U. S. ARMY CORPS OF ENGINEERS
Water Quality Certification // Natural Resources Protection Act
Kennebec River Dredge – Bath and Phippsburg

ORDER UNDER APPEAL

- WITH FEDERAL CONSISTENCY DETERMINATION LETTER FROM THE MAINE STATE PLANNING OFFICE; DATED JUNE 7, 2011

STATE OF MAINE

Department of Environmental Protection

PAUL R. LEPAGE
GOVERNOR

DARRYL N. BROWN
COMMISSIONER

April, 2011

U.S. Army Corps of Engineers
C/o Ed O'Donnell
Chief, Navigation Section
New England District, Army COE
696 Virginia Road
Concord, MA 01742-2751

RE: Natural Resources Protection Act Application, Bath/Phippsburg,
DEP #L-16281-4E-E-N *(Corrected Order)

Dear Mr. O'Donnell:

Please find enclosed a signed copy of your Department of Environmental Protection Water Quality Certification. You will note that the Certification includes a description of your project, findings of fact that relate to the approval criteria the Department used in evaluating your project, and conditions that are based on those findings and the particulars of your project. Please take several moments to read your Certification carefully, paying particular attention to the conditions of the approval. The Department reviews every application thoroughly and strives to formulate reasonable conditions of approval within the context of the Department's environmental laws. You will also find attached some materials that describe the Department's appeal procedures for your information.

If you have any questions about the permit or thoughts on how the Department processed this application please get in touch with me directly. I can be reached at 207- 822-6300 or at robert.green@maine.gov

Yours sincerely,

Robert L. Green, Jr.

Robert L. Green, Jr., Project Manager
Division of Land Resource Regulation
Bureau of Land & Water Quality

pc: File

AUGUSTA
17 STATE HOUSE STATION
AUGUSTA, MAINE04333-0017
(207) 287-7688 FAX: (207) 287-7826
RAY BLDG., HOSPITAL ST

BANGOR
106 HOGAN ROAD
BANGOR ME 04401
(207-941-4570 FAX 207-941-4584

PORTLAND
312 CANCO ROAD
PORTLAND, MAINE 04103
(207) 822-6300 FAX: (207) 822-6303

PRESQUE ISLE
1235 CENTRAL DRIVE, SKYWAY PARK
PRESQUE ISLE, MAINE 04769-2094
(207) 764-0477 FAX: (207) 764-3143

WEB SITE: WWW.MAINE.GOV/DEP

STATE OF MAINE
DEPARTMENT OF ENVIRONMENTAL PROTECTION
17 STATE HOUSE STATION
AUGUSTA, ME 04333

DEPARTMENT ORDER

IN THE MATTER OF

U.S. ARMY CORPS OF ENGINEERS	) NATURAL RESOURCES PROTECTION ACT
Bath and Phippsburg, Sagadahoc County	) COASTAL WETLAND ALTERATION
MAINTENANCE DREDGING	) WATER QUALITY CERTIFICATION
L-16281-4E-E-N (approval)	) FINDINGS OF FACT AND ORDER
*(Corrected Order)	

Pursuant to the provisions of 38 M.R.S.A. Sections 480-A et seq. and Section 401 of the Federal Water Pollution Control Act, the Department of Environmental Protection has considered the application of the U.S. ARMY CORPS OF ENGINEERS with the supportive data, agency review comments, and other related materials on file and FINDS THE FOLLOWING FACTS:

1. PROJECT DESCRIPTION:

A. History of Project: Under the Lower Kennebec River Navigation Project, the Army Corps of Engineers (Corps) is authorized to maintain the Federal channel in the lower Kennebec River. The dimensions of the channel are 27 feet deep at mean low water (MLW) and at least 500 feet wide, extending approximately 13 miles upstream from the Kennebec River's mouth near Popham Beach to the City of Bath. Shoaling within the Federal channel at two reaches, Doubling Point reach and North Sugarloaf Island reach, require periodic maintenance dredging to maintain the 27-foot deep channel. Maintaining the channel depth at these two locations ensures the safe passage of U.S. Navy vessels to and from Bath Iron Works (BIW).

In Department Order #L-16281-4E-A-N, dated November 30, 1989, the Department issued a federal consistency finding and water quality certification to the applicant for dredging approximately 150,000 cubic yards of material to restore the channel to its authorized depth. Subsequent water quality certifications in 1997 and 2000 were issued by the Department for maintenance dredging in the Kennebec River. In Department Order #L-16281-4E-D-N, dated March 15, 2002, the Department issued a federal consistency finding and water quality certification authorizing conditional approval over a ten-year period to perform maintenance dredging at both Doubling Point and North Sugarloaf Island reaches. To protect the endangered shortnosed sturgeon, Department Order #L-16281-4E-D-N limits maintenance dredging to the winter months with specific dredge windows dependent on the dredging method.

