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June 1, 2015

Patricia Aho
Commissioner
Maine Department of Environmental Protection
28 Tyson Drive
Augusta, Maine 04330

RE: Searsport Federal Navigation Project Dredging Proposal and Application
Project No. **DEP # L-26487-08-A-N/L-26487-4E-B-N**

VIA: Electronic Transmission and U.S. Mail

Dear Commissioner Aho:

This letter serves as a formal request for public hearing and/or for the Board of Environmental Protection (“BEP”) to assume jurisdiction over, and the review of, the pending application for Water Quality Certification (“WQC”) and Natural Resources Protection Act (“NRPA”) permit for dredging and aquatic dredge spoils disposal, filed by the U.S. Army Corps of Engineers (“the Corps” or “ACoE”) on behalf of the Corps and its non-federal partner, the Maine Department of Transportation (“DOT”). This application was accepted as complete by DEP on May 13, 2015. This letter is filed on behalf of the following organizations and the individual members thereof: the IMAW Local Lodge 207 (hereinafter “the Maine Lobstering Union” or “IMLU”); the Lincolnville Lobstermen’s Association (including all licensed lobstermen and their sternmen who fish from Lincolnville, Maine); the Pemaquid Mussel Farm (“PMF”), located off Northport on land leased for cultivation of mussels; the Sierra Club of Maine (“Sierra Club”); the citizens and small business owners from the Searsport area known and incorporated as “Thanks But No Tank” (“TBNT”); as well as Armindy McFadden, co-owner and lease holder of the PMF off Northport, and a seaweed cultivation license holder and harvester off Searsport; and Mike Hutchings, western Penobscot Bay lobsterman, Zone D Lobster Council member and Lincolnville Harbor Master.

I. Brief Summary of the Proposed Project

Culled down to its essence, the Corps and Maine DOT are advocating for the expenditure of *more than \$13 million in State and federal taxpayer funds*, so that shippers (primarily Sprague Energy and Irving Oil, two well-financed, *foreign-owned*, oil companies), can save at best \$845,000 in transportation costs, by reducing tidal delays of *no more than 6-hours*, for vessels with drafts over 35.2-ft and up to 40-ft. Data from the Corps’ Waterborne Commerce Statistics Center (WCSC) reveals that, from 2003 to 2012, on average ***only 6 to 8 vessels a year*** would be benefited by deepening the channel, based on this criteria. Further, this limited, *private corporate* benefit would come at the cost – *for at least 4-years* according to newly-revealed estimates from the Corps – of the commercial fisheries in Penobscot Bay – one of the most fertile fishing grounds remaining

in the world. The cost of the loss of just the Waldo County lobster landings for 4-years (a time frame acknowledged for “recovery and re-colonization” of the dredge and dump sites by the Corps) would exceed \$40 million at the dock and \$2 billion in the economy.

The Corps’ proposed dredge spoils disposal site is in a methane deposit, in pockmarks formed by methane venting, that was expressly rejected for dredge spoils disposal in the late 1990s, because the area is too geologically unstable and unsafe for this use. The Corps’ 2013 FSEA fails to reveal this history to DEP and the public.

II. Board Jurisdiction Criteria Satisfied

As discussed in more detail below, BEP jurisdiction is warranted and required because this proposed dredging project is a “project of statewide significance” -- meeting all four criteria for Board jurisdiction mandated by 38 M.R.S.A. § 341-D(2) and 06-096 C.M.R. ch. 2 § 17(C).

(1) *The Project will have an environmental or economic impact in more than one municipality, territory or county;*

The DEP has already acknowledged that this project impacts more than one municipality by requiring the Corps and DOT to provide notice of the pending dredge and dump application to the following municipalities: Searsport, Islesboro, Northport, Belfast and Stockton Springs. However, this project does and will impact the environment and economy of far more municipalities than this notice-list reflects. The impacts of this dredging and dumping project will impact *all of the communities in and around Penobscot Bay*. Indeed, according to public statements made by DOT leadership in presentations regarding the *intended* impacts of this proposed project, the “improvement dredging” in Searsport will impact the economy and ecology of Central Maine and the North Woods, including areas and municipalities in Penobscot, Piscataquis and Aroostook Counties, as well as the known and/or acknowledged impacts in Waldo and Knox Counties.

According to project proponents, this project is intended to: (i) increase industrial development in central and northern Maine; (ii) increase rail traffic through Maine, including potentially facilitating and increasing the transport of toxic and dangerous substances by rail to and from the port of Searsport (including explosive Bakken crude, tar sands, and/or LPG); increase cutting of Maine forest products from the North woods, for conversion to wood pellets *for export* to Europe; and facilitate the industrial development of Sears Island and Searsport. However, the Corps – in violation of the National Environmental Policy Act (NEPA) and regulations implementing that Act, promulgated by the Council on Environmental Quality (CEQ)¹ -- has failed

¹ See e.g., CEQ NEPA Regulations, 40 C.F.R. § 1508.8, which states in relevant part that:

“Effects” include:

(a) Direct effects, which are caused by the action and occur at the same time and place.

~~(b) Indirect effects, which are caused by the action and are later in time or farther removed in distance, but are still reasonably foreseeable. Indirect effects may include growth inducing effects and other effects related to~~

(b) Indirect effects, which are caused by the action and are later in time or farther removed in distance, but are still reasonably foreseeable. Indirect effects may include growth inducing effects and other effects related to induced changes in the pattern of land use, population density or growth rate, and related effects on air and water and other natural systems, including ecosystems.

to acknowledge, address, and assess *any* of these reasonably foreseeable, direct, indirect and cumulative impacts from this proposed 2013-project in the draft Feasibility Study and Environmental Assessment issued in April of 2013 (“2013 FSEA”) and submitted – without updates – with the April 2015 WQC application. More importantly, the Corps has failed to complete an Environmental Impact Statement (EIS) on this project, assessing *all of the reasonably foreseeable, direct, indirect and cumulative impacts* – expressly and publicly acknowledged by the Corps’ non-federal partner DOT.

