buoy 28 at Doubling Point delayed the departure of the USS Jason Dunham (DDG 109). In order to clear the shoals, the Navy shifted the Dunham's departure date by five days to utilize the best possible

tide and altered its line of departure to a deeper lane of travel to the east of the marked channel, which required temporarily relocating buoy 28. Measured clearance was less than a foot. (Dean Krestos, Captain, USN, letter to Col. Philip T. Feir, Army Corps of Engineers (Nov. 23, 2010) (hereinafter as “Krestos 1”), Ex. 11.)

40. Based on this event, the Navy determined that shoaling in the vicinity of Doubling Point has created a “Critical Safety Impact” and requested immediate action by the Corps to clear the channel in support of then scheduled sea trials of the USS Spruance (DDG 111) on or about Feb. 15, 2011. (*Id.*) In a follow-up letter, the Navy stated, “hazardous shoaling in the navigable channel in the vicinity of buoys 28, 29, and 31 [Doubling Point] is unsafe and constitutes an emergency situation.” (Dean Krestos, Captain, USN, letter to MG William T. Grisoldi, Army Corps of Engineers (Jan. 19, 2011) (hereinafter as “Krestos 2”), Ex. 11.)

41. Due to “insufficient project funding and lead time” (Col. Philip T. Feir, District Engineer, *Statement of Findings*, at 1 (June 15, 2011), Ex. 12), the Corps was unable to dredge the channel prior to the scheduled sea trials in February, or at any time during the existing November 1 to April 30 dredging permit window. (EA at 1.)

42. The draft of the USS Spruance and other DDG Destroyers is 28 feet 9 inches. (Krestos 1.) The overall length is 510 and the “extreme beam” is 60 feet. (Naval Vessel Register, <http://www.nvr.navy.mil/nvrships/details/DDG111.htm>, Ex. 13)

43. According to BIW, the shipbuilder, in the Kennebec, the “minimum depth of water to safely navigate a DDG 51 Class destroyer safely is 25 feet, and the vessel can only move through this region during a small window of time surrounding a high tide of at least 6 feet (once per day). This allows a 2 foot margin of safety against the vessel running aground.” (Bob Herman, BIW, email to Robert Green, Maine DEP, April 7, 2011 at 1:47 pm, Ex. 14).

44. BIW's licensed Master and River Pilot takes monthly depth soundings of the Kennebec River. (*Id.*) Those soundings are communicated to the Corps, and the agency annually meets with BIW, the Maine Congressional delegation, and other interested parties to review the status of dredging needs on the Kennebec River. (*Id.* at 2.)

45. In January 2011, BIW's Master identified a 300-foot lane of travel with "water sufficiently deep for safe navigation to the east of the designated channel" at Doubling Point. (*Id.* at 1; Krestos 2)

46. BIW and the Navy petitioned the US Coast Guard to temporarily relocate the channel markers at Doubling Point reach. (*Id.*; Krestos 2.) With the Navy's permission, the BIW master moved DDG 111 Spruance safely through this temporarily marked area four times for two separate sea trials, including a round trip between BIW and the Atlantic Ocean on February 16-17 and a second round trip on March 15-18. (*Id.*)

47. Outgoing transits occurred at high tides in Bath of 7.1' and 6.5' respectively. (Maine Boats, Homes and Harbors, *Tide Charts for Bath and Ft. Popham*, Feb, March, August, & Sept. 2011, <http://maineboats.us harbors.com/monthly-tides/Maine-Midcoast>, Ex. 16).

48. Soundings taken in January 2011 found that the depth of the federal navigational channel was limited at Doubling Point, buoy 28, to a controlling depth of 19' 7" and the shoals spanned almost the entire width of the 500 foot channel. (Dean Krestos, Captain, USN, letter to Col. Philip T. Feir, Army Corps of Engineers (June 3, 2011) (hereinafter as "Krestos 3"), Ex. 11).

