



ALAN WILSON
ATTORNEY GENERAL

April 8, 2019

Mr. W. Dean Moss, Jr., Chairman
Savannah River Maritime Commission
P.O. Box 7396
Columbia, SC 29202-7396

Dear Chairman Moss:

You seek our opinion regarding the new Savannah Bluff Lock and Dam ("NSBLD"). Specifically you provide the following background information as stated in your letter:

I request the opinion of your office regarding the respective jurisdictions of the Savannah River Maritime Commission (SRMC) and the South Carolina Department of Health and Environmental Control (DHEC) for a project proposed by the U.S. Army Corps of Engineers (Corps) at the New Savannah Bluff Lock and Dam (NSBLD). Specifically, based on certain amendments to federal law, I am requesting an opinion as to whether the SRMC's jurisdiction extends to the portion of the Savannah River that includes the NSBLD, which is located approximately 13 miles below Augusta, Georgia and approximately 170 miles above the Savannah River Harbor, and how that jurisdiction, if applicable, intersects with the jurisdiction of DHEC over the proposed NSBLD project. The Corps has proposed substantial modifications and alterations to the NSBLD, which raises questions regarding the permitting and authorization of these modifications and alterations by the State of South Carolina. This, in turn, presents questions regarding review and decisions on the appropriate licenses, permits, certifications, or authorizations for the proposed modifications and alterations of the NSBLD. In sum, I am respectfully requesting an opinion of your office with respect to the following two questions:

1. What is the scope of the State's regulatory authority applicable to the Corps' proposed modifications and alterations of the NSBLD?

2. Assuming the State's regulatory authority is triggered, what are the respective delineations of the exercise of that jurisdiction between the SRMC and DHEC with respect to the Corps' proposed modifications and alterations of the NSBLD?

Background

The NSBLD was constructed on the Savannah River approximately 13 miles below Augusta, Georgia in 1937 as part of the ongoing federal Savannah River below Augusta, Georgia Project (the Project). The Project begins at mile 21.31 of the Savannah River, which is the end of the Savannah Harbor, and continues to mile 202.6 near Augusta. The original purpose of the Project was to assist in commercial navigation of the Savannah River from Savannah Harbor to Augusta via steamship and commercial barge. The Project authorizes maintenance of a channel through the Savannah River that is nine feet deep and 90 feet wide.

The nine-foot authorized depth of the Project would support only the operation of commercial freight barges, but not ocean-going container ships. Modern barges used on inland waterways typically have a minimum draft of nine feet. In contrast, the typical draft for a Panamax ship carrying between 3,001 and 5,100 TEU . . .—a smaller modern oceangoing container ship—is 39.5 feet. These ships also have a beam, or width, of approximately 106 feet. Even the smaller seagoing container vessels that carry around 300 TEU and are used as feeder ships . . . have a minimum draft of approximately 20 feet. These smaller feeder ships also typically have a beam of approximately 75 feet.

In implementation, however, it appears that the Project did not live up to its intended commercial navigational purpose even for barges. In 1970, the Industrial Development Division Staff of the Georgia Institute of Technology generated a report noting that, with respect to the area governed by the Project, the "navigation channel has many sharp curves and, most of the time, depth is unsatisfactory, with the result that barges have to limit their draft to 6 ½ feet." Robert E. Van Geuns, "The Development of Barge Traffic on Georgia's Inland Waterways, 1958'1968, and Some Development Potentials" at 8, Eng'g Experiment Station, Georgia Institute of Technology (Aug. 1970).

Only a few years after this report, around 1978, commercial traffic ceased on the Savannah River around Augusta and the Corps of Engineers has not maintained the Project or the nine-foot channel since 1978. In fact, in 2016, a syngas converter was delivered to the ramp at the NSBLD—not using the lock itself—by commercial barge, marking the first time that freight had been delivered by barge to Augusta since the late 1970s. Mary Carr Mayle, "Barge Delivers First Cargo up Savannah River in 40 Years" www.savannahnow.com (June 11, 2016). Significantly, the Corps of Engineers notes on its website that "Commercial navigation through the lock ceased in 1979" and that "the lock is no longer operated for fish passage or recreational boating."

