

Islesboro Islands Trust: June 1, 2015 Request for Board Jurisdiction

(Note: Annexes 2 through 5 of the letter are in the Department's record but are not included in this packet because they go to the merits of the application.)



June 1, 2015

Commissioner Patricia Aho
 Department of Environmental Protection
 #17 State House Station
 Augusta, Maine 04333

Re: DEP # L-26487-08-A-N/L-4E-B-N (“Army Corp Dredge”); Request by a Member of the Public for Assumption of Jurisdiction by the Board of Environmental Protection.

Dear Commissioner Aho,

Islesboro Islands Trust (“IIT”) is a trust organized under the laws of the State of Maine, and the owner of properties in the Town of Islesboro, an island in Penobscot Bay located approximately four miles from the port of Searsport, which is the site of the proposed dredging that is the subject of the above referenced application (hereinafter “Application”) by the Army Corps of Engineers (“ACOE”) and the Maine Department of Transportation (“MDOT”). IIT hereby requests that that the Board of Environmental Protection (“Board”) assume jurisdiction over this Application. This Request by IIT is timely because it is filed within 20 days of the acceptance of the Application as complete by the Department of Environmental Protection on May 13, 2015. (See NRPA Rules, Chapter 2.)

While IIT is a member of the public, and thus eligible to file this Request, it is also pertinent that Islesboro is a municipality required to be notified of the filing of the Application by the applicant. In addition, as noted above, IIT owns property that would be impacted by the proposed Project, including a preserve at Turtle Head, which is located directly across the Bay from the dredge site, and other properties that are less than a mile from the proposed disposal site.

Pursuant to Maine law, 38 M.R.S.A. 341-D(2), the Board is required to decide applications for approval of permits that represent a project of statewide significance. The statute defines a project of statewide significance as one that meets at least three of the following four criteria: (i) the project will have an environmental or economic impact in more than one municipality, territory or county; (ii) the project involves an activity not previously permitted or licensed in the State; (iii) the project is likely to come under significant public scrutiny; and (iv) the project is located in more than one municipality, territory or county. Each of these criteria is met in this instance.

A. Environmental or Economic impact, 38 M.R.S.A. § 341-D(2)(i):

The proposed Project would dredge an area of 5 million square feet and remove approximately one million cubic yards of sediment in one municipality (Searsport) and dispose of those dredge materials

within the half mile square Penobscot Bay Disposal site located in two other municipalities (Islesboro and Northport). (See ACOE Draft 2013 Environmental Assessment, which is included with the Application, at 31.) Attached as Annex 1 is a map showing the contours of the proposed Project, which clearly demonstrates that these activities will occur in and impact more than one municipality.

There can be no dispute that the proposed project will have, at a minimum, an economic impact upon many other municipalities – indeed that is its very purpose. According to the applicants, expansion of the deep-water port at Searsport Harbor will increase transportation efficiencies for shipment of aggregates, petroleum products, forest products and bulk cargoes, which are either brought from (exports) or delivered to (imports) many other coastal and inland towns, counties and territories. In addition, the shipping channels that are used travel through half a dozen other Maine towns along Penobscot Bay. These actions will impact economic activity in each of these communities. (Draft EA at 5.) Accordingly, there is a showing of economic impact in more than one municipality.

Further substantiating this impact is the finding by the legislature in 38 M.R.S.A. § 480-A, that any dredging and dumping in Maine’s coastal waters will have an environmental and economic impact. The proposal by ACOE and MDOT would be one of the single largest dredging and disposal projects in Maine’s history.

Additionally, subsequent to the completion of the 2013 Draft EA, on May 5, 2014, the Penobscot River Watershed, which includes the dredge and disposal sites, was designated as a habitat focus area by the National Oceanic and Atmosphere Administration (“NOAA”) (www.habitat.noaa.gov/habitatblueprint/pdf/maine_penobscot.factsheet.pdf). The purpose of this designation is to support habitat conservation and restoration for eleven migratory fish species that use the watershed (including the proposed Project area) as a spawning and nursery area. This designation also recognizes the ecological and economic importance of the Watershed to commercial fishing in the Gulf of Maine. The Application and its attachments make no mention of this important new NOAA initiative, thus leaving unresolved whether the proposed project will inhibit conservation and restoration of the fish species targeted by NOAA.

