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June 13, 2011

John Almeida,
Assistant District Counsel
U.S. Army Corps of Engineers, New England
696 Virginia Road,
Concord, MA 01742-2751

Re: August Dredging of the Kennebec River, Maine

Dear Mr. Almeida,

On June 1, 2011, the Town of Phippsburg, the Phippsburg Shellfish Conservation Commission, the Phippsburg Land Trust, the Kennebec Estuary Land Trust, Friends of Merrymeeting Bay, Bob Cummings, Lawrence Pye, Dean Doyle, Dot Kelly, Captain Ethan DeBery, and Laura Sewall (together as “Commenters”) wrote to your agency concerning the need to evaluate less environmentally damaging alternatives to the currently proposed full scale hydraulic dredging and overdredging of the Kennebec River this August.

As noted in that letter, Commenters believe that the Army Corps of Engineers’ issuance of “Construction Solicitation and Specifications” (#W912WJ-11-B-0002) for the dredging project is premature given that the Corps has not yet completed the alternatives analysis pursuant to the National Environmental Policy Act (“NEPA”) and Section 404 of the Clean Water Act (“CWA”), nor has it obtained a biological opinion pursuant to the Endangered Species Act (“ESA”). We are writing again today to notify the Corps’ of our concern that, as written, the solicitation – including a June 8, 2011 amendment (#W912WJ, Amendment 0001) – will unlawfully limit the range of reasonable alternatives to this dredging project 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).

As noted in Commenters’ submissions to the Corps – including comments to the Corps in response to the public notice, the appeals to the Maine Board of Environmental Protection, and the June 1 letter, all of which you have on file – the range of reasonable and practicable alternatives that must be considered include (1) alternative dredging techniques (in situ methods, mechanical dredging), (2) reduced dredging (minimal dredging, maintenance dredging only), and (3) alternative disposal (upland, offshore).

Solicitation W912WJ, however, limits the bid requirements in a manner that would foreclose these reasonable alternatives. Specifically, the solicitation limits bids to just (1) hydraulic dredging methods of (2) maintenance dredging (-27 feet, plus two feet of allowable overdredging) and/or advanced maintenance dredging (-30 feet, plus two feet of allowable overdredging) with (3) disposal at the in-river and dear-shore dump sites. The project start date is August 1, 2001. 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.

Clearly, the Department of the Army may “focus *most intently* on a limited subset of all the possible alternatives available to it,” but it may not go “too far in doing so, reaching the point where it actually has ‘[l]imit[ed] the choice of reasonable alternatives.’” *National Audubon Society v. Department of Navy*, 422 F. 3d 174, 205-06 (4th Cir. 2005), quoting 40 C.F.R. § 1506.1(a)(2) (emphasis added). *See also* 40 C.F.R. § 1506.1(a)(2) (“Until an agency issues a record of decision ... no action concerning the proposal shall be taken which would limit the choice of reasonable alternatives.”).

In this case, the Solicitation goes too far because it impermissibly limits timely implementation of reasonable and practicable alternatives. For example, as noted in the draft Environmental Assessment, a “mechanical dredge has also been considered if work is urgently needed during the warmer months, to reduce potential impacts to shortnose sturgeon.” (Draft EA at 3.) Thus, by the Corps’ own admission, mechanical dredging is clearly a reasonable and practicable alternative that may be less damaging to endangered species. By limiting bids in response to the Solicitation to hydraulic dredging only,¹ the Corps has effectively eliminated the ability to timely implement a mechanical dredging alternative – and it has done so prior to completion of the NEPA analysis, 404 alternatives analysis or biological opinion. Similarly, by not requesting bids for a minimal dredging scenario (but which would still allow safe transit of the Spruance) and by not requesting bids for upland and/or ocean disposal, these options will also be timed out.

To preserve all reasonable alternatives prior to the final decision, as required by NEPA, and to comply with the CWA and the ESA, Commenters respectfully request that the Corps immediately amend the solicitation to include bidding options for mechanical dredging, reduced dredging and alternative disposal sites.

Sincerely,



Stephen F. Hinchman, counsel for Commenters

Cc: William Kavanaugh, Jr., Army Corps Project Manager
Nancy Stoner, Acting Assistant Administrator, EPA Office of Water
David Evans, Director, Wetlands Division, Office of Wetlands, Oceans and Watersheds
Mary Colligan, Director, Protected Resources Division, NMFS Northeast Regional Office

¹ *See* #W912WJ, Section 01-11-00, Part 1.1 at page 2 (“[t]he proposed work shall be performed with a hopper dredge”).