By proposing to increase the size and character of vessels using the port of Searsport, this project is expected to, and will have, direct, indirect and cumulative impacts on the environment and economy of every community in and around Penobscot Bay that rely on tourism, fishing and the preservation of the environmental quality of Penobscot Bay for economic prosperity. None of these impacts is addressed, assessed or acknowledged in the 2013 FSEA. Of particular concern, the proposed dredging and dumping will have significant and potentially permanent, damaging impacts on the fishing and aquaculture uses of Penobscot Bay – especially the valuable Penobscot Bay lobster fishery – impacts that resulted in this project being abandoned in 2000, but which have never been assessed by the Corps in the EA using current data or relevant studies.

Specifically, the proposed dredging and dumping will directly and indirectly impact the Penobscot Bay fisheries, especially the valuable and significant lobster fishery that accounts for roughly 20% of the current lobster landings in the United States and directly employs about **2,100 licensed lobstermen** in the Penobscot Bay area, plus their sternmen; aquaculture facilities, including the destruction of the Pemaquid Mussel Farm – located in Northport just 5,000 feet from the proposed dredge spoils disposal site – and seaweed harvesting in the vicinity of Searsport. This dredging and dumping also adversely impacts Essential Fish Habitat (“EFH”) for Winter Flounder, seaweed harvesting grounds near the public landing in Searsport, and eel grass beds in and around Long Cove and Sears Island.

The dredging and dumping of a million cubic yards of dredge material into the fertile lobster grounds in western Penobscot Bay – *even if those spoils are pristine and free of all contamination* – would have a devastating impact on the lobster fishery for years ***according to the Corps***. The Corps has acknowledged this multi-year loss in lobster landings would occur in at least Waldo County. The 2013 FSEA sets this loss at 2-years for “recovery and re-colonization.” However, in meetings with lobstermen in 2014 in Belfast, the Corps acknowledged that the time for “recovery and re-colonization” of the dredge and dump sites would be *double that – 4-years*. DEP and DMR staffs were in attendance at the meeting with lobstermen at which this representation was made by Corps staff member, Steven Wolf. As discussed in greater detail below, this 4-year loss in just Waldo County’s lobster landings would represent an economic loss over that period of time of between \$40.9 million and \$68 million in the economy of this region.

Effects and impacts as used in these regulations are synonymous. Effects includes ecological (such as the effects on natural resources and on the components, structures, and functioning of affected ecosystems), aesthetic, historic, cultural, economic, social, or health, whether direct, indirect, or cumulative. Effects may also include those resulting from actions which may have both beneficial and detrimental effects, even if on balance the agency believes that the effect will be beneficial.

However, the sediment proposed for dredging and dumping is not “clean” as claimed by the Corps. Here, in the Northern portions of Penobscot Bay down to the southern tip of Islesboro, there are known deposits of mercury, illegally dumped by HoltraChem into the Penobscot River from 1967 through 1970. This “legacy mercury” from HoltraChem, its environmental and economic impacts, and the need for its remediation are the subjects of a pending lawsuit in the United States District Court for the District of Maine against HoltraChem’s successor corporation, *Mallinckrodt*. The federal court’s sediment expert in the *Mallinckrodt* litigation, Dr. Kevin Yeager, analyzed the 2008 sediment test results in the 2013 EA and its appendices. Dr. Yeager concluded that the Corps’ testing methodology not only failed to meet PRMS standards, but failed to even meet the Corps’ standards for testing sediment for disposal in New England waters in the RIM 2004 Guidelines (used by DEP).

Dr. Yeager has now reviewed the additional sediment testing done in late 2014, and submitted by the Corps with the 2015 WQC application. Dr. Yeager is drafting a formal report, which will be submitted to DEP as soon as completed. However, one initial observation Dr. Yeager has made regarding the Corps’ “Supplementary suitability determination of Searsport Harbor federal navigation maintenance and improvement project, Penobscot Bay, Searsport, Maine” is worth noting now:

[N]ote page 2, first paragraph: “Contaminant concentrations in some of the surficial, more recently deposited sediments were higher than those found in the other project material. At three core locations, represented by the tops of cores A, F, and J the surficial concentrations were sufficiently elevated above the reference data from the disposal site and above the most conservative sediment quality guideline to classify the materials as unsuitable for open-water placement without the prescribed level of management to limit long-term exposure of the sediment to the benthic environment.”

. . . As can be seen in Table 1, core samples for bulk chemical analyses WERE taken from large core intervals (typically 1 foot, but in several instances 2 foot intervals were used). There is no discussion in this document re: how these samples were obtained. Was a single discrete sample taken from the selected intervals? Was the entire interval homogenized and bulked to generate one sample? Were discrete intervals analyzed separately or were some combined? Needless to say, the fact that some of the cores exhibit “high” concentrations of some contaminants in near surface sediments of some cores is troubling, as the contaminant concentrations likely represent homogenized samples over 1 to 2 foot intervals (and would therefore certainly be minimum values).

Proceeding with this project in the absence of proper sediment testing, when there has already been the loss of a 7-square mile area in the upper Bay due to HoltraChem mercury contamination in the area south of Verona Island, is contrary to the public interest and potentially risks the loss of the marketability of all lobsters in Penobscot Bay if methyl mercury contamination results from the dredging and dumping proposed. Accordingly, BEP jurisdiction is appropriate to assess these impacts to the environment and economy of multiple municipalities.