49. Soundings completed on May 21, 2011, after the spring run-off, found some improvement, with a new controlling depth of 22' 5" in the Doubling Point Reach. (*Id.*) But the

Navy also determined that shoaling has moved eastward into the unmarked channel used by the Spruance in February and March. (*Id.*)

50. The May survey shows, however, that any new shoaling on the edge of the unmarked channel to the east of the marked channel is minimal, that other areas of the eastern unmarked channel have been cleared out by the spring runoff, and that there is still an open lane of travel 300' to 500' wide in the eastern unmarked channel with water in excess of -27'. (EA, App. G, Revised Drawings C-101, C301, Ex. 17.)

51. The May survey shows that the shallowest waters – and therefore the areas that will take the longest time to dredge and which will produce the bulk of the dredge spoils – are in the western two thirds of the marked channel at Doubling Point. (*Id.*)

52. The May survey shows that the eastern third of the marked channel at Doubling Point has a much smaller area of shoaling, and that shoals in this section have built up to lesser depth. (*Id.*)

53. The May survey shows that by dredging the eastern third of the marked channel only, the Corps could open a 500'-plus lane of travel with water sufficiently deep for safe transit of the USS Spruance that still leaves a sizeable buffer between the ship and the eastern shore. (*Id.*)

54. High tide on the Kennebec River in Bath on Sept. 1 is predicted to be 7.8' and will occur at 3:08 pm. (Ex. 16).

C. Conditions at Popham Beach

55. In the November 2010, January 2011, and June 2011 letters from Captain Krestos, the Navy declared an emergency due to shoaling in the Doubling Point reach of the FNP only. (Ex. 11.) None of these letters discussed a need for dredging at PB and there is no indication in

the EA (EA at 8-10 and 42-44) or in any of the attached correspondence (EA, App. A) that the Navy has declared an emergency that requires dredging of the FNP at Popham Beach in order to enable safe transit of the USS Spruance on September 1, 2011.

56. The May 2011 survey of the Popham Beach area of the FNP shows minor shoaling on the margins of the FNP, but not at levels that would present an emergency or a barrier to safe transit of a DDG Destroyer. (EA, App. G, Revised Drawings C-103, C301).

57. The shallowest location in the PB reach has a controlling depth of -22.3 feet. (*Id.*) At that location, the May 2011 survey shows shoals covering a small area on the northeast boundary of the channel, which leaves an approximately 450-foot lane of travel with water sufficiently deep for safe navigation within the 600-foot marked channel (*Id.* at C-301, Cross section C-103). No dredging is proposed for this 450-foot wide lane of travel. (*Id.*)

58. At the most constricted location, south of North Sugarloaf Island, the May 2011 survey shows that there is at least a 300-foot lane of travel of deep water within the 500-foot marked channel, and that controlling depths exceed 26 feet throughout the 500-foot wide channel. (*Id.*) No dredging is needed or proposed for this 300-foot wide lane of travel. (*Id.*)

59. High tide at Fort Popham, Hunnewell Beach on Sept. 1 is predicted to be 10.2' and will occur at 2:12 pm. (Ex. 16).

D. The 2011 Environmental Assessment and Statement of Findings

60. On or about March 1, 2011, the Corps issued a Public Notice for an emergency out-of-season (August) maintenance *and* advanced maintenance dredging of the FNP in the Kennebec River. (Public Notice at 1-2, Ex. 18.)

61. Instead, of seeking approval to dredge the minimum width and depth necessary to enable the USS Spruance to safely transit the Doubling Point reach, the Corps proposed to

dredge to authorized depths (-27' plus two feet of allowable overdredge) and an extra three feet (-30, plus two feet of allowable overdredge) of the entire 500-foot channel. (Public Notice at 7; EA at 6.) In all, the Corps proposed to dredge to -32', which would remove an estimated 50,000 cubic yards from the Doubling Point channel, and to dispose of those spoils in-river at the Kennebec Narrows dump site north of Bluff Head. (*Id.*)

62. At the mouth of the Kennebec River at Popham Beach, the Corps proposed to dredge all shoaled areas to authorized depths (-27' plus two feet of allowable overdredge) (Public Notice at 8; EA at 6.) In all, the Corps proposed to dredge the PB reach to -29', which would remove 20,000 cubic yards of material, and to 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.*)

63. The Corps proposed to perform the work by hopper dredge over a three to five week period beginning on or about August 1, 2011. (Public Notice at 1-2; EA at 6.)

