IN THE MATTER OF

U.S. ARMY CORPS OF ENGINEERS Bath and Phippsburg, Sagadahoc County MAINTENANCE DREDGING L-16281-4E-E-N (approval)	))))	WATER QUALITY CERTIFICATION APPEAL—U.S. ARMY CORPS OF ENGINEERS RESPONSE TO APPELLANT DOT KELLY

INTRODUCTION

The U.S. Army Corps of Engineers ("Corps") provides the following in response to the appeal filed by Ms. Dot Kelly ("Appellant") challenging the Maine Department of Environmental Protection's ("DEP") Order of April 14, 2011 granting a water quality certification ("WQC") to the Corps for a proposed maintenance dredging project of the Kennebec River federal navigation project. This response incorporates by reference the responses filed by the Corps to the appeal filed by the Town of Phippsburg et al. ("Phippsburg appeal") and to the appeal filed by Douglas H. Watts and Ed Friedman ("Watts appeal"), and addresses items not raised in the Phippsburg and Watts appeals. As set forth more fully below and in the Corps response to the Phippsburg appeal, DEP's Order satisfies the applicable standards of the Natural Resources Protection Act, and therefore the Order should be affirmed.

I. The WQC Does Not Require Ocean Disposal.

Appellant argues that the WQC concluded that ocean disposal (ie offshore disposal) is the "least environmentally damaging practicable alternative," and therefore disposal at the Bluff Head and Jackknife Ledge disposal sites are prohibited in favor of ocean sites like the Portland Disposal Site. Appellant's argument represents a disingenuous and cramped reading of the language of the Order. A reading of the pertinent portion of the Order and the Draft Environmental Assessment ("EA") the Order cites makes clear that the Order was contrasting upland disposal with the Bluff Head and Kennebec disposal sites. The Order described both these sites as "ocean disposal" to contrast with upland disposal, and plainly concluded that the Bluff Head and Jackknife Ledge sites represented the least environmentally damaging practicable alternative for disposal of dredged material from the Corps Kennebec dredging project.

II. The WQC Review Does Not Require a Section 404 Review by DEP.

Appellant suggests that before DEP can issue a WQC pursuant to Section 401 of the federal Clean Water Act ("CWA"), 33 U.S.C. § 1341, it must perform a CWA Section 404 review. Appellant's argument misstates the framework of a Section 401 WQC. Section 401 requires an applicant for federal approvals for an activity involving a discharge to provide certification from the state where the activity is occurring that such discharge will comply with applicable effluent limitations or with state water quality standards. The Corps administers the permitting program for CWA Section 404 discharges, and while the Corps does not issue Section 404 permits to

itself, the Corps authorizes its own discharge of dredged material by applying the 404(b) guidelines to its activities, and seeks a WQC for such discharges into waters of the United States. 33 C.F.R. § 336.1(a). Thus, because the Corps will be disposing of dredged material in the waters of the Kennebec, a discharge pursuant to Section 404, the Corps was required to obtain certification from DEP that its discharge will comply with Maine water quality standards. Section 401 does not, however, require DEP to review Section 404 compliance.

Appellant argues that CWA Section 301, 33 U.S.C. § 1311, mandates that DEP perform a Section 404 review. However, Section 301 addresses effluent limitations to discharges, not discharges of dredged material. Effluent limitations governed by Section 301 are generally applicable technology based standards that are "promulgated by the EPA and restrict the quantities, rates, and concentrations of specified substances which are discharged from point sources." Arkansas v. Oklahoma, 503 U.S. 91, 101 (1992). If the discharge of a particular pollutant were subject to an effluent limitation, then a NPDES permit would be required under CWA Section 402, 33 U.S.C. § 1342, and a Section 401 review for such a discharge would address the applicable effluent limitations. Effluent limitations are not applicable to the discharge of dredged or fill material, which are governed by Section 404, not Section 301. See generally Southeast Alaska Conservation Council v. U.S. Army Corps of Engineers, 486 F.3d 638, 646-47 (9th Cir. 2007) (no section 404 permit for discharges for which effluent limitations exist). It is the Corps, not DEP, who performs the Section 404 review for discharges of dredged material. DEP's role is to determine if such discharges will comply with state water quality standards, and that is what the Order has done.

Appellant suggests that the DEP cannot issue its Section 401 WQC before the Section 404 review of the disposal of dredged material at the Bluff Head or Jackknife Ledge sites, in accordance with the Section 404 regulations found at 40 C.F.R.§ 230, is complete. However, as noted above Section 404 review is the responsibility of the Corps, not DEP, and while it was not complete at the time of DEP's WQC decision, that is not a prerequisite of either Section 401 or Section 404. In fact, Corps regulations generally require completion of a state WQC determination (or waiver) before a 404 decision can be made. 33 C.F.R. § 325.2(b)(ii); id. § 337.6(d).

III. The Wetland Protection Rules Were Satisfied.

Appellant argues that the Wetland Protection Rules were not satisfied, in particular the alternatives analysis. The Corps addressed the treatment of alternatives pursuant to the Wetland Protection Rules in its response to the Phippsburg appeal at pages 13-15, and the Corps refers the Board to that discussion.