(2) *The Project involves an activity not previously permitted or licensed in the State;*

There has never been a dredge of this magnitude in Penobscot Bay and the proposed depth of the Searsport Federal Navigation Project would be unprecedented in this State and region. Congressional authorization would be required for deepening the Searsport Federal Navigation Project's dimensions by a third and increasing the authorized channel depth from 35-ft to 40-ft. A 40-ft depth for this channel exceeds the channel depths in the Portland or Portsmouth channels – even though these are far more utilized ports with ten-fold the traffic of Searsport annually. Regionally, only Boston has a channel depth of 40-ft+ currently.

Further, to the best of my knowledge, after consulting with Dr. Joe Kelley, who is one of the foremost experts on the Belfast Bay pockmarks after his decades of studying this phenomenon in Belfast Bay, no permit has ever been issued for dredge spoils disposal into the methane vent pockmarks in Belfast Bay. Dr. Kelley knew of no place in the United States (or the world for that matter) where disposal of dredge spoils in a methane field containing pockmarks like those in Belfast Bay has been attempted in a controlled manner.

The Corps *claims* that there is “anecdotal” evidence of some dredge spoils disposal in Belfast Bay and there is evidence on scans that the Corps may have dumped dredge spoils from the original Searsport FNP dredging in 1964 somewhere near Islesboro's northern tip in 1964. A mound of spoils off Islesboro seems to support the claim that some dredge spoils were dumped in this general area at some time many decades ago – at least 50-years ago. However, it remains unclear if the earlier dumpings were actually over gas or just near it; no one (including the Corps) has specifically tried to look to answer this question. However, no permit has been issued to dispose of any dredge spoils in this area since at least the time of enactment of the Clean Water Act (“CWA”), and no permit to dispose of dredge spoils in this area or for dredging in the expanded FNP area has been issued subsequent to the illegal dumping of mercury in the Penobscot River and Bay by HoltraChem in 1967 to 1970 – which occurred after the Searsport FNP dredge was done in 1964.

More importantly, ***the notion of using the PBDS for dredge spoils disposal was expressly rejected more than 15-years ago.***

Specifically, in the late 1990s, the Corps proposed using *the same site off Islesboro* (“the Penobscot Bay Disposal Site” or “PBDS”) to dispose of dredge spoils for the earlier (*abandoned*) version of the Searsport dredging project (which contemplated dredging and dumping 700,000 cy of material from Searsport and dredging to a channel depth of 37-ft). At that time, the area the Corps now calls the “Penobscot Bay Disposal Site” or “PBDS” became the subject of extensive scientific assessment and study.

While this study work on Belfast Bay's pockmarks and gas deposits was originally undertaken for, and funded by, Sea Grant and the MMS (now BOEM) and NOAA-NESDES, and not the Corps, the results of this work were used by the Corps' agent, Normandeau, to determine *if* this was a plausible or safe area to dispose dredge spoils when the Corps proposed using this site for that purpose in connection with deepening the Searsport FNP channel. However, the State and federal government officials that reviewed the scientific evidence compiled on this area then

expressly rejected the PBDS for use as a dredge spoils disposal site because the Belfast Bay methane deposits and pockmarks formed from methane venting were **too geologically unstable** and **unsafe** for use as a site for dredge spoils disposal.

There was no understanding then (or now) about what sort of load the gas-rich sediment column could sustain, and no understanding (then or now) of whether gas would migrate from the field if it were disrupted, though turbidity and methane in possibly large quantities could be released to the water column if disrupted. Indeed, we have found no record of any governmental entity in the U.S. or elsewhere in the world intentionally using methane vent formed pockmarks or areas of known methane deposits, like those found in the PBDS and “Belfast Bay,” as a dredge spoils disposal site.

In the 2015 Application, the Corps states: “No historic use of the placement site can be confirmed.” (Block 16.3.) **Inexplicably, in issuing the 2013 FSEA and filing the 2015 WQC application, the Corps has failed to acknowledge to DEP *and the public* (or even to other federal agencies) that the PBDS was previously rejected as a dredge spoils disposal site by the Corps and the State of Maine.**

Finally, there are modeling observations, obtained through years of independent study by scientists (including Dr. Kelley and Dr. Laura Brothers (now at the USGS)), that sediment in the Belfast Bay pockmarks are winnowed out and released by tidal currents and that this “scouring” is why the pockmarks have not filled in with sediment through natural attenuation over the years, but rather have remained essentially unchanged in size and depth for long periods of time and observation. The August 2013 DAMOS study confirms that these pockmarks remain essentially unchanged from prior scans.

There is no reason to suppose, based on the currently known scientific evidence, that dredged spoils will remain in any of the Belfast Bay pockmarks – including the three pockmarks identified by the Corps for use in disposing spoils from the proposed project. Significantly, despite knowing of these issues for more than 15-years since authorization for a Feasibility Study was provided by Congress on July 26, 2000, the Corps has undertaken *no study* of this “scouring” in the pockmarks to be able to assess whether dredge spoils would or could remain in them even if successfully placed as planned, or to determine the level and effects of turbidity in the water column that would result from disposing of spoils in these pockmarks and in these conditions and currents.