64. Because this out-of-season dredging was scheduled to occur outside its existing permit window, and because the Kennebec River stock of the Gulf of Maine Distinct Population Segment of Atlantic Salmon was listed as endangered in 2009, the Corps re-initiated a section 7 consultation process with the National Marine Fisheries Service ("NMFS") under the Endangered Species Act and applied for a new Section 401 water quality certification from the State of Maine. (Public Notice at 3-4.)

65. The Corps held a public hearing Feb. 24, 2011. The public, including several Plaintiffs, raised the following concerns: the timing of dredging in August, which is the best time of year for shellfishing on the Kennebec; that the JKL dump site is productive for lobster in August; impacts to shellfishing and lobstering and the potential for lost harvests; impacts to other

fish species and to sport fishing and commercial fishing; the need to consider alternative dredging methods, times, and disposal sites; noise and other impacts to summer tourism; the need for a compromise solution; inadequate planning by the Corps; and deposition of spoils on clamflats and private shorelines. (Robert Green, Maine DEP, handwritten notes, Ex. 19.)

66. On March 19 and 26, 2011 FOMB submitted comments to the Corps that raised the following concerns: violations of Maine water quality standards, the proposed reclassification of Maine water quality designations to allow dumping at the Kennebec Narrows; the availability of “Less Environmental Damaging Practicable Alternatives”; and adverse impacts to endangered sturgeon and salmon, anadromous fish and marine mammals. (Ex. 4.)

67. On March 20 and 30, 2011, Plaintiff Dot Kelly, an owner of property abutting the shoreline of the Kennebec Narrows dump site, submitted comments to the Corps that raised the following concerns: water quality and wildlife impacts due to accumulation of dredge spoils on her normally rocky shoreline from a Nov. 2009 dredging by BIW; cumulative impacts of dredging by the Corps and BIW; violations of Maine Class SA water quality standards in the Kennebec Narrows; the need for low impact alternatives; impacts of disposal at JKL on erosion of Popham Beach; impacts to clam flats; and violations of the Section 404(b)(1) Guidelines, 40 C.F.R. § 230. (Dorothy Kelly, *Comments to Army Corps* (March 30, 2011) and Dorothy Kelly, *Comments to Maine DEP* (March 20, 2011), Ex. 7.)

68. On March 25, Plaintiffs Dean Doyle and the Phippsburg Shellfish Conservation Commission submitted comments to the Corps regarding impacts of August dredging upon shellfish, lobster, and finfish, and noted that because of the severe impacts to the region’s fishing and tourism industry – including lobstermen, shellfish harvesters, fishing guides, and suppliers of

bait and equipment – that dredging in August should be a measure of “last resort.” (Dean Doyle, Chair, Phippsburg Shellfish Conservation Commission, *Comments*, (March 25, 2011), Ex. 1.)

69. On March 30, all Plaintiffs submitted comments to the Corps seeking review and implementation of less environmentally damaging alternatives, including no action, minimal dredging, alternative dredging methods including mechanical clamshell dredging, alternative disposal sites including upland and offshore disposal, and deferral of portions of the dredging to the Corps existing winter permit window. Among other issues, the letter stated:

In summer, lobsters are highly abundant in the project area surrounding the Popham [Beach] Dredge site and JKL dump site. JKL is part of the area’s traditional fishing grounds, and is extensively fished by Small Point and Phippsburg lobstermen in August, including by several commenters here. Harvests from JKL make up a significant portion of their summer catch and thus their annual income.

Use of hopper vacuum dredges, barges and tugs, and dumping during the height of the lobster season will, literally, cut and bury the fishery. The proposed action will kill and disturb lobster, destroy habitat, cut lines, and cover lobster and gear in meters of sand and silt. The project will effectively prevent any fishing within the project area and a large buffer zone, will degrade fishing quality in adjacent areas, and will cause crowding of remaining fishing areas due to loss of the JKL fishing grounds. Coming during the prime fishing season in August, this will cause severe adverse impacts to the local lobstermen as well as businesses that depend upon the lobster industry, such as suppliers of bait and equipment and operators of lobster pounds. It is absolutely unconscionable that the draft EA would wholly ignore this localized, but nevertheless severe and major economic impact.