IV. The Dredged Materials Are Suitable for Disposal at Bluff Head and Jackknife Ledge.

Appellant argues that the dredged materials must be chemically and biologically tested before a WQC can issue to the Corps. As an initial matter, the determinations under 40 C.F.R. § 230.60 are for the Corps to make as part of the Section 404 review for this project, not DEP. Moreover, Appellant ignores the fact that the materials to be dredged are sand, and as such there

is a regulatory presumption that, absent circumstances that do not exist in this situation, such materials do not require biological or chemical testing. As stated in 40 C.F.R. § 230.60(a), "Dredged or fill material is most likely to be free from chemical, biological, or other pollutants where it is composed primarily of sand, gravel, or other naturally occurring inert material." Because sand and gravel materials are not likely to carry contaminants, the presumption is that expensive chemical and biological testing is not necessary. Here, the samples taken for this project contained between 98.9% to 99.9% sand and gravel, coarse materials that do not carry contaminants. Kennebec River GS Results 010411.pdf. The regulation provides factors to consider that may rebut the presumption that sand is not likely to carry contaminants, but here the Corps determined that none of these factors were implicated in a manner that would require chemical or biological testing. Email dated March 1, 2011 from William Kavanaugh, Corps, transmitting draft suitability determination to DEP, U.S. Fish and Wildlife Service, and U.S. Environmental Protection Agency.

V. "Dragging" is not a Feasible Solution to the Shoaling.

Appellant argues that DEP should consider "dragging" as a means to address the shoaling at Doubling Point. As Appellant points out, however, this technique—dragging an I-beam behind a tug to move silt—was addressed by the Corps as being unworkable to address the sand wave shoals of Doubling Point. Email dated February 15, 2011 from William Kavanaugh, Corps, to Robert Green, DEP. Moreover, as noted by the Corps project manager, such techniques create turbidity and are not favored by regulatory agencies. Id. Dragging is simply not a feasible solution to the shoaling in the Kennebec federal navigation project.

VI. The Impacts of Dredging and Disposal Were Properly Addressed

Appellant suggests that DEP failed to adequately consider the impacts of the disposal of dredged material, because there are more silt particles per ton than sand particles. Appellant's calculations illustrate no more than the obvious fact that silt particles are much smaller than sand particles. What Appellant does not acknowledge, however, is that the samples taken showed that the vast majority of the dredged materials—98.9 to 99.9%--are sand, and the finer silt particles are intermingled among the vast amounts of sand. None of the samples revealed pockets of heavily silted materials, rather the samples showed a uniform, almost entirely sandy sediment. Thus, contrary to the suggestion of Appellant, there will not be any massive discharge of silty materials, the miniscule percentage of silt will be mixed in the sandy materials being discharged into the disposal sites. The draft EA provided to DEP plainly discussed and analyzed the impacts of dredging and disposal on water quality and species living in the Kennebec. Given the sandy nature of these materials, DEP reasonably concluded that there would not be unreasonable harm to species or significant wildlife habitat.

VII. Relevant Information Relating to the Application Was Provided to DEP.

Appellant suggests that the DEP permit issuance is invalid due to the lack of an Endangered Species Act Section 7 Biological Opinion or a final National Environmental Policy Act ("NEPA") Environmental Assessment. However, these are federal, not state, requirements that the Corps must complete. DEP's review is based on the application submitted and other

materials reviewed, and there is nothing in DEP's regulations that tie its review to the completion of federal ESA and NEPA reviews.

Appellant further suggests that the DEP review was invalid because of difficulties encountered by the Corps in taking sediment samples at one of the sampling locations. However, the samples that were gathered provided sufficient information about the nature of the materials to be dredged. Likewise, at one Bluff Head location where a sample was not obtained (and the grab sampler was lost in the rocky bottom), this confirmed that the site has a rocky bottom, consistent with earlier analysis conducted for other dredging projects. This does nothing to undermine the analysis and conclusion of DEP that the Bluff Head site is an appropriate in-river disposal site for the sandy materials to be dredged.

Appellant argues that there should be further investigation as to what happens to materials disposed in the Bluff Head location. However, the record includes exactly such a study, conducted by William Hubbard of the Corps, which showed that the material does not remain in the disposal site, but moves down river over time. W. Hubbard, Analysis of Survey Data, Kennebec River Disposal Site, Sagadahoc County Maine, U.S. Army Corps of Engineers, New England Division, Waltham MA (1982). Likewise, the bathymetric surveys conducted in association with this project showed that the last disposal events have not left mounds of sand at the bottom of the Bluff Head disposal site, as the materials have migrated downstream over time.

VIII. The Proposed WQC Conditions Are Impractical and Unnecessary.

Appellant's suggested conditions for the WQC are impractical and unnecessary. Moreover, they would render the project unworkable. For example, the suggested limitations based on turbidity changes of 10 NTUs (a minimal change in turbidity in the Kennebec that would probably be barely perceptible to the naked eye—lakes with turbidity of up to 25 NTUs are considered relatively clear) would result in limiting disposal events to slack tide. As an initial matter, the Corps and DEP are well aware that dredging and disposal causes turbidity. In a project involving the disposal of sandy material like this one, however, such effects are short lived as sand quickly settles to the bottom. By limiting disposal to slack tide, only four disposal events would be possible per day. The result of this would be to extend the project over a much longer timeframe (from weeks to months), the likely result being that the Corps could not complete the dredging in the timeframe required by the Navy. Likewise, the associated environmental impacts would extend over a longer timeframe, as well as disruptions to the various users of the waterways. In addition to the costs to the environment and the mission of the Navy, such a condition would result in much higher contract costs for the Corps, as a contractor would base its bid on the possibility that its dredging equipment may be tied up at the Kennebec for months, not weeks. This would likely result in bids that exceed appropriated funds available for this project. The end result, whether intentional or unintentional, is that the proposed conditions make the project likely to fail, and they should be rejected.

CONCLUSION

Appellant's arguments are not based on the relevant conditions of the NRPA, which the record shows have been satisfied. Rather, Appellant presents unsupported theories of environmental impacts and attempts to link the DEP WQC review to unrelated and legally unconnected federal legal frameworks. BEP should affirm DEP's decision in its entirety.

DATE: June 16, 2011

Respectfully submitted,

FOR U.S. ARMY CORPS OF ENGINEERS,

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