Even the August 2013 DAMOS study conducted by the Corps, reported in 2014, ignored the greatest issue presented by the proposal to dispose of dredge spoils in the PBDS. Specifically, the Corps has failed to address the profound uncertainty that continues to exist about the relative stability of the field with respect to being loaded, even accidentally, by dredge spoils (particularly in this volume). The experts who have studied the Belfast Bay pockmarks and methane deposits for decades, including Dr. Kelley, will confirm that, until there is a physical/geological oceanography study of sediment/tidal current interactions, we will not understand the duration the spoils will remain in place. Until there is an engineering/ geotechnical study of the gas pressure and sediment strength and sediment column permeability we cannot really be confident what will happen when gassy sediment is disrupted.

However, what is clear is that the 2015 permit application seeks approval for an activity that has never been done before in this State (or elsewhere) and which has been rejected by this State as unsafe when considered previously.

(3) *Is likely to come under significant public scrutiny;*

Although this project was first conceived in the late 1990s and congressional authorization for a Feasibility Study of this project was made in July 2000, ***the Corps has failed to do any legitimate scientific assessment of the impacts of this dredging and dumping on any of the fisheries in Penobscot Bay (especially the Waldo County lobster fishery).***

In the 2015 Application, the Corps makes the following statements and representations about the status and vitality of the Waldo County lobster fishery: “[T]here is less lobster activity, and in particular lobster settlement rates, in the northern part (project area) than the Southern part of Penobscot Bay.” (Block 16.5.) The Corps also acknowledges that: “[L]obster resource data (i.e., abundance and distribution) in and around the Penobscot Bay Disposal Site is limited.” This omission is apparently by the Corps’ design and it is the Corps’ burden on conducting such studies prior to seeking a permit to do this dredging.

Although the Corps, at the request of the Department of Marine Resources, did a *short term* study of the impact of a late-season (late-Fall, early-Winter) Penobscot Bay dredge and dredge spoils disposal *in the Rockland Disposal Site (“RDS”)*², the Corps has done:

- No assessment of the abundance of lobsters in the PBDS or upper Bay location where dredging or dumping are proposed;
- No assessment of the relevance of the dredging and dumping areas to the lobster fishery, including as a settlement and spawning area;
- No study of the impact of re-suspended sediment from the initial dredging and dumping in this area, or from expected post-dumping natural and on-going pockmark-scouring by the significant currents in this area, on lobster abundance, health, reproduction, survivability, marketability and harvesting; and
- No study anywhere in Penobscot Bay of contamination of lobsters or crabs by consuming organic material from contaminated dredge spoils dumped in the Bay – although Dr. Rick Wahle’s prior studies in 2002 and 2008 for the Corps in the RDS have all concluded that such studies are needed to properly understand the impact of dredge spoils disposal on the benthic populations in the Bay and on the lobster and crab fisheries specifically.

The Corps also makes bald assertions about this project having “no significant impact” on the valuable and profitable mussels grown on and harvested at the Pemaquid Mussel Farm off Northport, located just 5,000-feet from the proposed dredge site. However, ***the Corps has done no investigation of the currents in and around the PMF or in the pockmarks and dredging site, to support or justify these bald assertions with scientific facts.*** Indeed, prior to April of 2014, long after the Corps’ August 2013 DAMOS study had been completed, the project manager for the

² www.nae.usace.army.mil/portals/74/docs/DAMOS/TechReports/154.pdf

Corps (Barbara Blumeris) revealed in a public meeting attended by several hundred people in Belfast, that she (and her Corps colleagues on this project), were ***unaware of the existence of the PMF***. Armindy McFadden, leaseholder on the PMF in Northport, had to point out the PMF on the projected image of the nautical chart of the proposed disposal site during the public meeting.

It is both stunning and disturbing that the Corps could be unaware of an aquaculture facility that has appeared on nautical charts for more than a decade, is located just 5000' from the proposed disposal site, and was on its second 10-year lease (renewed on April 1, 2014) – a lease dually issued by the Corps and DMR. However, it is more stunning and disturbing that, since learning of the existence of this facility, ***the Corps did no testing to legitimately assess the impact of the dredging, dumping and scouring of dredge spoils on the PMF***, but makes the bald assertion in its application to DEP that there would be no impacts from this project on the PMF.

Throughout the 2013 FSEA, the Corps improperly relies on information collected from 2007 and earlier regarding only the immediate area around Searsport. This data is out-dated, incomplete, erroneous and inadequate to justify and support this project -- even under the Corps' own regulations. This old data ignores the significant changes in the fisheries in Penobscot Bay – especially in the area to be dredged and where dumping is to occur – changes that have occurred since 2007.

For example, prior to 2004, the lobster fishery in Waldo County was so insignificant that landings in this area were not separately recorded by DMR. However, as revealed by the chart attached as Exhibit A, as a result of the improving fishing conditions that currently exist in western Penobscot Bay, from 2008 to 2014 there has been more than a 282% increase in the number of *just Waldo County* lobster landings (forgetting the even more significant but impacted Knox County lobster fishery in western Penobscot Bay. There has also been more than a 319% increase in the *value* of the catch landed in Waldo County between 2008 and 2014. According to the formula used to determine the value of this catch to the Maine economy established by the Maine Lobster Institute, the Waldo County lobster landings were worth more than \$17 million in the State's economy in 2014 alone.

Even if the Corps' best case scenario of a 4-year timeframe for re-colonization and recovery is right, this project will cost the economy and people of Maine no less than \$2 million in mussel sales from the Pemaquid Mussel Farm and between \$40.9 and \$68 million in lobster landings over four years from the lost Waldo County lobster landings -- in the Maine and national economy.

