

March 28, 2011

Comments via E-mail

Bill Kavanaugh, Project Manager
US Army Corps of Engineers
Programs/Project Management Division
696 Virginia Rd.
Concord, MA 01742
(978) 318-8328
William.M.Kavanaugh@usace.army.mil

March 30, 2011

RE: US Army Corps of Engineers NRPA/CWA Sections 401 and 404 permit application for Maintenance Dredging of the Kennebec South of Bath, Maine with disposal in the Kennebec Narrows in 95-100 feet of water north of Bluff Head and Dredging in the Lower River with Disposal at Jackknife Ledge.

Dear Mr. Kavanaugh,

Thank you for the opportunity to comment on the above captioned permit application.

I have been told this application is at least partly dependent upon the Maine Legislature legally downgrading a portion of the tidal Kennebec River from Class SA to Class SB, which has not been done and may never be done.

As the ACOE is aware, the legal downgrading of a waterbody's legal classification is difficult under Maine and U.S. law, and for good reason. Especially difficult is the legal downgrading of a waterbody specifically for the purpose of permitting an activity that will degrade that waterbody from its existing condition. It appears, from the record, that the Maine Legislature's proposal to legally downgrade this portion of the Kennebec River is for the sole and specific purpose of allowing this single permit application to be approved.

It is axiomatic that if the activities described in this permit application would be permitted under existing Class SA standards, there would be no need for the Maine Legislature to downgrade the Kennebec in this area to Class SB to accommodate this project. So this appears to be “spot zoning” of a reach of the Kennebec River for the sole purpose of allowing it to be degraded beyond what existing law allows. If true, this is disturbing and is *prima facie* factual grounds for the Corps to deny this application. If the activity subject to the permit was permitted under existing law, there would be no need to downgrade the legal classification of the Kennebec River to accommodate it. It would seem much easier if this project could confine its activities to those parts of the Kennebec River that do not require a legal downgrade of the river to accomplish them, rather than to change the legal classification of the Kennebec River to accommodate the damage caused by the project.

As noted by other commenters, Maine and U.S. law does not allow for a river reach to be downgraded solely to accommodate an activity that would otherwise be illegal in that reach under existing law. This is anathema to the letter and spirit of the U.S. Clean Water Act, which in general, states that once a waterbody has attained a certain level of quality, that quality must be 'maintained and protected.' This is called the 'anti-degradation' or 'anti-backsliding' provisions of the CWA.

If any of the areas to be dredged or used as spoils sites are now Class SA, the permit application must be denied on its face, since the Corps cannot consider or issue a permit for an activity that is now on its face in violation of Maine law and requires a future change in Maine law to be made legal. Under normal rules of law, a permit which proposes an activity which is in violation of existing law cannot even be accepted for processing; and certainly not if the entire legal authority of the Corps to process the application depends on changes made to state law that have not even been made yet. The only proper way to do this is to wait until the Maine Legislature acts on the changes necessary and for the application to be resubmitted at that time for proper processing.

I have also been informed that the Maine DEP intends to claim that the Legislature “mistakenly” classified the dredging site as Class SA and now intends to correct this 'error' by reclassifying the area to Class SB during this spring's legislative session, apparently for the sole purpose of allowing this August dredging operation. It is odd, to say the least, that it is only now, when this dredging operation is to occur in August, that the Maine DEP has suddenly decided that this 'mistake' which has been law for many years suddenly needs to be 'corrected.' It is disturbing, to say the least, when the Maine DEP suddenly decides that a standing law which gives protection to marine waters is a 'mistake' because it might interfere with an activity that will harm and degrade those waters. Under this rubric, the entire Clean Water Act could be considered a 'mistake' and should be corrected by repealing it.

II. Dredging in Class SB waters.

Similarly, maintenance dredging and dumping of spoils in Class SB waters appears problematic, since Maine Class SB narrative standards state:

Class SB waters. Class SB waters shall be the 2nd highest classification.

A. Class SB waters must be of such quality that they are suitable for the designated uses of recreation in and on the water, fishing, aquaculture, propagation and harvesting of shellfish, industrial process and cooling water supply, hydroelectric power generation, navigation and as habitat for fish and other estuarine and marine life. The habitat must be characterized as unimpaired.

It seems obvious that the dredging of and dumping of spoils in Class SB waters must impair the existing habitat of Class SB waters. In the case of dredging, the entire benthic community of the waters is forcibly and physically removed and killed via the dredging operation. In the case of spoils dumping, the entire benthic community is smothered and buried by the deposition of the spoils on top of the existing benthic community and its supporting substrate. It goes without saying that neither of these activities would ever be allowed in the freshwater, non-tidal reach of the Kennebec River. As the letter from the Town of Phippsburg shows, the August dredging will directly *impair* nearby clam flats and clam beds; and will *impair* the designated use of these areas for commercial clamming.

The Class SB narrative standards cited above do not explicitly state that 'dredging' and 'dumping of dredge spoils' are designated uses of the SB classification. As such, dredging and spoils dumping are not 'designated uses' of Class SB waters within the meaning of Maine water quality standards and the U.S. Clean Water Act. However, propagation of fish and shellfish *is* a designated use of Class SB waters; and shellfishing for clams *is* a designated use of these waters. So here we have an August dredging, which is not a designated use of Class SB waters directly impairing and interfering with two legally designated uses: shellfish habitat and commercial harvesting of shellfish. It is of note that the Town of Phippsburg does not oppose the dredging *per se*, but its timing, right in the middle of the shellfishing season when clams are active and growing.

The Corps documents state the dredging *must* occur in August, rather than during the winter, despite the fact the Corps admits that an August dredging will have a much greater potential negative effect on endangered shortnose sturgeon (*Acipenser brevirostrum*) in the Kennebec River. However, the documents do not explain or detail the 'emergency' need for this particular ship to leave BIW at a certain date and why this 'emergency' should nullify the U.S. Endangered Species Act. It seems to me, at even the

most cursory level, that this 'emergency' is not an emergency, that the need for dredging in August rather than November is spurious, and there is no justification to literally suspend the ESA in this matter as it respects shortnosed sturgeon. Extraordinary claims require extraordinary evidence and none has been provided here.

Sincerely,

Douglas H. Watts
131 Cony Street
Augusta, Maine 04330