B. Summary: At the request of the U.S. Navy, the applicant proposes to dredge from both Doubling Point and North Sugarloaf Island reaches to the approved 27-foot channel to ensure safe passage for the U.S.S. SPRUANCE. The Navy will take delivery of the U.S.S. SPRUANCE from BIW on September 1, 2011 and has stated that the addition of the U.S.S. SPRUANCE to the fleet is critical to Fleet Operations and National Defense.

The U.S.S. SPRUANCE embarked for sea trials on February 16, 2011 and returned February 17, 2011. BIW's pilot, Captain Earl Walker, reported during the February 18, 2011 meeting between the Army Corps of Engineers, Maine Congressional representatives, multiple State agencies, and

members of the public involved in dredging activities that he was able to navigate the ship past the shoals, but doing so was both difficult and hazardous. He reported that in order to make the transit past Doubling Point, he had to turn the ship outside of the Federal channel.

An estimated 70,000 cubic yards of sand is proposed to be dredged based on a hydrographic survey the Corps conducted in January 2011. Because of the dynamic nature of the river system, the actual volume of dredged material may be more or less than 70,000 cubic yards. The hydrographic survey indicates that Doubling Point has shoaled up to -21.6 feet Mean Lower Low Water (MLLW). At North Sugarloaf Island reach, sand has shoaled at a lesser rate, but some areas within this reach are still above the authorized river channel depth of -27 feet MLLW. The Corps is changing its tidal datum for setting the bottom of the river channel from MLW to MLLW. This change in datum represents an increase in depth of approximately three inches.

The Corps proposes to dredge the Federal channel in a portion of Doubling Point reach between Lincoln Ledge, which is approximately 2,350 feet downstream of BIW, to the turn at Doubling Point. Most of the dredging activity will occur between the Coast Guard's green buoy C"31" and red buoy R"28", which covers an area of approximately 35 acres. To reduce the frequency of dredging at Doubling Point, the Corps proposes advanced maintenance of the channel by removing the sand waves down to elevation -32 MLLW. The proposed project will generate approximately 50,000 cubic yards of fine-grained sand. Disposal of dredge material from this area will be disposed of at a delineated in-river site, known by the Corps as the Bluff Head Disposal Area and locally as Fiddlers Reach, located approximately 1.7 nautical miles downriver from the dredge site. The Corps has disposed of dredge material from Doubling Point at this site six times since 1986, with the last dredge done in 2003.

The applicant also proposes to dredge the Federal channel to a depth of -27 feet MLLW plus an additional 2-foot overdredge in a portion of North Sugarloaf Island reach. Most of the dredging activity will occur at two points between the Coast Guard's green buoy C"5" and red buoy R"6", which covers an area of approximately two acres. The proposed project will generate approximately 20,000 cubic yards of fine-grained sand. Disposal of dredge material from the area will be disposed of at a nearshore disposal site located approximately 0.4 nautical miles south of Jackknife Ledge. This site has been used as a disposal site for previous dredge projects, with the last dredge done in 2003.

C. Current Use of the Site: Along Doubling Point reach the west (Brunswick) side of the Kennebec River is developed along the riverbank, while the east (Arrowsic) side is largely undeveloped. At North Sugarloaf Island reach, the west (Phippsburg) side abuts Popham Beach.

2. <u>EXISTING SCENIC, AESTHETIC, RECREATIONAL OR NAVIGATIONAL USES:</u>

In accordance with Chapter 315, Assessing and Mitigating Impacts to Scenic and Aesthetic Uses, the applicant submitted a copy of the Department's Visual Evaluation Field Survey Checklist as Appendix A to the application along with a description of the property and the proposed project. The Corps also submitted several photographs of the proposed project site including an aerial photograph of the project site.

The proposed project is located in the Kennebec River, which is a scenic resource visited by the general public, in part, for the use, observation, enjoyment and appreciation of its natural and cultural visual qualities. There will be no permanent changes to the scenic and aesthetic values of the river, because dredging activities will take place in the subtidal area. The applicant intends to use a hopper dredge to perform the proposed project, working 24 hours a day seven days a week

beginning August 1, 2011. Dredging equipment will be in the water for approximately four weeks or less depending on conditions.

The proposed project was evaluated using the Department's Visual Impact Assessment Matrix and was found to have an acceptable potential visual impact rating. Based on the information submitted in the application, and the visual impact rating, the Department determined that the location and scale of the proposed activity is compatible with the existing visual quality and landscape characteristics found within the viewshed of the scenic resource in the project area.

In comments submitted to the Department, interested parties expressed concern that the proposed project would impact summertime recreational activities both on and adjacent to the river because of noise generated during dredging and disposal operations and from the hopper dredge making repeated trips to dispose of dredged material. Given the amount of boat traffic currently experienced on this section of the river during this time of year, and the relatively short period during which the proposed project will take place, the Department finds that the movement of the hopper dredge from the two dredge sites to their respective disposal sites will not result in an unreasonable impact to existing navigational uses of the river provided the mitigation requirements outlined in Finding 7 are followed.