To put these losses in perspective, the Corps' estimated savings to shippers from doing this dredge is \$845,000 a year in transportation savings by reducing the time vessels with drafts of at least 32.5-ft and up to 40-ft wait for a high tide to land at the Searsport docks. This wait is never more than 6-hours due to the 10-ft+ tides in Searsport. The total transportation savings and the sole basis given by the Corps in the 2013 FSEA for doing this project is that transportation savings multiplied by a 50-year life for this project – or ***\$42.25 million in transportation savings for Sprague and Irving over the next 50-years.***

In each year since 2008, lobster landings in Waldo County have increased an average of 26% over the preceding year. (See Chart attached as Exhibit A). However, even assuming that Waldo County landings would remain stagnant at 2014 levels, a 4-year loss of this fishery would result in a loss over that period of time of between \$40.9 million and \$68 million in the economy of this region with no compensation for this loss from the federal government or Sprague and Irving (the intended beneficiaries of this publicly-funded, government largesse).

Thus, even if “only” the Waldo County lobster fishery is impacted, and the losses in lobster landings were for only 4-years, the economic loss to just Waldo County would exceed the total savings to Sprague and Irving projected by the Corps from this project over the next fifty (50) years!!

These numbers demonstrate that this proposed project simply *makes no economic sense* for the people and economy of Maine.

Additionally, the Corps has ignored recommendations made by sister federal agencies, including NMFS and NOAA, regarding measures that should be undertaken to mitigate inevitable damage that this project would cause to Essential Fish Habitat (EFH) for winter flounder and eel grass beds in the area of the dredging. Specifically, neither the Corps nor the National Marine Fisheries Service (“NMFS”) have conducted any monitoring of the Searsport Federal Navigation project for the presence of winter flounder, nor does NMFS have any site specific surveys for winter flounder or any other species. However, an area that has been identified as EFH for winter flounder and other species by the New England Fisheries Management Council and NMFS, *including the Searsport Harbor and Long Cove area*, is considered important habitat *regardless of whether or not baseline data or new monitoring data for those species exist.*

The area proposed for dredging and the area directly adjacent to the dredge area is also designated as EFH for a number of other species, and several diadromous fish that use the Penobscot River for spawning. This fact is well-known by the DMR, and DMR likely has some monitoring data to support this finding. Regardless, whether or not DMR has data indicating winter flounder are present does not change the designation of EFH for winter flounder in Long Cove and around Sears Island. Nor does the lack of data showing the specific presence and abundance of such species in this EFH in any specific period obviate the need for the Corps to minimize impacts to this habitat.

The Searsport Harbor area was included in the EFH designation because the habitats in Long Cove and around Sears Island meet all of the requirements for winter flounder (e.g., depth, substrate, temperature, salinity). NMFS uses its seasonal trawl data to determine what areas support federally-managed species, but the surveys are generally offshore habitats. NMFS also uses inshore trawl data from the ELMR (Estuarine Living Marine Resource) database for estuaries. (http://www8.nos.noaa.gov/biogeo_public/elmr.aspx) This database indicates that that all life stages of the winter flounder species were collected in Penobscot Bay (identified as abundant for a number of months). While it would be useful to have long term, site specific monitoring data for species in every harbor on the eastern seaboard, that's just not feasible. So NMFS has used the best available data, and believes there is ample support for determining that winter flounder use the Searsport area during all life stages -- this fact was essentially ignored by the Corps in the 2013 FSEA and in its application.

NMFS did a consultation with the Corps for the Searsport FNP project. The recommendations from NMFS are advisory. NMFS provided several letters to the Corps recommending they avoid dredging the shallow habitat in Long Cove, and well as conduct pre- and post-construction monitoring of eelgrass beds adjacent to Sears Island to ensure those areas are protected. Unfortunately, the Corps did not implement any of the recommendations that NMFS provided to them. However, the DEP or BEP can impose all of the NMFS-recommendations on this project through the application process. For this reason all of that correspondence is submitted with this letter requesting public hearing and/or BEP jurisdiction over this project.

The Board of Environmental Protection process is best designed to conduct a thorough analysis of the purpose, need and impacts of this proposed project and its significant adverse environmental and economic impacts on Waldo County, Penobscot Bay, the Midcoast region and the State of Maine in considering this application.

(4) Is located in more than one municipality, territory or county.

The Corps and its non-federal partner, the Maine Department of Transportation, propose dredging off Searsport, Maine – to deepen and expand the Searsport Federal Navigation Project (FNP) and dumping almost a million cubic yard (“cy”) of dredge spoils off Islesboro, Northport, and Belfast into “pock marks” on the sea floor in Belfast Bay. These pockmarks were formed by venting methane in the sediment of Belfast Bay. This methane is formed as a byproduct of bacteria consuming organic material in the sediment deposited there more than 10,000 years ago when this area was a marsh and wetlands. Turbidity from the dredging and dumping will impact, at a minimum: Searsport, Belfast, Stockton Springs, Islesboro, Lincolnville (which was not given notice) and Northport.

III. Background on Proposal to Deepen Searsport FNP

After the proposal to deepen the Searsport FNP TO 37-ft failed in 2000, on July 26, 2000, the House Transportation and Infrastructure Subcommittee issued a Resolution, authorizing the Corps to conduct a Feasibility Study to determine if deepening the Searsport FNP was necessary. No action was taken on this Resolution by the Corps until 2004, when work on a Feasibility Study began to be undertaken. However, in 2008, it appears all work on this Feasibility Study stopped – presumably because of the economic down-turn that occurred at that time.

