UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
Region 1
5 Post Office Square, Suite 100
BOSTON, MA 02109-3912

July 20, 2011

Patricia W. Aho, Acting Commissioner
Maine Department of Environmental Protection
17 State House Station
Augusta, ME 04333-0017

Re: Review and Action on Water Quality Standards Revisions

Dear Acting Commissioner Aho:

By letter of July 8, 2011, the Maine Department of Environmental Protection ("DEP") submitted revisions of the State's surface water quality standards to Region I of the United States Environmental Protection Agency ("EPA" or "Region") for review. The revisions were enacted by the Maine Legislature and signed into law by the Governor on June 3, 2011. By letter to the Region dated July 8, 2011, Maine's Assistant Attorney General in the Natural Resources Division certified the revisions as having been duly adopted pursuant to state law. The Region has completed its review of the submitted revisions as further described below.

Pursuant to Section 303(c)(2) of the Clean Water Act and 40 C.F.R. Part 131, I hereby approve the following water quality standards revisions to 38 M.R.S.A. §469(5) as set forth in Section 11 of P.L. 2011, c. 206 (LD 1398) "An Act To Amend the Laws Administered by the Department of Environmental Protection":

1. Rewording of the description of SA waters in Phippsburg;
2. Reclassification of Kennebec River waters within 500 feet of Popham Beach State Park from Class SB to SA; and
3. Relocation of default SB classification language for estuarine waters from a generally applicable reference to specific references in individual county classification descriptions.

Discussion

1. <u>Phippsburg Class SA Waters</u>

The Legislature revised the description, in 38 M.R.S.A §469(5)(B)(1), of Class SA waters in Phippsburg to read as follows:

> "Offshore waters east of longitude 69`-50'-05" W. and west of longitude 69`-47'-00" W., including the tidal waters of the Morse River and the Sprague River, - Class SA."

The State has explained that these revisions were enacted to address an ambiguity in the classification amendments enacted in 1990. The ambiguity arose from the following description contained in 38 M.R.S.A §469(5)(B)(1) as amended in 1990 pursuant to LD 2244 "An Act to

Reclassify Surface Waters of the State" (hereinafter referred to as the "1990 legislation" or the "1990 reclassification"),which reclassified certain marine and estuarine waters in Phippsburg from Class SB to Class SA:

> "Tidal waters east of longitude 69°-50'-05" W. and west of longitude 69°-47'-00" W. - Class SA."

The omission of any reference to a northern boundary, either by land mass description or latitude, created an ambiguity as to whether the SA classification included the western portion of the Kennebec River, within Phippsburg, all the way north to the Bath town line. The Legislature addressed the ambiguity by replacing the word "tidal" with the word "offshore," which makes clear that the SA classification of Phippsburg waters between the specified longitudinal coordinates does not include the tidal waters of the Kennebec River north of the Popham Beach State Park peninsula. The Legislature also clarified the 1990 reclassification by adding the words "including the tidal waters of the Morse River and the Sprague River," to explicitly include these tidal waters, which are directly linked to the waters offshore of Popham Beach and Seawall Beach.

In its submission, DEP provided information to support its explanation that these revisions are clarifications that reflect the original intent of the 1990 legislation which upgraded certain waters in Phippsburg to Class SA.[1] Conversely, the Phippsburg Shellfish Conservation Commission and others contend that the revisions are not clarifications but rather constitute a downgrade of the Kennebec River waters in Phippsburg from Class SA to Class SB. They assert that the original intent and the literal language of the 1990 legislation classified the River within Phippsburg as SA, and that the reclassification to SB cannot occur unless and until a use attainability analysis ("UAA") is prepared and it demonstrates that such downgrade complies with federal regulations.

The Region has reviewed relevant materials contained in its own files; all of the materials submitted by DEP, which includes, among other information, documents from the record relating to enactment of the 1990 legislation and the revisions to 38 M.R.S.A. §469(5)(B)(1) as set forth in Section 11 of P.L. 2011, c. 206 (LD 1398) (hereinafter referred to as the "2011 revisions"); as well as information provided to the Region by Bath Iron Works and by a group of entities and individuals collectively referred to as the "Phippsburg Commenters." Based on that review, the Region has concluded that the 2011 revisions are clarifications consistent with the original 1990 legislation. The Region believes that the Kennebec River's SB classification that has existed since at least 1985 was not changed as a result of the 1990 upgrade to SA of certain waters in Phippsburg. While we acknowledge that the wording of the 1990 legislation creates some ambiguity and is open to more than one interpretation, we conclude that the far stronger interpretation is that the River's classification was not changed in 1990. Therefore, the 2011 revisions do not constitute a downgrade and there is no need for a UAA before EPA can approve

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[1] DEP also asserts that because the revisions are clarifications, there is no need for EPA to review and approve them pursuant to Section 303(c)(2) of the CWA. We disagree. The CWA and EPA's implementing regulations at 40 C.F.R. Part 131 do not distinguish between revisions that are "clarifications" and other types of revisions. Both are subject to EPA review and approval or disapproval.

the revisions. The Region's conclusion is based on the combination of the factors discussed below.