Dredging operations will run for 24 hours a day, and as a result, disposal of dredged material will occur during nighttime hours. The Corps reported that the hopper dredge would fill, dump, and return approximately once every two hours. This would result in approximately 4-5 trips between the hours of 9 pm to 7 am. The Corps also reported that under optimal conditions, the estimated time to complete dredging at the Doubling Point site would be two to three days and less at the North Sugarloaf Island site. Given the short duration of the project and limited number of trips expected during the nighttime hours, the Department finds that the proposed project will not have an unreasonable impact to the recreational uses of the area.

The Department finds that the proposed activity will not unreasonably interfere with existing scenic, aesthetic, recreational, or navigational uses of the protected natural resource.

3. GEOLOGICAL CONSIDERATIONS:

Doubling Point has been identified as a bedload convergence zone, where bi-directional flow from the natural flow (downstream) of the river and tidal action (upstream) transport sand up and down river depending on the dominant current. The result is that bedload sediment accumulates in the form of large, oscillating sand waves within the limits of the Federal channel. The recent surveys have documented crests of the sand waves reaching a height of almost 20 feet MLLW. The Corps last dredged these two river segments in 2003.

The Maine Geological Survey (MGS) has routinely reviewed maintenance dredging projects in the Kennebec River proposed by both the Corps and BIW. MGS favors the in-river disposal of sand at the Bluff Head Disposal Area since it keeps the sand, an important resource, within the riverine system. In commenting on earlier applications that proposed disposal of sand at Bluff Head, MGS stated that the sand will disperse in less than a year and remain part of the natural river bedload. MGS further stated that the mobile sand in the Kennebec River is a resource that has an important role in maintaining sandy estuarine habitats as well as the sand bars, beaches, and dunes at the river mouth. MGS has no concerns about using Jackknife Ledge as a disposal site.

The Department of Marine Resources (DMR) held a public meeting in Phippsburg on February 24, 2011 to gather information and hear concerns from the public about the proposed project.

During the public meeting, Ms. Dot Kelly, whose property abuts the Bluff Head Disposal Site, raised concerns about the effects of a dredge that occurred in 2009 (the Department approved BIW's dredge of its dry-dock sinking basin in Department Order #L-14787-4E-Z-N) during which dredged materials were disposed of at the Bluff Head Disposal Site. Ms. Kelly stated that following the disposal of this material by BIW, her shoreline was heavily deposited with silt and expressed concern that the proposed project would have the same effect.

Included with the current application were grain-size analyses from several locations within both dredge sites. The Particle Size Analysis (ASTM D422-63) determined that samples taken at both locations were composed of 98-99% sand. The Unified Soil Classification System identified the samples as medium to fine-grained, poorly-sorted sands. Only one sample contained greater than one percent silt/clay. MGS reported that the bulk of the dredged material from Doubling Point reach would be expected to settle quickly at the Bluff Head Disposal Area, and that material from North Sugarloaf Island reach was consistent with the sandy sediment found in the Jackknife Ledge disposal site. MGS noted that fine-grained sediment (silts and clays) would not settle quickly but would be carried by tidal and river currents to intertidal and subtidal depositional sites upstream and downstream of the disposal sites. MGS also noted that it is not possible to quantify and predict transient water quality impacts, nor is it possible to identify specific areas that may become silted as a result of the proposed project.

In comments received from other interested parties, the concern was raised that chemical sampling of the proposed dredge material was not performed and that the Department should require chemical sampling prior to issuing a Water Quality Certification. Under the statute, 38 M.R.S.A. § 480-E(3)(A), an applicant is required to collect and test dredge spoils in accordance with a protocol approved by the commissioner. The Department has historically required that all dredge projects that propose open water disposal comply with the disposal requirements established by the Corps. As part of the application, the Corps submitted a draft Suitability Determination, dated January 14, 2011. The Suitability Determination summarized the grain-size analyses conducted on samples from the two dredge sites and noted that, in accordance with 40 CFR Part 230.60, no further testing would be required because the composition of the samples is primarily sand and not considered a likely carrier of contaminants. 40 CFR Part 230.60 states that dredged or fill material would most likely be free from chemical, biological, or other pollutants where it is composed primarily of sand, gravel, or other naturally occurring inert material.

Based on the materials submitted with the application and MGS' comments, the Department finds that the activity will not cause unreasonable erosion of soil or sediment nor unreasonably inhibit the natural transfer of soil from the terrestrial to the marine or freshwater environment.