In 2012, after DCP Midstream Partners LP expressed an interest in constructing a 22.7 million gallon LPG storage tank and a marine “import” terminal in Searsport, the Corps began working on the Feasibility Study relating to deepening the Searsport FNP again, using the July 26, 2000 Resolution as the authorization for this effort. Curiously, the 2012 EA issued by the Corps on the DCP LPG project the Corps stated that “no dredging,” even maintenance dredging, was needed for 4-8 LPG tankers a year, with an expected draft of 39.7-feet, to safely use the port of Searsport for deliveries to this proposed LPG facility.

However, while on April 4, 2013 the Searsport Planning Board denied permits to DCP for the LPG tank and terminal – ultimately concluding this project was unsafe and violated a myriad of requirements in the local land use ordinances – on April 5, 2013 the Corps issued its draft Feasibility Study and Environmental Assessment (“the 2013 FSEA”), proposing to expand the footprint of the existing Searsport FNP by a third and deepening the channel from the authorized

depth of 35-feet (the same as Portland and Portsmouth) to 40-ft and deepening the dock area to 43-ft. One of the stated purposes of the project proposed in the 2013 FSEA was to allow tankers that draw 39.7-ft to safely use the port of Searsport. This justification is in direct contravention to the Corps' and U.S. Coast Guard's representations in the 2012 DCP EA that "no dredging was required" for such tankers to safely use the Searsport FNP and port in servicing the proposed DCP LPG project.

The Corps and DOT propose spending more than \$13 million in taxpayer dollars to deepen the channel in Searsport from the congressionally-authorized depth of 35-ft to 40-ft and expand the size of the channel and turn-around by a third of the existing footprint, so that Sprague Energy and Irving Oil (*two foreign-owned oil companies*) can supposedly *save \$845,000 a year*, in transportation costs. This "transportation savings" estimate was based on 2006 data on port usage, and did not reflect that, since 2008 port usage has dropped significantly and consistently.

A. The Economic Benefit Has Been Inflated by Using Out-dated Port Usage Numbers

Post-2008 data from the Corps' Waterborne Commerce Statistics Center (WCSC) confirms that as oil imports have declined after 2008 (as a result of more U.S. oil and gas production and deliveries of these domestically-sourced products being made by pipeline, rail or truck to Maine), the use of the port of Searsport has also declined. This is a predictable result, since, as the FSEA notes, the primary use of this port has been for oil imports – accounting for 75% to 80% of the port's usage historically. The reduction in usage of the port of Searsport, related to the decline in oil imports, was not considered by the Corps in drafting the FSEA, however, because the FSEA cites *no data on vessel landings after 2008, although this document was written in 2012-2013.*

All Vessel Landings at Mack Point, port of Searsport, Maine 2003 to 2012

	2013	2012	2011	2010	2009	2008	2007	2006	2005	2004	2003
All Drafts	131	330	297	361	276	339	331	344	303	374	296
0-5 ft			27	52	8	12	13	9	23	28	12
6-9 ft			1	1	4	2	6	7	5	16	4
10-12 ft			2	21	0	4	13	8	4	87	4
13-14 ft			12	3	3	15	20	7	13	17	14
15-17 ft			17	16	18	19	25	30	20	27	24
18-20 ft	33	86	16	34	19	39	31	18	24	19	19
21-23 ft	14	34	30	18	13	18	22	44	29	17	29
24-26 ft	20	63	62	80	66	56	74	66	61	70	139
27-29 ft	26	71	70	80	54	74	63	82	41	36	23
30-32 ft	22	29	27	30	53	47	33	31	37	20	11
33-35 ft	15	39	26	22	32	42	27	30	27	29	13
36-38 ft	1	1	4	3	6	4	3	8	18	6	4
39-40 ft	0	7	3	1	0	7	1	2	1	2	0
41 ft	0	0	0	0	0	0	0	1	0	0	0
42 ft	0	0	0	0	0	0	0	0	0	0	0
Total >35 ft	1	8	7	4	6	11	4	11	19	8	4

If calculated using the 2008-2013 data, deepening the channel would only keep an *average of 7 or fewer vessels a year* from waiting *no more than 6 hours* for a high tide to unload imported oil products at Mack Point. In fact, 2006 was an outlier year for *all* ports, including Searsport, in which more oil was imported by the United States in 2006 than in any year before or after. By using 2006 as the year the Corps used to calculate the 50-year transportation savings projection for this project, the Corps has grossly inflated the National Economic Development (NED) benefit from this project.

B. The PBDS Was Previously Rejected for Dredge Spoils Disposal as Geologically Unstable and Unsafe

The 2013-proposal also seeks to dispose of roughly *a million cy* of dredge spoils in pockmarks formed by methane venting, off the Northwest corner of Islesboro, rather than using the RDS (which would cost at least \$8.5 million more to use for dredge spoils disposal). Significantly, the area in which the Corps now proposes dumping the project's dredge spoils is in the middle of a geologically unstable area with known methane deposits, unapproved, undesignated and unused for dredge spoils disposal under the criteria established by the Clean Water Act (CWA) and *previously rejected for dredge spoils disposal for this same project in the late 1990s*. The Corps' EA fails to reveal *to DEP or the public* that this area was considered as a dredge spoils disposal alternative when the 1999-proposal to deepen the Searsport FNP – *but rejected as geologically unstable and unsafe for this purpose* prior to the public becoming aware of the 1999-project in the Spring of 2000.

C. The Impacts on the Lobster Industry Make This Proposal Economically Damaging to the Region and State

As noted above, the 1999 Searsport proposal was abandoned in the late Spring of 2000, due to concerns raised by lobstermen and local officials and citizens about the adverse environmental and economic impacts of the project on the valuable Penobscot Bay lobster fishery. Since 1999, this lobster fishery has grown exponentially in the amount landed and the value of the catch. Western Penobscot Bay is where at least 20% of all lobsters caught annually in the U.S. are landed. The amount and value of this catch continues to increase -- valued in 2014 at over \$130 million and an estimated \$650+ million to the Maine economy (see Exhibit A) – more than a 26% increase over 2013 levels.