A-1. Environmental impact: Dredging is a unified activity and its elements cannot be considered discretely. In this matter, the elements of the proposed Project are the dredging in Searsport harbor and the disposal of the dredged materials in the Penobscot Bay Disposal site. Dredging and disposal together constitute the proposed activity, that is the Project,” and must be considered a single activity for the purpose of evaluating environmental criterion.

In considering the first statewide significance criterion, there are present here four principal factors to be evaluated in determining the case for assumption of jurisdiction.

First, of course, is the validity of the mercury testing, which will be addressed by Dr. Yeager, a principal architect of the Penobscot River Mercury Study for the Federal District Court in Bangor. Dr. Yeager will present testimony that the testing performed by the applicant in response to the mercury levels found in the Penobscot River and, possibly beyond, is inadequate to evaluate the real risk of mercury contamination by the dredging and disposal.

Second, is the issue of pockmarks in the disposal site. While the Applicant acknowledges their existence, and proposes remedial measures, it simply proposes monitoring to determine if there will be adverse

effects from depositing dredge material in the pockmarks. (Application, Block 16.) This “closing of the barn door after the cows escape” is an inadequate basis for granting of certification. The pockmarks are a significant geological feature of the disposal site. IIT and others will present new information and analysis that will demonstrate that promises to “close the barn door after the fact” are not sufficient.

Thirdly, a disturbing illustration of the insensitivity of the ACOE to environmental concerns is its abrupt dismissal of the concerns of the NOAA officials it was required to consult about the environmental effects of the dredging. By letter dated March 27, 2014, NOAA notified the ACOE that as discussed “in previous letters to you, the shallow water areas that would be impacted by dredging the proposed maneuvering area represents significant new and permanent losses of shallow water habitats.” (See Annex 2.) While NOAA urged a proactive eelgrass protection /mitigation, these concerns were brushed aside by ACOE in adopting a now familiar “study” approach. (See Application, Block 16.) We plan to present evidence that the ACOE approach is inadequate to deal with the actual (and unmentioned) interaction of the pockmarks, tides, and intrusive disposals as well as the concerns of NOAA.

Finally, the Application reveals for the first time that the volume of dredged materials is now estimated to be 929,000 cubic yards, an increase of more than 20 percent from the original estimate/ (Application, App. C, at 2-3.) The applicant dismisses this as irrelevant, but logic dictates that an increase in the volume of dredged materials of this magnitude cannot be flippantly disregarded.

A-2. Economic Impact: The Applicant’s Environmental Assessment concedes that the “dredging and disposal activities will temporarily disrupt the immediate project areas.” (Draft EA 62.) However, this disruption is dismissed by the Applicant on the basis of its conclusion that the Project “area is expected to return to normal levels of density and diversity a few years after construction ceases.” (Ibid.) This is an unacceptable cost to local fishermen, which is nowhere calculated into the outdated cost and benefits of the ACOE Draft Feasibility Report at pages 56-58. (The Draft Feasibility Report, Public Review Draft, was released at the same time as the Draft EA and can be found at <http://www.nae.usace.army.mil/Missions/ProjectsTopics/Searsport.aspx>.)

The disposal site is not well known. According to the Application, “No historic use of the placement site can be confirmed.” (Block 16.3.) While some testing was conducted, the Application confirms that “[L]obster resource data (i.e., abundance and distribution) in and around the Penobscot Bay Disposal Site is limited.” This is a significant flaw in the Application and provides important support for our Request, since lobster fishing is a critical part of the economic fabric of both Searsport and Islesboro, as well as the other Towns in the vicinity of the proposed Project. The statistics available, but not mentioned by the ACOE, inform the basis for a full Board review. Recalling that Islesboro and Searsport are both in Waldo County, consider the following data: In 2008, lobster landings in Waldo County were valued at \$1.1 million, but by 2014 had increased to \$3.4 million. See <http://www.maine.gov/dmr/commercialfishing/documents/lobster.county.pdf>.