First, the Region has reviewed documents provided by the State relating to the Maine DEP's and Maine Board of Environmental Protection's ("BEP") proceedings and recommendations to the Maine Legislature during the 1990 reclassification of the marine and estuarine waters in Phippsburg. Based on that review, the Region has found no evidence that the reclassification was intended to include any portion of the Kennebec River. As noted earlier, since at least 1985, Kennebec River waters within the boundaries of the Town of Phippsburg were classified as SB (the State's default classification absent explicit reference to the contrary). A review of documents that are part of the record of the 1990 reclassification, submitted to the Region by DEP, including testimony provided to the Maine legislature, supports the conclusion that the State intended to, and did, reclassify from SB to SA only those tidal waters in the Popham Beach area (including Seawall Beach and the nearby Heron Islands), situated on the seaward (or southern) side of the Popham Beach State Park peninsula, including the tidal waters of the Morse and Sprague Rivers. [2]

The record does not support the proposition that the State also intended to reclassify the entire length of the Kennebec River within the boundaries of the Town of Phippsburg. Had a reclassification of that magnitude been intended in 1990, we would expect the record to reflect a specific DEP proposal that mentioned the Kennebec River, and/or comments from the public recommending in favor or against inclusion of the River, and/or explicit DEP recommendations to or findings by the Legislature related to the River. This is so particularly in light of the fact that in 1990, no direct discharges of pollutants were allowed into SA waters pursuant to 38 M.R.S.A. § 465-B(1)(C) (since then, certain limited exceptions have been added to §465-B (1)(C)). It is reasonable to assume that decision makers and commenters would have evaluated and discussed the implications of such an upgrade on entities that would no longer be able to discharge (including discharges associated with periodic dredging in the River). No such information exists in the record. Rather, the record shows that the reclassification to SA was focused on waters in the relatively limited area of Seawall and Popham Beaches and reflected the State's purpose to provide the highest level of protection to waters associated with public lands where there were no known discharges. That purpose and focus does not logically extend to the entire length of the Kennebec River within the boundaries of the Town of Phippsburg. Therefore there is no basis for assuming that the Kennebec River was included in the reclassification. Moreover, the absence of any specific reference to the Kennebec River stands in contrast with other water body classifications contained within 38 M.R.S.A. §469, which do explicitly reference tidal waters of specific rivers when such waters are intended to be covered. See, for example, Subsection 1.A.(1) "Tidal waters of the Spurwink River system" and Subsection 1.E-1.(1) "Tidal waters of the Scarborough River system."

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[2] As tidal waters directly connected to the offshore waters located in the vicinity of the Seawall and Popham Beaches, the Morse and Sprague Rivers clearly were always intended to be part of the waters reclassified as SA in the 1990 legislation. EPA is not aware of any past or present misunderstandings as to the SA classification of those waters. Their explicit inclusion in the 2011 revisions is to ensure that the change from "tidal" to "offshore" waters did not create confusion about the classification of those rivers.

We also do not believe that the absence of a reference in the 1990 reclassification to a northern boundary of the reclassified waters is persuasive evidence of legislative intent to include the Kennebec River in the SA classification, as some have contended. Rather, given the purpose of the reclassification (to enhance protection of the waters near the public lands in the vicinity of Popham and Seawall Beaches between the two longitudinal coordinates), it is reasonable to conclude that the Popham Beach State Park peninsula serves as a natural northern boundary for the scope of the reclassified waters. The presence of this natural northern boundary underscores our view that the better interpretation of the 1990 legislation is that the Kennebec River was not included within the scope of the reclassified waters in the absence of a specific reference to it. [3]

In addition, we have evaluated information about the manner in which this portion of the Kennebec River has been managed over time. While management of a water body does not *per se* determine its classification, it can be an important indication of a state's understanding of a water's classification where, as here, there is arguably an ambiguity related to the classification. In this case, various management decisions made by DEP since 1990 show that the lower Kennebec River in Phippsburg has consistently been managed as a Class SB water body. This consistent interpretation of the River's classification supports the Region's conclusion based on the record that in fact the 1990 legislation did not reclassify the River within Phippsburg's boundaries to SA.

Examples of decisions reflecting this interpretation include:

- DEP permit approvals and Clean Water Act Section 401 water quality certifications issued after 1990 in relation to dredging operations conducted in the Kennebec River;
- DEP's reissuance in 2007 of a permit for overboard discharges into the Phippsburg side of the Kennebec River, which would have been prohibited (until a legislative exemption was enacted in 2009) if the Lower Kennebec River were Class SA[4];
- Maine's CWA Section 303(d) biennial list of impaired waters which, since DEP began including explicit references to water body classifications in 2002, has described the Lower Kennebec River as "Lower Kennebec, Phippsburg/Georgetown" and identified that water body as Class SB; and
- The DEP's August, 2009 Statewide Bacteria Total Maximum Daily Load ("TMDL") report, which identifies the Lower Kennebec in Phippsburg/Georgetown as SB and identifies sources, allowable loads, and an implementation plan to address bacteria impairment in that water body and similarly impaired water bodies in Maine.