In fact, the lobster landings in Waldo County -- the area proposed for dredging and dumping in Belfast Bay – were so insignificant when this project was first proposed that separate landings data was not even kept for Waldo County. It was not until 2004 that Waldo landings were separately reported by DMR. These landings have increase by 282% since 2008, when the Corps gathered the data on which it based its 2013 FSEA of the anticipated impacts of this project on the lobster fishery in Pen-Bay.

Despite the concerns raised by lobstermen and other community leaders in 2000 and the fact that *western Penobscot Bay is where more than 20% of all lobsters caught in the United States have been landed annually for at least a decade*, the Corps *did not hold one single meeting with the lobstermen of Penobscot Bay* in the almost 13-years that passed from the time that the House Transportation and Infrastructure Committee issued the July 26, 2000, Resolution authorizing the Feasibility Study on this project and when the FSEA was issued on April 5, 2013.

Indeed, in the 13-years it took the Corps to draft this FSEA, *no meetings* were held by the Corps that included *any* of the representatives, residents or business owners from the communities in and around Penobscot Bay who would be the most adversely impacted by this project. By the Corps' own admission in the 2013 FSEA, in the 13-years it took the Corps to draft the 2013 FSEA, the Corps only held *one "pertinent meeting"* and that took place on August 24, 2006 -- more than 6-years *after* congressional authorization for a Feasibility Study was issued, and more than 6-years *prior* to the FSEA being drafted and released to the public. Further, the one meeting held by the Corps that the Corps describes as "pertinent" occurred in 2006, and only included State and federal bureaucrats and private stakeholders who were biased in favor of deepening the Searsport channel (including a representative from Sprague Energy, the Maine Port Authority and two representatives from the Pen-Bay and River Pilots). The only local official invited was the Town Manager of Searsport. See, FSEA, Appendices, pp. 3-6 of 226 (2013 FSEA, Appendix A).

Corps personnel acted throughout the *thirteen (13) year* process of drafting the Feasibility Study as though their only real priority is to justify dredging the Searsport FNP for the benefit of Sprague Energy and Irving Oil. At no time did Corps personnel evidence an acknowledgement of their legal duty to protect: public health and safety; the environment; and the economic interests of the people of the State of Maine, including the Penobscot Bay lobstermen and other commercial fishermen who are dependent on maintaining the integrity of Penobscot Bay for their lives and livelihoods. In contrast, *Sprague Energy has been involved at all stages of development and discussion of this project, while the public, including impacted fishermen, have been excluded.* However, lobstermen and community leaders for all of the impacted communities *except Searsport* have been excluded from this process.

More importantly, the Corps failed to conduct any of the scientific studies needed to verify the claims that the 2013 FSEA and the Corps' Finding of No Significant Impact (FONSI Determination), attached to the FSEA, contains.

D. The Risk of Spreading Dangerous Contamination Is Too Great And Sediment Testing Done by the Corps Too Inadequate to Proceed

Even if the dredge spoils to be dumped in the Belfast Bay pockmarks off the Northwest corner of Islesboro are "*clean*" (i.e. devoid of any contaminants, toxins and heavy metals, including mercury), as the Corps represents, the turbidity that will be caused from re-suspension of dredge spoils by natural currents in the PBDS area, that maintain these pockmarks through scouring, could: (i) devastate Essential Fish Habitat, fisheries and aquaculture facilities in this area; (ii) damage lobster settlements in Penobscot Bay; and (iii) destroy the nearby Pemaquid Mussel Farm aquaculture facility that brings in an estimate \$500,000 a year to the local economy from sales of clean, high-quality, locally-raised mussels.

However, because of the known presence of contamination in Searsport and the upper Penobscot Bay – including the likely presence of buried HoltraChem legacy mercury that dredging in Searsport could disturb -- this dredging project also risks destroying the reputation for wholesomeness of ALL Maine lobsters and, if dredging spreads methyl mercury contamination to *any Pen-Bay lobsters*, this project could irreparably damage demand for Penobscot Bay lobsters and the reputation of the iconic Maine Lobster brand – a cornerstone of the Maine economy.

Although the Corps was instructed by DEP personnel in the Summer of 2014 to update sediment testing using criteria and testing standards that are consistent with the standards developed by the federal court's experts in the Penobscot River Mercury Study ("PRMS-compliant standards"), the Corps has submitted the WQC application based on sediment testing that falls well beneath this standard and fails to even meet the Corps' own standards under the RIM 2004 guidelines.

In the Spring and Summer of 2014, the federal court's sediment expert in the HoltraChem (*Mallinckrodt*) litigation, Dr. Kevin Yeager, reviewed the Corps' sediment testing for this project. Dr. Yeager determined that the Corps' 2008 sediment testing was inadequate under both the RIM 2004 standards jointly issued by the Corps and EPA, and the federal court's experts' standards developed during the Penobscot River Mercury Study (PRMS) to detect the presence and effects of mercury, particularly HoltraChem legacy mercury. Dr. Yeager made a similar finding after reviewing the sediment tests submitted in 2013 by Sprague to obtain a permit to dredge at the Mack Point docks.