Thus, the NSBLD has fallen into disrepair over the years due to lack of funding and use. Over the years, various tentative and ultimately unfulfilled steps have been taken with respect to the NSBLD. The Water Resources Development Act of 2000 approved rehabilitation of the NSBLD and the subsequent transfer of the facility to the City of North Augusta/Aiken County, South Carolina. The 2001 Consolidated Appropriations Act added a fish passage to the rehabilitation project, but removed the estimated cost of the rehabilitation from the available appropriations. Consequently, no substantive steps were taken by the Corps to rehabilitate the NSBLD.

As part of the development approval of the Savannah Harbor Expansion Project (SHEP), it was agreed by the Corps and the Georgia Ports Authority that a fish passage would be constructed at the NSBLD. Since its construction in 1937, the NSBLD has prevented fish from migrating to the Augusta Shoals located on the Savannah River near the 1-20 overpass, which serve as spawning grounds for sturgeon, American shad, striped bass, and other fish species. Construction of the fish passage allowing access to the Augusta Shoals would serve to mitigate the consequences to the sturgeon and other fish resulting from the SHEP.

However, before any action was taken to construct the fish passage at the NSBLD, Congress deauthorized the NSBLD as a federal project in the Water Infrastructure Improvements for the Nation Act (2016 WIIN Act), Title I, Water Resources Development Act of 2016, Section 1319. More significantly for purposes of the present analysis, and as recognized by the Corps, Congress also "required modifications to the fish passage as previously authorized as part of SHEP." Savannah Harbor Expansion Project, Georgia and South Carolina' Fish Passage at New Savannah Bluff Lock and Dam, Integrated Post Authorization Analysis Report and Supplemental Environmental Assessment, Executive Summary, i-ii, U.S. Army Corps of Engineers, Savannah District (Feb. 2019) (Draft FONSI).

Specifically, the 2016 legislation gives the Corps the following options with respect to the NSBLD:

(c) PROJECT MODIFICATIONS.—

(I) IN GENERAL.—Notwithstanding any other provision of law, the Project is modified to include, as the Secretary determines to be necessary—

(A)(i) repair of the lock wall of the New Savannah Bluff Lock and Dam and modification of the structure such that the structure is able—

(I) to maintain the pool for navigation, water supply, and recreational activities, as in existence on the date of enactment of this Act; and

(II) to allow safe passage over the structure to historic spawning grounds of shortnose sturgeon, Atlantic sturgeon, and other migratory fish; or

(ii)(I) construction at an appropriate location across the Savannah River of a structure that is able to maintain the pool for water supply and recreational activities, as in existence on the date of enactment of this Act; and

(II) removal of the New Savannah Bluff Lock and Dam on completion of construction of the structure; and

(B) conveyance by the Secretary to Augusta-Richmond County, Georgia, of the park and recreation area adjacent to the New Savannah Bluff Lock and Dam, without consideration.

2016 WIIN Act, Title I, WRDA of 2016, § 1319(c). The 2016 WIIN Act also repeals the requirement of a transfer to North Augusta and Aiken County and, instead, requires conveyance of the modified structure to Augusta-Richmond County, Georgia.

The Corps undertook, as it was required to do, an environmental assessment of the modifications to the NSBLD required by the 2016 WIIN Act. In its Draft FONSI, the Corps proposes a version of the second alternative identified in the legislation, namely construction of "an in-channel fish passage design with a 108.2 (NAVD88, 109.0 NGVD29) foot elevation fixed crest weir with a flood bench." Draft FONSI, ii. The Corps describes the proposed project as follows:

The proposed action consists of a fixed crest weir with a rock ramp sloping upstream from the existing dam location The fish passage structure would be constructed with boulders and stone sized following the same design that was previously-approved for the bypass. The structure would have a 2 percent slope upstream to the weir crest, and a 10 percent slope downstream from the crest to the river bed. The lock and dam would be removed, including the foundation, down to elevation 91.22 feet NAVD88. The weir would have an average crest elevation of 108.2 feet NAVD88 (109.0 NGVD29). A floodplain bench (Figure 2) approximately 275 feet in width would be excavated to elevation 110 feet NAVD88 on the Georgia side of the existing dam location. The bench would ease the passage of flood waters past that point in the river. The bench would be grassed or rock lined to prevent erosion. The floodplain bench would be partially inundated for the 1-yr return interval flow of 16,500 cfs. A new boat ramp will be built just upstream of the existing boat ramp and will require acquisition of 10 acres of commercial forested land.

