



STATE OF MAINE  
DEPARTMENT OF ENVIRONMENTAL PROTECTION

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July 8, 2011

Ellen Weitzler  
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Dear Ms. Weitzler,

As part of this Department's miscellaneous corrections to Maine laws the "omnibus bill" (LD 1398) was submitted, passed by the Maine Legislature, and signed as an emergency measure by the Governor on June 3, 2011. Among other items, this law contains a provision to correct an error in the law governing the classification of waters in the lower Kennebec River, in the Town of Phippsburg.

The error occurred in 1990 when a number of state waters were being reclassified, including highly valued coastal waters around state parks. Among other things, the 1990 legislation reclassified the waters surrounding Popham Beach State Park as Class SA. The state park is located on the coast next to the mouth of the Kennebec River. Unfortunately, the statutory language, based on latitude-longitude coordinates and town boundaries, was not sufficiently specific and inadvertently introduced ambiguity regarding the classification of segments of the Kennebec River in Phippsburg, upstream of Popham Beach State Park. The 1990 legislation appeared to reclassify the west side of the lower river (adjacent to Phippsburg) as SA while leaving the east side of the lower river (adjacent to Georgetown and Arrowsic) as SB. The Legislature agreed with the Department that this language was the result of a mistake or drafting oversight and that the river upstream of the state park was never intended to be and has never been managed as Class SA. The Legislature corrected the error in P.L. 2011, c. 206, by clarifying that, except for a small strip of water on the north side of the state park, the entire lower Kennebec River adjacent to the towns of Phippsburg, Georgetown and Arrowsic is Class SB.

A similar example of a needed correction in statutory language occurred in 2009. As part of the Department's triennial review of classification, the law governing a segment of Trout Brook in South Portland was found to have the same unintentional, illogical language where the use of a town line boundary bisected the water quality class of that stream, with Class B on one side and Class C on the other side of the stream. A correction was made in the 2009 reclassification legislation to clarify that the entire stream segment is Class C. That correction to the classification of Trout Brook was accepted by the USEPA (attached letter from Stephen Perkins dated 19 May 2010) which described that change as a "clarification of the classification".

Despite the obvious error in the prior law, as found by the Department and the Legislature, certain parties have claimed that the 1990 legislation intentionally reclassified the west side of the lower Kennebec River as Class SA, and that any subsequent change to the statutory language should therefore be considered a substantive lowering of the classification of that portion of the river. Others argue that if there was an

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error in the 1990 legislation, it was that the *east* side of the lower river was mistakenly omitted from the Class SA reclassification. These claims are not supported by the classification and legislative history of the lower Kennebec, or the Department's actions in managing this segment of the river.

### **Historical Background**

The following will provide some background on the lower Kennebec issue. In 1987 the Legislature revised surface water quality standards and consolidated marine waters into 3 classes (SA, SB, SC). Formerly, there had been 5 classes of marine waters (SA, SB-1, SB-2, SC, SD). All waters in the Town of Phippsburg were previously designated SB-1. With the new classification system, SB-1 and SB-2 waters were consolidated into Class SB and the higher, SB-1 standards were applied. In 1989, the Department proposed upgrading certain waters, among them the waters around its state parks. By assigning many of those waters to Class SA, they are provided with the highest level of protection in terms of water quality criteria and limitations of potentially deleterious human activities. All Class SA waters are designated as Outstanding National Resource Waters. The SA classification is reserved for our highest quality and most valued coastal waters such as state and national parks. In the documents prepared by DEP staff for the Board of Environmental Protection (November 1, 1989) proposing the classification upgrade, the purpose for the upgrade was described as protecting the waters around Popham Beach State Park and adjacent Seawall Beach and Heron Islands, which are privately owned conservation areas. Staff comments in the reclassification proposal acknowledged that the adjacent water quality of the Kennebec River itself (Class SB) might have an effect on water quality of the proposed SA waters but even so, the high level of protection afforded by the SA designation was deemed appropriate for the high value resources of Popham Beach. Maine Audubon Society submitted comments in support of the SA upgrades to the Energy and Natural Resources Committee, with specific attention drawn to waters in "the Popham Beach vicinity".

The ambiguity in the 1990 statutory language creates an illogical water quality management situation similar to the Trout Brook situation. The town boundary line between Phippsburg and Georgetown bisects the Kennebec River with the result that a literal interpretation of the language and coordinates in the 1990 classification law assigns waters of Phippsburg to Class SA for the western side of the river segment and waters of Georgetown and Arrowsic to Class SB for the eastern side of the river segment.

The ambiguous situation on the Kennebec is made more urgent by the existence of a number of permitted wastewater discharges within and upstream of the segment in question. These discharges could not have been legally permitted if the River was deemed by the State to be Class SA. The State is charged with protecting downstream uses and even if permits were issued for outfalls within the SB segment in Bath, the State could not have certified that downstream uses would be protected if segments immediately downstream in Phippsburg were Class SA. Moreover, an SA designation of the entire lower Kennebec River could never have been approved in 1990 because these significant wastewater discharges were in existence at that time. Therefore we do not agree with those arguing that the lower Kennebec has "always been SA".