Dr. Yeager's Reports (submitted with this letter) concluded that additional sediment testing was required by the Corps and Sprague using the PRMS standards before any dredging, even maintenance dredging, is done. PRMS-compliant testing protocols require taking 90 cm cores (where possible), and testing every 1 cm segment from 0-20 cm, 2 cm segments from 21-40 cm, and 5 cm segments from 41-90 cm. After reviewing and considering Dr. Yeager's reports, DEP staff directed the Corps and Sprague to do additional testing that was PRMS-compliant. Both the Corps and Sprague did additional testing after that instruction. **Unfortunately, the Corps failed to meet the PRMS-compliant standard and failed to even meet the lesser standard approved by DEP's Beneficial Use section for Sprague to dredge the Searsport dock area in late 2014.**³

The updated 2014 Corps testing only looked at 1-foot segments from 1-3 foot cores (and even several 2-foot segments). Despite the inadequacy of the updated testing, the Corps still found elevated levels of contaminants, despite using a methodology calculated to under-estimate and conceal the true level of contamination present in the sediment to be dredged and dumped. The Corps has acknowledged during a recent dredge team meeting that they used what they described as a "maintenance dredge standard" – even though this project is proposed as an "improvement" dredge and not limited to restoring the channel through a maintenance dredge. However, the methodology used does not conform to the RIM 2004 standard since it uses 1-ft segments and apparently compositing.

The PRMS established that there is a layer of buried inorganic mercury throughout the entire upper Penobscot Bay, down to the southern tip of Islesboro, found generally at a depth of about 20 to 40 cm (8 to 16 inches), attributable to the dumping of mercury by HoltraChem primarily in 1967 to 1970. The Court's experts concluded that there is no threat to the environment, biota or public health as long as this layer remains buried. Disturbing buried legacy mercury from HoltraChem through the proposed dredging in Searsport could result in

³ Because Sprague was disposing of all spoils on land and on-site as beneficial use, DEP allowed them to submit testing results using a methodology that was not PRMS-compliant (e.g. 5 cm segment testing for with some compositing within those segments prior to testing when the material was all being disposed of on land as beneficial use material on the Searsport site, housed under a cement pad and warehouse).

contamination of the entire Penobscot Bay food web, creating an environmental, economic and human crisis in this region and the State of Maine.

Failure to conduct the necessary, updated sediment testing prior to proceeding with this project – even prior to doing the needed maintenance dredging that we support -- could:

- Directly interfere with the federal court's oversight of the remediation of HoltraChem mercury;
- Increase the actual, economic, environmental and human costs of the remediation of the HoltraChem mercury contamination;
- Spread methyl mercury contamination to the entire Pen-Bay food web, including the valuable commercial fisheries and aquaculture facilities in this region;
- Damage or destroy the actual and economic viability of the lobster industry in Penobscot Bay, that sustains the Midcoast economy and the more than 2,100 licensed lobstermen in Zones C and D; and
- Do irreparable harm to the iconic Maine Lobster Brand.

**E. The Corps has Failed to Consider the LEDPA:
The Dawson Alternative if the Only Appropriate Alternative to Pursue**

Finally, the Corps has failed to assess the Least Environmentally Damaging Practicable Alternative (LEDPA) for this project in the 2013 FSEA or the 2015 application – a violation of NEPA and the applicable state and federal water quality standards for any project proposing an aquatic disposal of dredge spoils. Here, the LEDPA is a maintenance dredge with upland disposal of all spoils – despite requests during public hearings in 2014, the Corps has still not revealed the cost for removing just the 37,100 cy of material required for restoring the channel to the congressionally authorized depth of 35-ft and still has failed to reveal the cost of an upland disposal of the maintenance dredge material.

Dawson & Associates, the nation's premier expert in federal water resources development, evaluated the Searsport dredging proposal as proposed by the Corps and concluded that:

- A less environmentally damaging, practical, *Non-Structural Alternative* to the proposed Searsport project exists, involving doing only maintenance dredging in the existing channel to restore the congressionally authorized depth of 35-ft and deepening the dock area to a 45-ft depth, that would accommodate 97% of the desired future fleet that the Big Dig and Dump is designed to attract to Searsport;
- Potential Mercury contamination of the proposed dredge and dredge disposal sites must be further analyzed before the project moves forward; and
- Several Army Corps' economic assumptions are questionable and could significantly affect projected cost benefit ratios.

Dawson's Non-Structural Alternative should be adopted because it achieves 97% of the Corps' port improvement goals *at no cost to State taxpayers* and a fraction of the cost to federal taxpayers, and without inflicting adverse environmental and economic damages on Penobscot Bay and its people. This is both the best economic choice for accomplishing the goals of this project and the Least Environmentally Damaging Practicable Alternative (LEDPA) – requiring the removal of

only 37,100 cy of material in the channel to re-establish the 35-foot authorized depth for this federal navigation project and only about 2-feet to 5-feet of material from the dock after recent maintenance dredging at the docks conducted by Sprague.

All of this material could be disposed upland, not in the Bay, as Sprague did with the material that it dredged in the winter of 2014-2015 at the Mack Point, Searsport docks. The cost of the maintenance dredging in the channel would cost Maine taxpayers nothing – because maintenance dredging is 100% a federal obligation. And the cost of dredging the dock area down to 45-ft, from the authorized 40-ft with a 1-ft over-dredge – would be Sprague’s obligation to pay – which is appropriate since Sprague and Irving are the intended beneficiaries of this project according to the Corps’ 2013 FSEA.

CONCLUSION

This proposed dredging project is a Project of Statewide Significance, meeting all four criteria for this designation and for review by the Board of Environmental Protection. In addition, public hearings are needed over this project and its impacts on Penobscot Bay’s environment and economy. Thank you for your consideration.

Sincerely,



Kimberly J. Ervin Tucker
Maine Bar # 6969