4. HABITAT CONSIDERATIONS:

During the public meeting referenced in Finding 3, Mr. Dean Doyle, a local harvester of soft-shell clams, raised concerns that the proposed project will create a turbid discharge that would result in impacts to downstream clam flats at the height of the commercial clamming season. This issue was raised prior to the applicant's 1997 maintenance dredge of Doubling Point. Department Order #L-16281-4E-B-N, dated, October 22, 1997, required the submission of a report that summarized monitoring of the Bluff Head Disposal Area for turbidity and fecal coliform before and after the approved project. In a letter prepared by Normandeau Associates and dated December 5, 1997, summarizing the findings of the report, Normandeau stated that turbidity levels were consistent with other sampling stations along the Kennebec River and that there was no trend related to station, depth, or dredging/disposal. An earlier study entitled, "A Final Report on the Effects of Dredging and Spoil Disposal on the Sediment Characteristics of the Clam Flats

of the Lower Kennebec Estuary," dated March 1982, did not find a correlation between disposal of dredged material at the Bluff Head Disposal Site and sedimentation at downstream clam flats.

In previous dredging projects, the clam flats were not a major item of concern because they were not approved for commercial harvesting and because the dredge windows were restricted to the late fall and winter months when clams are not harvested. DMR recommends that sampling of the river for fecal coliform downstream from the Bluff Head Disposal Site be performed to ensure that dredging and disposal activities do not re-suspend fecal coliform, which may result in closure of the clam flats. DMR stated that it will use its staff to monitor the water quality downstream of the Bluff Head Disposal Site. DMR reiterated Mr. Doyle's comment that a significant portion of the local harvesters' income is generated during the month of August and that if a shellfish closure is mandated, then compensation should be required.

The Corps stated that, given the 24 hours a day work schedule for this project, dredging operations at Doubling Point could be completed in as few as two or three days and less for dredging at North Sugarloaf Island reach. Because DMR proposes to monitor water quality downstream of the Bluff Head Disposal Site, and given the low percentage of silt-sized particles that would create turbid discharge and the short time to perform the dredge, the Department finds that the proposed project is not expected to have an unreasonable impact to the clam flats near the mouth of the river.

DMR recognizes the emergency nature of the request to dredge, but it is concerned with the potential loss of shortnose or Atlantic sturgeon based on incidents from past dredging operations when fish were entrained. DMR recommended during the February 8, 2011 pre-application meeting, and again in its review comments, that the Corps tag up to 50 shortnosed sturgeon with acoustic tags and then track the fish with a mobile receiver aboard the hopper dredge. During the pre-application meeting, the Corps responded that dredging operations must continue 24 hours a day to ensure that the project is completed on time and that dredging would not be suspended because a tagged sturgeon may come into the area being dredged.

The Department finds that tagging and tracking sturgeon for this project would be impracticable, and recommends that in lieu of tagging and tracking, the Corps have a qualified observer be onboard the hopper dredge to monitor and report the capture of shortnose or Atlantic sturgeon during the proposed project to the Bureau of Land and Water Quality.

Department staff reviewed a Geographic Information System (GIS) database that contains information provided by both the Department of Marine Resources and the Department of Inland Fisheries and Wildlife. The GIS database indicates that there are no Significant Wildlife Habitats as defined in the Natural Resources Protection Act associated with the two dredge sites or with the two disposal sites.

Based on the prior studies referenced above, materials submitted with the application, and DMR's review comments, the Department finds that the activity will not unreasonably harm any significant wildlife habitat, freshwater wetland plant habitat, threatened or endangered plant habitat, aquatic or adjacent upland habitat, travel corridor, freshwater, estuarine or marine fisheries or other aquatic life provided that a qualified observer be onboard the hopper dredge to monitor and report the capture of shortnose or Atlantic sturgeon.

5. WATER QUALITY CONSIDERATIONS:

In April 2010, Ms. Kelly asked the Department to confirm the Water Quality Classification of the river segment where the Bluff Head Disposal Site is located. She alleges that the area is classified as a Class SA water, which would prohibit the disposal of dredge spoils.

Following a review of the statute, 38 M.R.S.A. § 469(5)(B), by staff from the Division of Environmental Assessment (DEA), it was determined that the statute, as written, is in error because it lacks a northerly boundary delineation. The literal interpretation of the statute, as written, lists the tidal waters of the Kennebec River in Phippsburg as Class SA extending from the mouth of the river to the Bath town line. While 38 M.R.S.A. § 469(5)(B) could be interpreted to lead to this conclusion, this would conflict with the history of this paragraph. Paragraph B was promulgated in 1990 based on the "Staff Proposal for Reclassification of Surface Waters to the Board of Environmental Protection," dated November 1, 1989, which includes the proposal for paragraph B under the heading "Popham Beach area (Phippsburg)." The proposal describes the Popham Beach, Seawall Beach and nearby offshore Heron Islands area, pointing out the protected status of the beaches and the seabird nesting habitat on Seawall and the Heron Islands. The longitudinal references in paragraph B are at either end of Seawall and Popham beaches. The clear intent was to protect these valuable beaches and the associated seabird nesting areas on the beaches and islands, and the Department has always interpreted it in this manner.