(Phippsburg Commenters, *Comments to Army Corps* (March 30, 2011), Ex. 5.)

70. On March 30, the National Marine Fisheries Service, commented that it continues to be concerned, as it has since 2003, that due to the presence of high quality habitat comprised of gravel/rubble sediment and ledge outcropping in the Jackknife Ledge area, this disposal site may not represent the least-damaging alternative for disposal of dredge material, and that

disposal at this location may have adverse effects on Essential Fish Habitat and NMFS trust species, including diadromous fish and shellfish (including lobster). Specifically NMFS stated:

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-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. The New England Fishery Management Council has designated similar gravel/cobble habitat on Georges Bank as a HAPC for juvenile cod. As such, NMFS considers gravel and cobble habitat to be an aquatic resource of national importance. In addition, larval and juvenile sea scallops prefer bottom habitat composed of gravelly sand (Packer et al. 1999); the highest survival rates of American shad eggs reportedly occur over gravel and rubble substrates (Collette and Klein-MacPhee 2002); and ocean pout deposit eggs in sheltered nests and are associated with rocky substrates (Steimle et al. 1999). 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.

(Peter Colosi, NMFS, letter to Col. Philip T. Feir, Army Corps (March 30, 2011), Ex 20.)

71. On April 5, 2011, Army Corps project manager Bill Kavanaugh, wrote to Maine DEP and 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."

(Bill Kavanaugh, Army Corps, email to Brian Swan, DMR, and Robert Green, DEP, April 5, 2011, 10:15 a.m. Ex 21).

72. On April 14, 2011, Maine DEP issued a Section 401 water quality certification and Natural Resources Protection Act permit for the Corps preferred alternative. On May 16, Plaintiffs filed three separate appeals of the permit and certification with the Maine Board of Environmental Protection, and provided copies of the Appeals to the Corps for inclusion in the administrative record. Those appeals alleged inadequate review of alternatives under state law, violations of Maine water quality standards, undue adverse impacts to significant wildlife habitat and marine fisheries, and interference with recreation, tourism and existing uses. The appeals requested similar relief as this complaint, but will not be heard until July 21, 2011. (Town of Phippsburg, et al., *Appeal to Board of Environmental Protection* (May 16, 2011), Ex. 3; Dot Kelly, *Appeal to Board of Environmental Protection* (May 16, 2011), Ex. 22; Ed Friedman and Douglas Watts, *Appeal to Board of Environmental Protection* (May 16, 2001), Ex. 15).

73. On April 28, 2011, the Corps' Chief of Engineering and Planning, in a letter to responding to concerns raised by NMFS about the proposed August dredging of the Kennebec, stated: "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." (H. Farrell McMillan, Army Corps, letter to Peter Colosi, NMFS, at 4 (April 28, 2011) Ex. 23).

74. In May 2011 and in later amendments, the Corps issued *Construction Solicitation and Specifications For Maintenance and Advanced Maintenance Dredging of the Kennebec River* (#W912WJ-11-B-0002) "to remove dangerous shoals from the channel in advance of the transit of the U.S. Navy Destroyer SPRUANCE, currently scheduled to depart the Bath Iron

Works (BIW) on or about September 1, 2011.” The solicitation specified that the work was to be done by hopper dredge to authorized depths, that advanced maintenance dredging to -32 feet may be performed as optional work in the Doubling Point reach, and spoils were to be dumped at the in-river (Kennebec Narrows) and near-shore (JKL) dump sites. (Ex. 24).

75. On June 1, 2011, Plaintiffs submitted a letter to the Army Corps Northeast Region District Engineer stating that issuance of a Construction Solicitation and Specifications for maintenance and advanced maintenance dredging of the Kennebec River (#W912WJ-11-B-0002) (hereinafter as “Solicitation”) prior to completion of endangered species section 7 consultation, the NEPA process, or the CWA review of less damaging alternatives, violated federal law. Plaintiffs again requested that the Corps consider alternatives that minimize August dredging. (Ex. 25).