Public Notice, Savannah District, U.S. Army Corps of Engineers (Feb. 14, 2019) (Public Notice), p.2. The Public Notice also contains a visual rendering of the proposed project:

[Figure 1]

Public Notice, p.3. In other words, the existing lock and dam are being removed, making the Corps' proposed action a substantial alteration of the existing NSBLD.

Despite what objectively appear to be significant and substantial changes and modifications to a structure in navigable waters of the United States and the State of South Carolina, the Corps has proposed to issue an Environmental Assessment determining "that the recommended plan does not constitute a major federal action that would significantly affect the human environment; therefore, preparation of an Environmental Impact Statement is not required." Draft FONSI, iii. No final EA has yet been issued.

Request for an Opinion

My concern with respect to the Corps' proposed action arises because, regardless of the Corps' minimalization of the substantial actions it proposes to undertake, it is likely that the Corps will be required to obtain certain state water and environmental permits from the State of South Carolina because of these changes to the NSBLD. That is, the Corps proposes to remove the lock and dam from the NSBLD and, thus, to substantially alter the existing structure and also construct a new structure within

the Savannah River. These substantial undertakings would appear to implicate the requirement that the Corps obtain from the State a Section 401 Water Quality Certification (401 Certification) and a Construction in Navigable Waters Permit (Navigable Waters Permit). See Clean Water Act, § 401, 33 U.S.C.A. § 1341(a); S.C. Code Ann. Regs. 19-450.1(A); S.C. Code Ann. Regs. 61-101.A.2. But the implication of these permitting requirements in turn raises questions regarding the appropriate state agency to issue the required water and environmental licenses, permits, authorizations, and certifications: the SRMC and/or DHEC. See generally Savannah Riverkeeper v. S.C. Dep't of Health & Env'tl. Control, 400 S.C. 196, 733 S.E.2d 903 (2012) (discussing delineation of authority of SRMC versus DHEC with respect to the Savannah Harbor).

As the chair of one of the agencies of South Carolina charged with oversight of the Savannah River, I want to ensure that the SRMC appropriately exercises its regulatory authority and jurisdiction. But the question thus arises whether jurisdiction over consideration of these permits is committed to the SRMC or DHEC, or both. I am aware that the SRMC has certain jurisdiction over matters pertaining to the Savannah River. Specifically, the SRMC's jurisdiction is statutorily defined as follows:

[A] commission to be known as the Savannah River Maritime Commission is hereby established to represent this State in all matters pertaining to the navigability, depth, dredging, wastewater and sludge disposal, and related collateral issues in regard to the use of the Savannah River as a waterway for ocean-going container or commerce vessels.

S.C. Code Ann. § 54-6-10. In applying this statute, the South Carolina Supreme Court has held that plain language of § 54-6-10 [gives] the Savannah River Maritime Commission the responsibility and exclusive authority to represent South Carolina in all matters pertaining or collaterally related to dredging in the Savannah River for purposes of navigation by ocean-going container or commerce vessels." Savannah Riverkeeper, 400 S.C. at 203, 733 S.E.2d at 906. Thus, with respect to the Savannah Harbor, the SRMC had jurisdiction over questions involving the Construction in Navigable Waters Permit because the "navigability and dredging of the Savannah River for use by ocean-going container and commerce vessels" was at issue. *Id.*

However, if a matter is not within the SRMC's jurisdiction, it appears DHEC has jurisdiction over the issuance of environmental and water quality permits such as the 401 Certification and a Construction in Navigable Waters Permit. See, e.g., S.C. Code Ann. Regs. 19-450.1(A) ("Unless expressly exempted, a permit issued by the Department of Health and Environmental Control is required for any dredging, filling or construction or alteration activity in, on, or over a navigable water, or in, or on the bed under navigable waters...."; S.C. Code Ann. Regs. 61-101.A.2. ("Any applicant for a Federal license or permit to conduct any activity which during construction or operation may result in any discharge to navigable waters is required by Federal law to first obtain a certification from the Department."); S.C. Code Ann. Regs. 30-2.B ("Except for those exemptions as specified in the 1977 Coastal Zone Management

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Act, as amended, any person wishing to alter a critical area must receive a permit from the Department.").