Because the statute uses the town-by-town classification system, the same stretch of river on the Georgetown side is not listed as Class SA in 38 M.R.S.A. § 469(5)(B), and so defaults to Class SB.

Since the issue was first raised by Ms. Kelly, the DEA has been working to resolve the drafting error in the water quality classification designation for this section of the Kennebec River as it was originally intended. In proposed legislation scheduled for review at the 125th Maine Legislature later this year, DEA proposes to correct the drafting error to limit the Class SA water designation to the intertidal portion of the Kennebec River on the northerly side of Popham Beach State Park and Fort Popham as was originally intended. All waters upstream of this point would be classified as Class SB waters. The legislative proposal would eliminate the Class SA designation to all waters of the Kennebec River north of the mouth of the river.

Given the drafting error noted in 38 M.R.S.A. § 469(5)(B) and the current efforts being taken to correct it, the Department does not anticipate that the proposed project will violate state water quality laws governing the classification of the State's waters. Provided that the Legislature corrects the classification of the intertidal portion of the Kennebec River from the mouth of the river to the Bath town line to be Class SB waters as described in proposed legislation before the 125th Session of the Maine Legislature, the Department does not anticipate that the proposed project will violate any state water quality law governing the classification of the State's waters.

In comments received from interested parties, the concern was raised that if it is determined that the disposal site is in a Class SB water, then in accordance with 38 M.R.S.A. *§ 465B(2)(C), discharges to Class SB waters may not cause an adverse impact to estuarine and marine life or that a new discharge will not cause closure of open shellfish areas. As discussed in Finding 4, the dredged material is not expected to carry contaminants that would result in an adverse impact to downstream aquatic life, and as discussed in Finding 5, provisions will be taken to monitor downstream water quality to determine if dredging operations will have an adverse impact on the clam flats.

Given the composition of the dredged material and the provisions that will be taken to protect open shellfish areas, the Department does not anticipate that the proposed project will violate any state water quality law, including those governing the classification of the State's waters.

6. WETLANDS AND WATERBODIES PROTECTION RULES:

The Department's Wetlands and Waterbodies Protection Rules, Chapter 310, require that the applicant meet the following standards:

A. Avoidance. No activity may be permitted if there is a practicable alternative to the project that would be less damaging to the environment. Each application for a coastal wetland alteration permit must provide an analysis of alternatives in order to demonstrate that a practicable alternative does not exist. The applicant submitted an alternatives analysis for the proposed project in the February 2011 Draft Environmental Assessment. The purpose of the proposed project is to restore the depth of the federal channel and reduce the potential of groundings by ships. The alternatives analysis considered a no dredge alternative and several alternate dredging methods (mechanical, hydraulic, or hopper dredge) and disposal methods (ocean or upland disposal). The Department finds that the analysis demonstrates that ocean disposal is the least environmentally damaging practicable alternative that meets the project purpose.

B. Minimal Alteration. The amount of wetland to be altered must be kept to the minimum amount necessary for meeting the overall purpose of the project. The applicant prepared a detailed hydrographic survey of the project area to ensure that the minimum amount of material will be removed from the project area to meet the federally approved depth. Removing bottom material will not permanently alter the existing bottom sediment and habitat characteristics and therefore minimizes the impact to marine fisheries.

C. Compensation. In accordance with Chapter 310, compensation is required to achieve the goal of no net loss of wetland functions and values. The applicant demonstrated that the proposed dredge will not permanently alter the characteristics of the project area. Based on surveys by the applicant and comments from DMR, the Department finds that the impact to wetland functions from the proposed project will be temporary and insignificant. Therefore, no compensation is required.

The Department finds that the applicant has avoided and minimized wetland impacts to the greatest extent practicable, and that the proposed project represents the least environmentally damaging alternative that meets the overall purpose of the project.

7. DREDGE SPOILS TRANSPORTATION CONSIDERATIONS:

As required by 38 M.R.S.A. Section 480-D (9), DMR provided an assessment of the proposed project and its impact on the fishing industry as stated in Finding 4. To minimize this impact, the Department finds that the applicant must:

a. Clearly mark or designate the dredging area, the disposal area, and the transportation route from Doubling Point reach to the Bluff Head Disposal Area and from North Sugarloaf Island reach to the Jackknife Ledge nearshore disposal site.

b. Publish the transportation routes in a newspaper of general circulation in the area adjacent to the routes.

c. Publish in a local newspaper the procedure that the applicant will use to respond to inquiries regarding the loss of fishing gear during the dredging operation.

8. OTHER CONSIDERATIONS:

The Department did not identify any other issues involving existing scenic, aesthetic, or navigational uses, soil erosion, habitat or fisheries, the natural transfer of soil, natural flow of water, water quality, or flooding.