76. On June 13, after the Corps further amended the Solicitation, Plaintiffs sent a letter to the Corps’ counsel protesting that the solicitation is premature, and that by limiting the range of reasonable alternatives, the Corps was unlawfully limiting the range of reasonable alternatives in violation of NEPA regulations, 40 C.F.R. § 1506.1(a)(2), Clean Water Act Section 404(b)(1) Guidelines, 40 C.F.R. § 230.10(a), and the Endangered Species Act, 16 U.S.C. § 1536(d): “Given the limited time available to complete mandatory federal bidding requirements, failure to include any other alternatives in the bid solicitation effectively forecloses timely implementation of all other alternatives but the preferred and no action alternatives.” (Ex. 26).

77. On June 16, 2011, the Corps approved its preferred alternative to conduct maintenance and advanced maintenance dredging of 70,000 cy of materials from the Kennebec River FNP in August 2011. (EA and SOF).

78. On June 17, 2011, the Corps opened bids submitted in response to Solicitation #W912WJ-11-B-0002. (Army Corps, Bid Opening Abstract, June 17, 2011, Ex 27.)

79. The Corps never provided a copy of the EA or SOF to Plaintiffs, despite their status as interested parties and Appellants before the Maine Board of Environmental Protection.

80. On or about June 22, 2011, the Corps posted the EA, SOF and appendixes on its Northeast Region website: <http://www.nae.usace.army.mil/projects/me/KREA/ea.htm>.

81. The EA and SOF state that at the time the project was approved on June 16, 2011 the Endangered Species Act section 7 consultation remained incomplete:

A BO is being prepared by NMFS concerning the effects of the proposed action on these species, and will be attached to this document once completed. At this time a draft statement of Reasonable and Prudent Measures and Terms and Conditions for the proposed August 2011 dredging has been issued by NMFS concerning shortnose sturgeon.

(EA at 33.)

82. The EA failed to separately consider a no action alternative for PB. (EA at 8-10.)

83. The EA failed to consider low impact and minimal dredging alternatives, including specifically a minimal dredge alternative for DP and, if necessary, PB. (EA at 10-11.) Additionally, the EA rejected alternative dredging methods (mechanical dredging) and disposal locations (upland, offshore) without considering whether such alternatives were viable under a minimal dredge alternative that reduced the areas that need to be dredged and the volume of spoils to be dumped (EA at 10-12).

84. The dredging and disposal area at PB and JKL, haul routes, and surrounding areas contain highly productive lobster habitat and are very heavily fished during July-September by approximately 20 boats based in Phippsburg and Georgetown. (Affidavit of Brett Gilliam, Ex. 6; EA at 40-41.)

85. The lobstermen have observed that the tremendous tides and currents in the disposal area 0.4 miles south of JKL can have a dramatic affect on the placement of their traps. Based on this observation, the lobstermen are concerned that disposal of dredge spoils at JKL will disperse over a much wider area than the 500-yard disposal area itself. (*Id.*)

86. Burial of the JKL disposal site and surrounding area under 20,000 cubic yards of dredge spoils will kill an enormous amount of lobster, and may result in lost gear (valued at \$100 per trap). (*Id.*) This will also displace lobstermen from the area from the remainder of the season, and may affect the productivity of the area in future seasons. (*Id.*)

87. Once displaced from the JKL fishing grounds, the lobstermen cannot move to another location since the entire area is heavily fished for lobster. Loss of the ability to fish the area surrounding the JKL disposal site will adversely affect the ability of local lobstermen to earn a living.

CLAIMS FOR RELIEF

Count I: Violations of the National Environmental Policy Act.

88. Plaintiffs hereby incorporate by reference the general allegations and statements made in paragraphs 1 through 87 above as if set forth in full herein.

89. NEPA requires federal agencies to determine whether a proposed action will significantly affect the quality of the human environment, 42 U.S.C. § 4332(C), and 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.” *Id.* § 4332(2)(E).

90. During the public comment period on the proposed August dredging, Plaintiffs repeatedly asked the Corps to study, develop and describe low impact and minimal dredge and fill solutions that would enable safe transit of the USS Spruance in September yet also reduce environmental impacts and impacts to Plaintiffs.

91. In its draft and final EAs, the Corps evaluated only two dredge and fill alternatives: (a) full scale maintenance dredging of DP and PB, and (b) full scale maintenance and advanced maintenance dredging of PB.