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Permit	Town	Classification specified in permit	Comments
City of Bath POTW (including a Combined Sewer Overflow)	Bath	SB	The 10/26/04 permitting action authorized the monthly average discharge of up to 3.5 million gallons per day (MGD) of secondary treated sanitary wastewater and storm water during wet weather events from four (4) combined sewer overflow (CSO) outfalls to the Kennebec River, Class SB, in Bath, Maine
Stinson Seafood (W000798-5P-D-R)	Bath	SB	Waste Discharge License (WDL) #W000798-5P-B-R/#W000798-5P-C-T issued on October 2, 2000 and expired on October 2, 2005. The 10/2/00 WDL authorized the discharge of an unspecified monthly average and daily maximum flow of treated process waste waters from a sardine/herring steak processing facility to the Kennebec River, Class SB, in Bath, Maine.
RESIDENTIAL OVERBOARD DISCHARGE LICENSE #W001085-5A-E-T	Phippsburg	SB	Year-round, daily maximum discharge of up to 300 gallons per day (GPD) of secondary treated sanitary wastewater generated by a three-bedroom, single-family dwelling and treated with a sandfilter wastewater treatment system to the Kennebec River, Class SB, in Phippsburg, Maine.
RESIDENTIAL OVERBOARD DISCHARGE LICENSE #W001085-5A-E-T	Arrowsic	SB	Secondary treated sanitary wastewater generated by a single-family dwelling and treated with a sandfilter wastewater treatment system to the Kennebec River, Class SB, in Arrowsic, Maine.
Numerous OBDs	Georgetown	SB	

The OBD in Phippsburg was permitted in 2007 and most recently renewed in 2010. The permit specifies that the lower Kennebec receiving water in Phippsburg is Class SB. There are also numerous overboard discharges in the Towns of Arrowsic and Georgetown which could not have been permitted if the River was Class SA. Finally, the Department's Integrated Water Quality Monitoring and Assessment Reports have consistently listed this segment as Class SB (Waterbody ID 710-2). Note that this segment is also listed as impaired due to shellfish closures affected by the present discharges and other bacteria sources, clearly not a condition that suggests "natural" quality.

### **Legislative Background**

The need for a correction and current ambiguity was discovered by DEP staff during 2010, and staff proposed statutory language to correct the classification during the fall of 2010. The language was placed in the Department's annual "miscellaneous" or "omnibus bill".

The bill was submitted to the 125<sup>th</sup> Legislature and was printed, introduced as LD 1398 and published on the website on April 4, 2011. The Legislature provided 2 week notice of a public hearing, which was held on April 26, 2011. The Environment and Natural Resources Committee subsequently held three work sessions, all of which were open to the public, with notice provided and comments allowed: May 3, May 11 and May 26, 2011. The Legislature ultimately enacted the bill on an emergency basis and it was signed into law on June 3, 2011, as Public Law Chapter 206.

### **Current Permit Background**

At the request of the US Navy, the US Army Corps of Engineers applied to the Department for a Natural Resources Protection Act permit and Water Quality Certification. The order was signed on April 14, 2011. During consideration of the application, the Department clearly noted its determination that the statute pertaining to the water quality classification was in error due to a lack of northerly boundary delineation. The Department immediately commenced to correct the error through a statutory clarification. The current permit issued on April 14<sup>th</sup> amply notes and addresses the error relating to the prior water quality classification law.

As documented above, the Department has never considered this segment of the Kennebec River, outside of the state park area, to be Class SA and we have clarified that in LD 1398. LD 1398 also clarifies the SA classification to include a small strip of water, within 500 feet of shore, surrounding the north side of Popham Beach State Park and Fort Popham, to afford those waters of the Park the same protection as the waters seaward of the Park. To the extent EPA considers the clarification regarding the small strip of water on the north side of Popham Beach State Park and Fort Popham to be a substantive upgrade to Class SA, we ask for EPA's approval of this upgrade. We ask for your concurrence that the clarifying language in LD 1398 otherwise constitutes a nonsubstantive correction to the classification law that does not require EPA approval.

We seek EPA's understanding and support as we attempt to address this type of non-substantive clarification of our water quality classification law. As noted above, the Department from time to time has had to make corrections to its classification law when similar errors have been discovered and we expect that this type of error and ambiguity may be discovered, and will need to be corrected in other places.

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I would like to ask for your prompt attention to this matter. If you have specific questions, you may also contact Susan Davies (207-441-9271) or Dave Courtemanch (207-592-3157).

Sincerely



Patricia W. Aho, Acting Commissioner

cc: Jerry Reid, Director Natural Resources Division, Assistant Attorney General's Office  
Thomas Harnett, Assistant Attorney General  
Jan McClintock, Assistant Attorney General  
David Courtemanch, Division Director DEP Bureau of Land and Water Quality  
Susan P. Davies, DEP Bureau of Land and Water Quality

#### Attachments

- 1989 DEP Staff Recommendation on Water re-classification
- 1989 Board of Environmental Record and Related Materials – November 30, 1989
- 1989 Minutes of Board of Environmental Protection meetings: November 29, 1989 and December 13, 1989
- Statement from Mark Margerum, July 6, 2011 regarding Maine State Archives search;
  - Legislative record on LD 2244, 1990
- Federal Consistency Review – September 14, 1989
- Federal Consistency Review (corrected copy) – November 30, 1989
- Federal Consistency Review – October 22, 1997
- Federal Consistency Review – November 30, 2000
- Federal Consistency Review – March 15, 2002
- Natural Resources Protection Act Order – April 14, 2011
- USEPA letter Trout Brook correction (page 3) – May 19, 2010
- Maine Waste Water Discharge Licenses (1085,2678,3440)
- LD 1398, "An Act to Amend the Laws Administered by the Department of Environmental Protection" – April 4, 2011
- Copy of Legislative Actions relating to LD 1398
- Copy of LD 1398, PL Ch. 206 – June 3, 2011
- Legislative record on LD 1398, 2011
- Copy of Maps presented to the Joint Standing Committee on Environment and Natural Resources:
  - Figure 1 Water Class 1990 - Present
  - Figure 2 Water Class 2011 MDEP Omnibus Proposal
- Maine Attorney General letter dated July 8, 2011