BASED on the above findings of fact, and subject to the conditions listed below, the Department makes the following conclusions pursuant to 38 M.R.S.A. Sections 480-A et seq. and Section 401 of the Federal Water Pollution Control Act:

A. The proposed activity will not unreasonably interfere with existing scenic, aesthetic, recreational, or navigational uses.

B. The proposed activity will not cause unreasonable erosion of soil or sediment.

C. The proposed activity will not unreasonably inhibit the natural transfer of soil from the terrestrial to the marine or freshwater environment.

D. The proposed activity will not unreasonably harm any significant wildlife habitat, freshwater wetland plant habitat, threatened or endangered plant habitat, aquatic or adjacent upland habitat, travel corridor, freshwater, estuarine, or marine fisheries or other aquatic life provided that the applicant publishes the notices described in Finding 7 one week prior to commencing the dredging operation, and a qualified observer is onboard the hopper dredge to monitor and report the capture of shortnose or Atlantic sturgeon, as described in Finding 4.

E. The proposed activity will not unreasonably interfere with the natural flow of any surface or subsurface waters.

F. The proposed activity will not violate any state water quality law, including those governing the classifications of the State's waters, provided the Legislature corrects the classification of the intertidal portion of the Kennebec River from the mouth of the river to the Bath town line to be Class SB waters as is currently proposed in the 125th Session of the Maine Legislature.

G. The proposed activity will not unreasonably cause or increase the flooding of the alteration area or adjacent properties.

H. The proposed activity is not on or adjacent to a sand dune.

I. The proposed activity is not on an outstanding river segment as noted in Title 38 M.R.S.A. Section 480-P.

THEREFORE, the Department APPROVES the above noted application of the U.S. ARMY CORPS OF ENGINEERS to complete dredging in the Kennebec River, as described above, SUBJECT TO THE ATTACHED CONDITIONS, and all applicable standards and regulations:

1. Standard Conditions of Approval, a copy attached.

2. The applicant shall take all necessary measures to ensure that its activities or those of its agents do not result in measurable erosion of soil on the site during the construction of the project covered by this approval.

3. Severability. The invalidity or unenforceability of any provision, or part thereof, of this License shall not affect the remainder of the provision or any other provisions. This License shall be construed and enforced in all respects as if such invalid or unenforceable provision or part thereof had been omitted.

4. The applicant shall not dispose of dredge material in any disposal site in the intertidal portion of the Kennebec River between the mouth of the river to the Bath town line unless and until the Maine Legislature corrects the classification of the intertidal portion of the Kennebec River from the mouth of the river to the Bath town line to be Class SB waters as is currently proposed in the 125th Session of the Maine Legislature.

5. The applicant shall employ a qualified observer to monitor and report the capture of shortnose or Atlantic sturgeon during the project to the Bureau of Land and Water Quality.

6. The applicant shall comply with the provisions of 38 M.R.S.A. 480-D (9) and shall:

   a. Clearly mark or designate the dredging area, the disposal area, and the transportation route from Doubling Point reach to the Bluff Head Disposal Area and from North Sugarloaf Island reach to the Jackknife Ledge nearshore disposal site.

   b. Publish the transportation routes in a newspaper of general circulation in the area adjacent to the routes.

   c. Publish in local newspapers the procedure that the applicant will use to respond to inquiries regarding the loss of fishing gear during the dredging operation.

THIS APPROVAL DOES NOT CONSTITUTE OR SUBSTITUTE FOR ANY OTHER REQUIRED STATE, FEDERAL OR LOCAL APPROVALS NOR DOES IT VERIFY COMPLIANCE WITH ANY APPLICABLE SHORELAND ZONING ORDINANCES.

DEPARTMENT OF ENVIRONMENTAL PROTECTION
*CORRECTING THE ORDER DATED 04/14/2011. The effective date and expiration date remain the same as in the original.

Teco Brown

This permit is digitally signed by Teco Brown on behalf of Commmissioner Darryl N. Brown. It is digitally signed pursuant to 10 M.R.S.A. § 9418. It has been filed with the Board of Environmental Protection as of the signature date.
2011.04.15 14:42:52 -04'00'

PLEASE NOTE THE ATTACHED SHEET FOR GUIDANCE ON APPEAL PROCEDURES…

rlg/ats#73122/l16281en

Natural Resource Protection Act (NRPA)
Standard Conditions

THE FOLLOWING STANDARD CONDITIONS SHALL APPLY TO ALL PERMITS GRANTED UNDER THE NATURAL RESOURCE PROTECTION ACT, TITLE 38, M.R.S.A. SECTION 480-A ET.SEQ. UNLESS OTHERWISE SPECIFICALLY STATED IN THE PERMIT.

A. Approval of Variations From Plans. The granting of this permit is dependent upon and limited to the proposals and plans contained in the application and supporting documents submitted and affirmed to by the applicant. Any variation from these plans, proposals, and supporting documents is subject to review and approval prior to implementation.