92. The Corps failed to study, develop and describe any low impact alternatives, including specifically, a no dredge alternative for PB and a minimal dredge alternative for DP (and, if necessary, PB). Additionally, the Corps unlawfully rejected alternative dredging methods (mechanical dredging) and disposal locations (upland, offshore) without considering whether such alternatives were viable under a minimal dredge alternative that reduced the areas that need to be dredged and the volume of spoils to be dumped.

93. By failing to evaluate a reasonable range of alternatives, the Corps did not meet its obligation under NEPA to take a hard look at whether the action will significantly affect the quality of the human environment. Additionally, this failure deprived the public and government decision makers of the ability to make an informed decision about the available solutions and impacts of their choices.

94. By issuing a bid solicitation for its preferred alternative prior to completion of the NEPA process, including the Section 7 consultation under the Endangered Species Act, the Corps violated NEPA's restrictions on premature agency actions. 40 C.F.R. §§ 1500.1(b), 1506.1.

95. By making a final decision and issuing a Statement of Findings prior to completion of the Section 7 consultation under the Endangered Species Act, the Corps the basic tenant of NEPA that “NEPA procedures must insure that environmental information is available to public officials and citizens before decisions are made and before actions are taken.” 40 C.F.R. § 1500.1(b).

96. By opening bids prior to completion of the NEPA process, which should have included completion of the Section 7 consultation under the Endangered Species Act, the Corps violated NEPA’s restrictions on premature agency actions. 40 C.F.R. §§ 1500.1(b), 1506.1.

Count II: Violations of the Clean Water Act.

97. Plaintiffs hereby incorporate by reference the general allegations and statements made in paragraphs 1 through 96 above as if set forth in full herein.

98. The Guidelines established pursuant to the Section 404(b)(1) of the Clean Water Act 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).

99. As the Corps has acknowledged, dredging in August – the most biologically productive time for the Kennebec River – has far greater environmental impacts compared to doing the work in other months. For this reason, over the last 30 years, no state or federal permit has allowed the Corps to dredge during the summer months.

100. The Corps’ approval of maintenance dredging of PB to -29’ this August violates 40 C.F.R. § 230.10(a) since it would be practicable and less environmentally damaging to dredge this reach during the existing winter permit window.

101. The Corps' approval of maintenance and advanced maintenance dredging of DP to -32' this August violates 40 C.F.R. § 230.10(a) since it would be practicable and less environmentally damaging to perform only minimal dredging in August, and to defer full scale dredging to the existing winter permit window.

102. No direct discharges are permitted in Maine's Class SA waters. 38 M.R.S.A § 465-B(1)(C). Until recently all Kennebec waters within Phippsburg were SA, including the Kennebec Narrows disposal site above Bluff Head. *Id.* § 469(5)(B) (2010).

103. In 2011, the Maine legislature recently reclassified these SA waters to SB, however it failed to comply with mandatory procedures governing water quality reclassification. 40 C.F.R. § 131.10. Additionally, no reclassification is effective unless and until approved by the United States Environmental Protection Agency ("EPA"). *Id.* § 131.21(c).

104. Because, Maine has not submitted its reclassification of tidal waters in Phippsburg to the EPA for review, the 2010 Class SA standards are in effect and use of the Kennebec Narrows disposal site would violate 40 C.F.R. § 230.10(b)(1).

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs pray for the following relief:

1. That this Court declare Defendants in violation of NEPA and the Clean Water Act;
2. That this Court enjoin Defendants from continuing to violate NEPA and order Defendant to correct its analysis to include evaluation of low impact dredge and fill alternatives;

3. That this Court enjoin Defendants from continuing to violate the CWA and order Defendant to implement less environmentally damaging and practicable minimal dredge and fill alternatives, including

- a. Deferral of dredging of PB until winter months when it will have less impact;
 - b. Dredging only the minimum amount of DP necessary to enable safe transit of the USS Spruance on Sept. 1, 2011;
 - c. Utilizing less impactful alternative dredging methods and disposal locations;
4. That Plaintiffs be granted the costs of this suit and attorney fees pursuant to the