Because of the significance of these issues and the impact of the Corps' proposed modifications and alterations of the NSBLD and the need for the State to exercise its regulatory and oversight authority appropriately in protecting the State's interests, I am respectfully requesting an opinion regarding the questions identified above.

Law/Analysis

With this extensive background in mind, we address your questions. First, you ask what is "the scope of the State's regulatory authority applicable to the Corps' proposed modifications and alterations of the NSBLD." Under the facts presented, the Corps is required to obtain from the State a Clean Water Act Section 401 Water Quality Certification ("401 Certification") and a Construction in Navigable Waters Permit ("Navigable Waters Permit"). See, e.g., S.C. Code Ann. Regs. 19-450.1(A) ("Unless expressly exempted, a permit ... is required for any dredging, filling or construction or alteration activity in, on, or over a navigable water, or in, or on the bed under navigable waters...."); S.C. Code Ann. Regs. 61-101.A.2. ("Any applicant for a Federal license or permit to conduct any activity which during construction or operation may result in any discharge to navigable waters is required by Federal law to first obtain a certification....").

The Corps' proposed project includes the removal of the existing dam and the construction of a fixed crest weir with a rock ramp. This proposed action will take place in part in South Carolina waters and on South Carolina's riverbed as the project stretches across the entire width of the Savannah River and South Carolina has a sovereign claim to a portion of river. See, e.g., Georgia v. South Carolina, 497 U.S. 376 (1990); see Martin v. Waddell's Lessee, 41 U.S. (16 Pet.) 367 (1842) ("[T]itle to a State's navigable waters and their riverbeds vested in the State as an aspect of sovereignty obtained when separating from the British Crown and becoming a State."). Unquestionably, as set forth in the facts, the Savannah River is a "navigable" waterway. State Water Control Bd. v. Hoffmann, 574 F.2d 191, 193 (4th Cir. 1978) ("The historical use concept includes within the framework of Corps authority under the 1899 Act those bodies of water which are deemed navigable only because they were navigable at some time in the past. Thus, a body of water may be currently unfit for navigation, and not susceptible to navigation through reasonable improvement, but will be brought within the Act's purview because it may have been used by a dozen traders two centuries ago."); see also Loving v. Alexander, 745 F.2d 861 (4th Cir. 1984) (discussing classification of waterbodies as navigable). Once a body of water, river or stream achieves "navigable" status, that status is not destroyed by the construction of a structure that may render the waterbody non-navigable in fact. 33 C.F.R. § 329.4 ("A determination of navigability, once made, ... is not extinguished by later actions or events which impede or destroy navigable capacity."); see also Loving, 745 F.2d 861.

In sum, given the extent and nature of the proposed project, it is beyond question that this proposed construction in South Carolina waters requires a Construction in Navigable Waters Permit under South Carolina law. S.C. Code Ann. Regs. 19-450. Moreover, the Corps'

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proposed project would alter river flow, lower the pool elevation in the fixed crest weir, and include a floodplain bench. Each of these actions independently would trigger the need for a 401 Certification and allow for the imposition of conditions to protect the water quality of the River. See, e.g., PUD No. 1 of Jefferson County v. Washington Dep't of Ecology, 511 U.S. 700 (1994); Sierra Club v. United States Army Corps of Eng'rs, 909 F.3d 635 (4th Cir. 2018); Murphy v. South Carolina Dep't of Health and Env'tl. Control, 396 S.C. 633, 723 S.E.2d 191 (2012).

Having concluded that the State possesses regulatory authority and jurisdiction over the Corps' proposed project for the NSBLD, the next question you pose in your letter is the delineation of the exercise of that jurisdiction between the SRMC and DHEC. See generally Savannah Riverkeeper v. S.C. Dep't of Health & Env'tl. Control, 400 S.C. 196, 733 S.E.2d 903 (2012) (discussing delineation of authority of SRMC versus DHEC with respect to the Savannah Harbor). See also Op. S.C. Att'y Gen., 2010 WL 4391637 (October 25, 2010).

As you state, the jurisdiction of the Savannah River Maritime Commission is established by statute, as follows:

[A] commission to be known as the Savannah River Maritime Commission is hereby established to represent this State in all matters pertaining to the navigability, depth, dredging, waste water and sludge disposal, and related collateral issues in regard to the use of the Savannah River as a waterway for ocean-going container or commerce vessels.