B. Compliance With All Applicable Laws. The applicant shall secure and comply with all applicable federal, state, and local licenses, permits, authorizations, conditions, agreements, and orders prior to or during construction and operation, as appropriate.

C. Erosion Control. The applicant shall take all necessary measures to ensure that his activities or those of his agents do not result in measurable erosion of soils on the site during the construction and operation of the project covered by this Approval.

D. Compliance With Conditions. Should the project be found, at any time, not to be in compliance with any of the Conditions of this Approval, or should the applicant construct or operate this development in any way other the specified in the Application or Supporting Documents, as modified by the Conditions of this Approval, then the terms of this Approval shall be considered to have been violated.

E. Initiation of Activity Within Two Years. If construction or operation of the activity is not begun within two years, this permit shall lapse and the applicant shall reapply to the Board for a new permit. The applicant may not begin construction or operation of the activity until a new permit is granted. Reapplications for permits shall state the reasons why the applicant will be able to begin the activity within two years form the granting of a new permit, if so granted. Reapplications for permits may include information submitted in the initial application by reference.

F. Reexamination After Five Years. If the approved activity is not completed within five years from the date of the granting of a permit, the Board may reexamine its permit approval and impose additional terms or conditions to respond to significant changes in circumstances which may have occurred during the five-year period.

G. No Construction Equipment Below High Water. No construction equipment used in the undertaking of an approved activity is allowed below the mean high water line unless otherwise specified by this permit.

H. Permit Included In Contract Bids. A copy of this permit must be included in or attached to all contract bid specifications for the approved activity.

I. Permit Shown To Contractor. Work done by a contractor pursuant to this permit shall not begin before the contractor has been shown by the applicant a copy of this permit.

Revised (4/92/DEP LW0428

DEP INFORMATION SHEET
Appealing a Commissioner's Licensing Decision

Dated: May 2004 **Contact: (207) 287-2811**

SUMMARY

There are two methods available to an aggrieved person seeking to appeal a licensing decision made by the Department of Environmental Protection's (DEP) Commissioner: (1) in an administrative process before the Board of Environmental Protection (Board); or (2) in a judicial process before Maine's Superior Court. This INFORMATION SHEET, in conjunction with consulting statutory and regulatory provisions referred to herein, can help aggrieved persons with understanding their rights and obligations in filing an administrative or judicial appeal.

I. ADMINISTRATIVE APPEALS TO THE BOARD

LEGAL REFERENCES

DEP's General Laws, 38 M.R.S.A. § 341-D(4), and its Rules Concerning the Processing of Applications and Other Administrative Matters (Chapter 2), 06-096 CMR 2.24 (April 1, 2003).

HOW LONG YOU HAVE TO SUBMIT AN APPEAL TO THE BOARD

The Board must receive a written notice of appeal within 30 calendar days of the date on which the Commissioner's decision was filed with the Board. Appeals filed after 30 calendar days will be rejected.

HOW TO SUBMIT AN APPEAL TO THE BOARD

Signed original appeal documents must be sent to: Chair, Board of Environmental Protection, c/o Department of Environmental Protection, 17 State House Station, Augusta, ME 04333-0017; faxes are acceptable for purposes of meeting the deadline when followed by receipt of mailed original documents within five (5) working days. Receipt on a particular day must be by 5:00 PM at DEP's offices in Augusta; materials received after 5:00 PM are not considered received until the following day. The person appealing a licensing decision must also send the DEP's Commissioner and the applicant a copy of the documents. All the information listed in the next section must be submitted at the time the appeal is filed. Only the extraordinary circumstances described at the end of that section will justify evidence not in the DEP's record at the time of decision being added to the record for consideration by the Board as part of an appeal.

WHAT YOUR APPEAL PAPERWORK MUST CONTAIN

The materials constituting an appeal must contain the following information at the time submitted:

1. *Aggrieved Status*. Standing to maintain an appeal requires the appellant to show they are particularly injured by the Commissioner's decision.

2. *The findings, conclusions or conditions objected to or believed to be in error*. Specific references and facts regarding the appellant's issues with the decision must be provided in the notice of appeal.

3. *The basis of the objections or challenge*. If possible, specific regulations, statutes or other facts should be referenced. This may include citing omissions of relevant requirements, and errors believed to have been made in interpretations, conclusions, and relevant requirements.

4. *The remedy sought*. This can range from reversal of the Commissioner's decision on the license or permit to changes in specific permit conditions.

5. *All the matters to be contested.* The Board will limit its consideration to those arguments specifically raised in the written notice of appeal.

6. *Request for hearing.* The Board will hear presentations on appeals at its regularly scheduled meetings, unless a public hearing is requested and granted. A request for public hearing on an appeal must be filed as part of the notice of appeal.