Equal Access to Justice Act, 28 U.S.C. § 2412, and other applicable law; and

5. That Plaintiffs be granted such other and further relief as the Court deems appropriate.

Respectfully Submitted, July 1, 2011

By: /s/ Stephen F. Hinchman
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List of Exhibits

1. Dean Doyle, Chair, Phippsburg Shellfish Conservation Commission, *Comments of the Phippsburg Shellfish Committee* (March 25, 2011).
2. Brenda Cummings, President, Phippsburg Land Trust, *Comments of the Phippsburg Land Trust* (March 30, 2011).
3. Town of Phippsburg, et al., *Appeal to the Maine Board of Environmental Protection* (May 16, 2011).
4. Ed Friedman, Chair, Friends of Merrymeeting Bay, *Comments of Friends of Merrymeeting Bay to MDEP* (March 19, 2011); Ed Friedman, Chair, Friends of Merrymeeting Bay, *Comments of Friends of Merrymeeting Bay to ACE* (March 26, 2011).
5. Phippsburg Commenters (Plaintiffs), *Comments to ACE* (March 30, 2011).
6. Affidavit of Brett Gilliam.
7. Dorothy Kelly, *Comments to ACE* (March 30, 2011); *Comments to Maine DEP* (March 20, 2011).
8. Laura Sewall, *Comments to MDEP and ACE* (March 29, 2011).
9. 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* (June 2011).
10. Maine Department of Environmental Protection, *Kennebec River Dredging permits for the years 2002, 2000, 1997, 1989 (corrected), Project No. L-16281-4E*.
11. Dean Krestos, Captain, USN, letter to Col. Philip T. Feir, Army Corps of Engineers (June 3, 2011); Dean Krestos, Captain, USN, letter to MG William T. Grisoldi, Army Corps of

Engineers (Jan. 19, 2011); Dean Krestos, Captain, USN, letter to Col. Philip T. Feir, Army Corps of Engineers (Nov. 23, 2010).

12. Col. Philip T. Feir, District Engineer, *Statement of Findings*, at 1 (June 15, 2011).

13. Naval Vessel Register, *USS Spruance, DDG 111, Guided Missile Destroyer* (June 30, 2011), <http://www.nvr.navy.mil/nvrships/details/DDG111.htm>.

14. Bob Herman, BIW, email to Robert Green, Maine DEP, April 7, 2011 at 1:47 pm.

15. Douglas Watts and Ed Friedman, *Appeal to the Maine Board of Environmental Protection* (May 16, 2011).

16. Maine Boats, Homes and Harbors, *Tide Charts for Bath and Ft. Popham*, Feb, March, August, & Sept. 2011, <http://maineboats.us harbors.com/monthly-tides/Maine-Midcoast>.

17. Appendix G, Hydrographic Surveys. 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* (June 2011).

18. Army Corps of Engineers, *Public Notice of Maintenance and Advanced Maintenance Dredging of the Federal Navigation Project in the Kennebec River, Maine* (March 1, 2011).

19. Robert Green, Maine DEP, *Handwritten Notes from Feb. 24 Public Hearing*.

20. Peter Colosi, NMFS, letter to Col. Philip T. Feir, Army Corps (March 30, 2011).

21. Email from Bill Kavanaugh, Army Corps, to Brian Swan, DMR, and Bob Green, DEP, at 1, April 5, 2011, 10:15 a.m.

22. Dot Kelly, *Appeal to Board of Environmental Protection* (May 16, 2011).

23. H. Farrell McMillan, Army Corps, letter to Peter Colosi, NMFS, at 4 (April 28, 2011).

24. Army Corps of Engineers, *Construction Solicitation and Specifications For Maintenance and Advanced Maintenance Dredging of the Kennebec River* (#W912WJ-11-B-0002) (May 2011).
25. Plaintiffs letter to Col. Philip T. Feir, District Engineer, Northeast District, Army Corps of Engineers (June 1, 2011).
26. Plaintiffs letter to John Almeida, District Counsel, Northeast District, Army Corps of Engineers (June 13, 2011).
27. Army Corps, Kennebec River Dredging, *Bid Opening Abstract*, June 17, 2011