For all of the reasons above, the Region concludes that the Kennebec River waters within Phippsburg have been classified as SB since at least 1985 and that the 1990 reclassification of certain waters in Phippsburg did not alter the River's classification. We further conclude that the

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[3] We recognize that the 1990 legislation also did not specifically refer to the Morse and Sprague Rivers. However, in contrast with the Kennebec River, those tidal waters are not separated by the Popham Beach State Park peninsula from the tidal waters offshore of Popham Beach and Seawall Beach. Hence, it is reasonable to conclude that the 1990 legislation's statutory reference to "tidal waters" would have included the Morse and Sprague Rivers but not the Kennebec.

[4] In 2009, 38 M.R.S.A. §465-B(1)(C) was revised to allow overboard discharges to Class SA waters if they were licensed prior to January 1, 1986 and if no practicable alternative exists.

2011 revisions to 38 M.R.S.A. §469(5)(1) clarify that the SA classification for Phippsburg waters does not include the Kennebec River. The revisions do not result in a reclassification of any water body or any other substantive change to Maine's Water Quality Standards. The Region approves the revisions as being consistent with CWA Section 303 and 40 C.F.R. Part 131.

Public comments from Phippsburg residents and local fishermen related to this clarification, made in public hearing testimony to the legislature and by letter directly to EPA, have expressed concern for water quality in the southern part of the Lower Kennebec River where clam flats are an important resource to the local community, and because of the natural resource, scenic, ecological, and economic value of those areas. The Region commends the efforts thus far of local residents and other stakeholders to protect marine and estuarine resources in the area and encourages them to continue working to enhance water quality by implementing currently applicable water quality standards and other water quality management strategies and to seek additional protection for water quality by means of future upgrades in classification, through DEP's reclassification program.

2. Reclassification of Kennebec River Waters Within 500 feet of Popham Beach State Park

LD 1398 also includes a revision that adds a new (5)(B)(3) to 38 M.R.S.A. §469, reclassifying a 500 foot strip of the Kennebec River from SB to SA, by the following language:

> "Tidal waters of the Kennebec River in Phippsburg within 500 feet of shore, beginning at a point of land at the head of Atkins Bay located at longitude 69°-48'-14" W. and latitude 43°-44'-40.4" N. and extending along the southeast shore of Atkins Bay to a point 500 feet off Fort Popham located at longitude 69°-47'-00" W. and latitude 43°-45'-23.89" N. - Class SA."

The Region approves of the upgrade of this portion of the Kennebec River adjacent to the state park from SB to SA because it is consistent with the intent expressed in 38 M.R.S.A. §465-B(1) to apply the SA classification to waters which should be preserved due to, among other things, their social, scenic, or recreational importance. We also find the revision to be consistent with CWA Section 303 and 40 C.F.R. Part 131.

3. Relocation of Default Classification Language for Estuarine Waters

In this revision, the first sentence of 38 M.R.S.A §469 has been deleted. The deleted sentence is:

> "All estuarine and marine waters lying within the boundaries of the State and which are not otherwise classified are Class SB waters."

A new sentence has been inserted at the beginning of each county water body classification description for estuarine and marine waters in all eight coastal Maine counties (Cumberland, Hancock, Knox, Lincoln, Penobscot, Sagadahoc, Waldo, Washington, and York) in 38 M.R.S.A. §469(1) through (8) The new sentence is:

> "All estuarine and marine waters lying within the boundaries of [*county name*] County and that are not otherwise classified are Class SB waters."

The legislative change does not result in any change in the extent of SA and SB estuarine and marine waters in the State of Maine and the eight counties included in 38 M.R.S.A. §469. Rather, it provides a clearer indication on a county basis as to which waters are SB in the

absence of a specific classification. The Region approves this revision as consistent with CWA section 303 and 40 C.F.R. Part 131.

EPA's approval of Maine's surface water quality standards revisions does not extend to waters that are within Indian territories and lands. The Region is taking no action to approve or disapprove the State's revisions with respect to those waters at this time. EPA will retain responsibility under Sections 303(c) and 303(d) of the Clean Water Act for those waters.

We look forward to continued cooperation with Maine in the development, review and approval of water quality standards pursuant to our responsibilities under the Clean Water Act. Please contact Ellen Weitzler (617-918-1582) if you have any questions.

Sincerely,

Stephen S. Perkins, Director
Office of Ecosystem Protection

cc: Teco Brown, MEDEP
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