This data belies the claim in the Application that “there 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 quick response to the Applicant here is “so what?” The lobstering activity that is occurring, and increasing dramatically, in the activity area is important even if possibly less important than in other areas. Indeed, comparative importance is irrelevant; what counts is a hard look at the impact in the activity area!

For the lobster persons on Islesboro and Searsport, as well as the other Towns impacted by the proposed Project, any disruption of their income flow from lobstering “for a few years” would be economically difficult to absorb. While the ACOE makes light of the threat to income from this fishery and suggests efforts to moderate the effect of the dredge material disposal, a Board hearing would be the most credible way to resolve the ambiguities in the Application. The threat to fishing income is ironic since the data demonstrate that the utilization of the port facilities in Searsport have declined significantly since 2006, the year used by the ACOE to project future need for the dredging and disposal. (See Annex 3.)

The decline in shipping activity in Searsport reduces significantly the need for the proposed Project according to an appraisal of the Searsport Deepening Project prepared for IIT by Dawson & Associates Washington, DC. (See Annex 4.) Dawson, which has extensive experience with ACOE projects, concludes that the objectives of the proposed Project could be achieved with a significantly less extensive alternative that would be dramatically less disruptive to the environment and much less expensive.

B. Previous Permitting, 38 M.R.S.A. § 341-D(2)(ii):

The current scale and location of the Searsport dredging and disposal zones are proposed activities that, as the applicant acknowledges, have never been previously permitted or licensed by the State. This satisfies the second criterion.

C. Significant Public Scrutiny, 38 M.R.S.A. § 341-D(2)(iii):

The project has already been subject to unprecedented and high levels of public scrutiny. The Applicant, pursuant to the State process, held two public hearings on the Project proposal. According to the Kennelly transmittal letter of April 21, 2015, “approximately 175 people attended the public information meeting on February 24, 2014 in Bangor, and approximately 214 people attended the public information meeting on April 8, 2014 in Belfast.” (Application cover letter, at 1-2.)

Further evidence of the highly significant level of public scrutiny that has been given to this proposed Project is the fact that nine towns in the area that will be impacted by the proposal have formally requested that the ACOE undertake a comprehensive environmental impact statement in lieu of the Draft 2013 Environmental Assessment that the ACOE continues to rely on despite the fact that such assessments are generally used where a “concise public document” is deemed sufficient to meet the requirements of the National Environmental Policy Act. See 40 CFR 1508.9 (Regulations of the Council on Environmental Quality.) Here, of course, the ACOE insists on using this shortcut with a Draft Feasibility Report that, together with appendices, is hundreds of pages in length, but fails despite all this paper to meet the requirements of an Environmental Impact Statement, which ACOE continues to refuse to undertake. In fact, ACOE has never responded to the Town letters.

On October 23, 2013, thirty-one Maine State Legislators requested that the ACOE undertake a comprehensive EIS, instead of relying on the Draft EA and the Draft Feasibility Report, which, as noted above, is available on the ACOE website. “Penobscot Bay’s waters are the most productive lobster grounds on the East coast,” the Legislators wrote. “We cannot risk harm to this critical resource.” (See Annex 5.)

D. Location of Project in More Than one Community, 38 M.R.S.A. § 341-D(2)(iv):

The project is physically located in multiple communities, including dredging in Searsport and disposal of dredge spoils in Islesboro and Northport. Further, the Applicant has acknowledged that the towns of Searsport, Islesboro, Belfast, Northport and Stockton Springs are required to be notified of the application and has certified that such notification has been made. (Letter to James Beyer, Maine Department of Environmental Protection, from John Kennelly, Chief of Planning, Army Corps of Engineers, April 21, 2015.) Therefore, the multiple municipality effect of criteria (i) and (iv) are met.

CONCLUSION

For the foregoing reasons, IIT submits that the criteria of 38 M.R.S.A. 341-D(2) are met here, and the Board should assume jurisdiction of the ACOE Application for a CWA certificate. In the event this Request is denied, IIT requests that the Department of Environmental Protection conduct a public hearing on the application.