7. *New or additional evidence to be offered.* The Board may allow new or additional evidence as part of an appeal only when the person seeking to add information to the record can show due diligence in bringing the evidence to the DEP's attention at the earliest possible time in the licensing process or show that the evidence itself is newly discovered and could not have been presented earlier in the process. Specific requirements for additional evidence are found in Chapter 2, Section 24(B)(5)

OTHER CONSIDERATIONS IN APPEALING A DECISION TO THE BOARD

1. *Be familiar with all relevant material in the DEP record.* A license file is public information made easily accessible by DEP. Upon request, the DEP will make the material available during normal working hours, provide space to review the file, and provide opportunity for photocopying materials.
There is a charge for copies or copying services.

2. *Be familiar with the regulations and laws under which the application was processed, and the procedural rules governing your appeal.* DEP staff will provide this information on request and answer questions regarding applicable requirements.

3. *The filing of an appeal does not operate as a stay to any decision.* An applicant proceeding with a project pending the outcome of an appeal runs the risk of the decision being reversed or modified as a result of the appeal.

WHAT TO EXPECT ONCE YOU FILE A TIMELY APPEAL WITH THE BOARD

The Board will formally acknowledge initiation of the appeals procedure, including the name of the DEP project manager assigned to the specific appeal, within 15 days of receiving a timely filing. The notice of appeal, all materials accepted by the Board Chair as additional evidence, and any materials submitted in response to the appeal will be sent to Board members along with a briefing and recommendation from DEP staff. Parties filing appeals and interested persons are notified in advance of the final date set for Board consideration of an appeal or request for public hearing. With or without holding a public hearing, the Board may affirm, amend, or reverse a Commissioner decision. The Board will notify parties to an appeal and interested persons of its decision.

II <u>APPEALS TO MAINE SUPERIOR COURT</u>

Maine law allows aggrieved persons to appeal final Commissioner licensing decisions to Maine's Superior Court, see 38 M.R.S.A. § 346(1); 06-096 CMR 2.26; 5 M.R.S.A. § 11001; & MRCivP 80C. Parties to the licensing decision must file a petition for review within 30 days after receipt of notice of the Commissioner's written decision. A petition for review by any other person aggrieved must be filed within 40-days from the date the written decision is rendered. The laws cited in this paragraph and other legal procedures govern the contents and processing of a Superior Court appeal.

ADDITIONAL INFORMATION: If you have questions or need additional information on the appeal process, contact the DEP's Director of Procedures and Enforcement at (207) 287-2811.

Note: The DEP provides this INFORMATION SHEET for general guidance only; it is not intended for use as a legal reference. Maine law governs an appellant's rights.

SPO Maine State Planning Office
Executive Department

PAUL R. LEPAGE
Governor

DARRYL BROWN
Director

June 7, 2011

Mr. Ed O'Donnell
Chief, Navigation Section
New England District
United States Army Corps of Engineers
696 Virginia Road
Concord, Massachusetts 01742-2751

RE: Federal consistency determination; Kennebec River maintenance dredging and dredged material disposal; TRANSMITTED BY ELECTRONIC MAIL

Dear Mr. O'Donnell:

This letter is in response to the United States Army Corps of Engineers' (ACOE) letter dated February 16, 2011,[1] providing its determination pursuant to Section 307 of the Coastal Zone Management Act (CZMA) that its proposed maintenance dredging operation on the Kennebec River is consistent to the maximum extent practicable with the enforceable policies of the Maine Coastal Program. In accordance with the findings, terms, and conditions of the Department of Environmental Protection's (DEP) findings of fact and order (L-16281-4E-E-N) (water quality certification), dated April 14, 2011, the State concurs with the ACOE's determination. We note that P.L. 2011, ch. 206, corrects the classification of the intertidal portion of the Kennebec as per condition 4 of the water quality certification.

In its water quality certification, DEP finds that the purpose of this project is to ensure safe passage of the *U.S.S. Spruance*, when the Navy takes possession of that naval vessel which is scheduled to occur on September 1, 2011, and references the Navy's statement that its addition to the fleet is "critical to Fleet Operations and National Defense."[2] DEP's findings also note concerns expressed regarding the project's potential adverse effects on soft-shell clam harvesting and other resources and uses in the project area. In general, we urge ACOE, in cooperation with Bath Iron Works and the Navy, to work within the framework of applicable authorities and authorizations to avoid and minimize the potential for adverse effects on public resources and uses in lower Kennebec as it addresses these national, defense-related interests.

Sincerely,

Kathleen Leyden
Director, Maine Coastal Program

cc: Robert Green, ME DEP

---

[1] The ACOE agreed to extension of the period for review of its federal consistency determination.
[2] Water quality certification, at 1

OFFICE LOCATED AT: 19 UNION STREET, 38 STATE HOUSE STATION, AUGUSTA MAINE
PHONE: (207) 624-7660 internet: www.maine.gov/spo FAX: (207) 287-6489