Sincerely,



Charles Verrill
IIT President



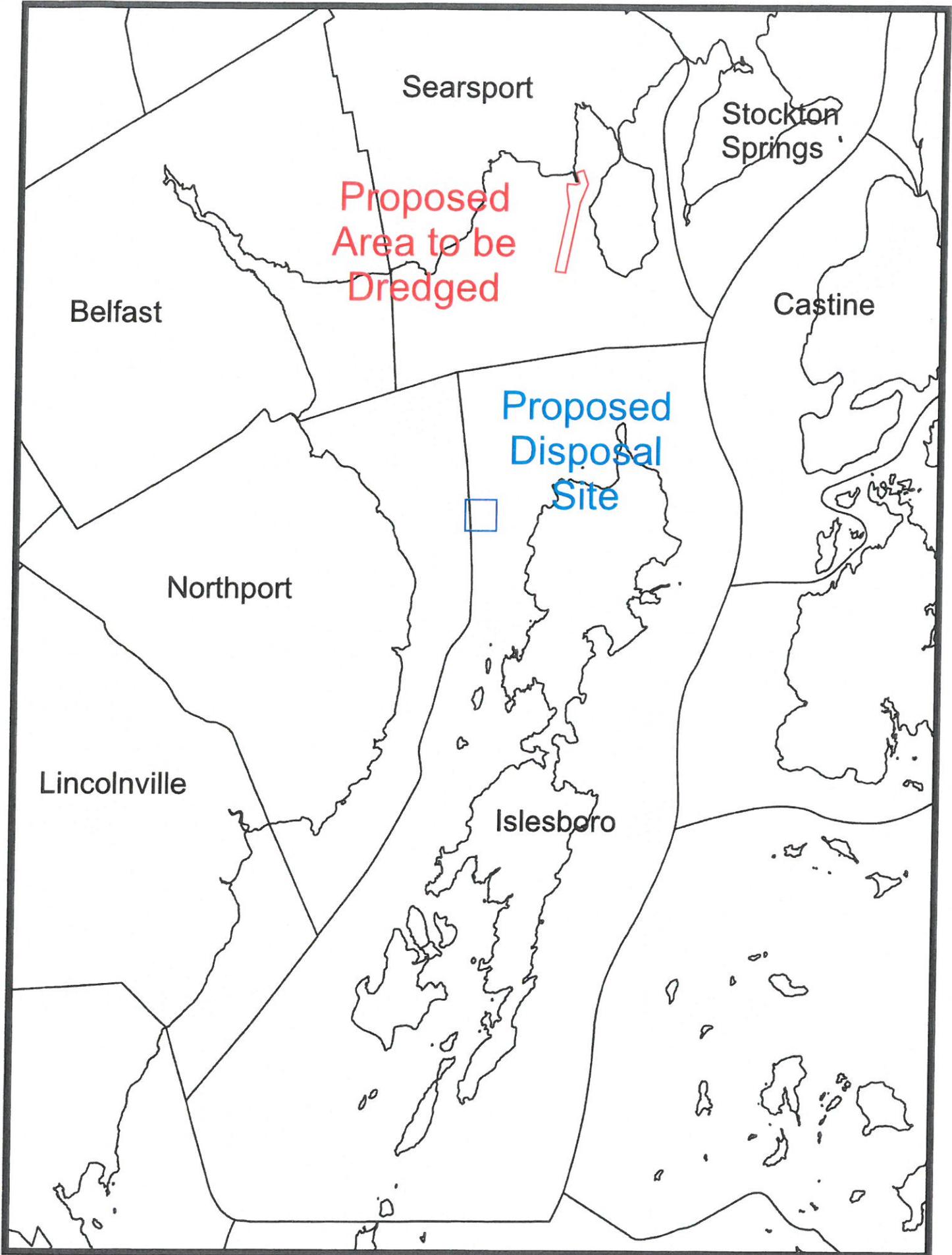
Stephen Miller
IIT Executive Director

CC. Representative Joan Welsh

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Annex 1

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