S.C. Code Ann. § 54-6-10. Thus, the “plain language of § 54-6-10 [gives] the Savannah River Maritime Commission the responsibility and exclusive authority to represent South Carolina in all matters pertaining or collaterally related to dredging in the Savannah River for purposes of navigation by ocean going container or commerce vessels.” Savannah Riverkeeper v. S.C. Dep't of Health & Env'tl. Control, 400 S.C. 196, 203, 733 S.E.2d 903, 906 (2012) (emphasis added); Op. S.C. Att'y Gen., *supra*.

A cardinal rule of statutory interpretation is to effectuate the intent of the legislature whenever possible. “What a legislature says in the text of a statute is considered the best evidence of the legislative intent or will” and “courts are bound to give effect to the expressed intent of the legislature.” Media Gen. Communications, Inc. v. S.C. Dept. of Revenue, 388 S.C. 138, 148, 694 S.C. 2d 525, 530 (2010); Wade v. State, 348 S.C. 255, 259, 559 S.E.2d 843, 844 (2002). When determining the effect of words utilized in a statute, a court looks to the plain meaning of the words. City of Rock Hill v. Harris, 391 S.C. 149, 154, 705 S.E.2d 53, 55 (2011). In interpreting ordinances, the rules of statutory construction may be applied. Like statutes, a court will apply the plain language of an act in interpreting an ordinance. Forrester v. Smith & Steele Builders, Inc., 291 S.C. 196, 352 S.E.2d 522 (1987). Moreover, we have consistently concluded that “. . . administrative agencies as creatures of statute possess only those powers expressly conferred or necessarily implied for them to effectively fulfill the duties for which they are charged.” Op. S.C. Att'y Gen., 2005 WL 292232 (January 27, 2005, citing authorities).

Consequently, the question as to whether the Commission's jurisdiction extends to the NSBLD must be resolved by reference to the statutory limitation of the Commission's authority to matters pertaining or collaterally related to "use of the Savannah River as a waterway for ocean-going container or commerce vessels." § 54-6-10. While the SRMC exercised jurisdiction over the Savannah Harbor Expansion Project ("SHEP"), the Corps' proposed project for the NSBLD, while ostensibly tied to mitigation for the SHEP, originates from a 2016 congressional enactment and goes well beyond the mitigation requirements of the SHEP and what was reviewed analyzed therein. Thus, this proposed project is properly viewed as a "stand alone" project subject to independent scrutiny.

Based on the statutory language and the background facts presented, it is our opinion that a court would likely conclude that the SRMC does not possess jurisdiction over the NSBLD because that portion of the Savannah River is not suitable or available for use "as a waterway for ocean-going container or commerce vessels." The maximum legally required depth of the Savannah River between Savannah Harbor and Augusta is nine feet. It appears, however, that this area has not been used or maintained for commercial shipping since the late 1970s. Moreover, a nine-foot depth is woefully inadequate to support "ocean-going container or commerce vessels" as required for the SRMC to have jurisdiction over the area. The draft for Panamax vessels is 39.5 feet, and even smaller feeder ships may require a 20-foot draft. Moreover, due to the sharp curves and oxbows located in various areas of the Savannah River, none of these ocean-going ships could maneuver that far up the Savannah River, thus surpassing the limit of SRMC jurisdiction.

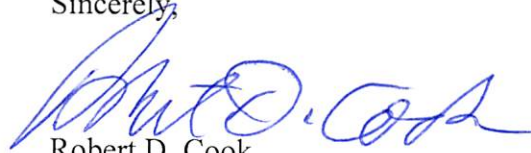
It therefore is the opinion of this Office that a court would likely conclude that the SRMC does not have jurisdiction over the NSBLD because the area of the Savannah River 11 miles below Augusta does not support "ocean-going container or commerce vessels." Cf. Savannah Riverkeeper, 400 S.C. at 203, 733 S.E.2d at 906 (holding that the SRMC had jurisdiction over issues pertaining to the proposed dredging of Savannah Harbor because it was "for purposes of navigation by ocean-going commerce and container vessels"). Moreover, because we conclude that the matter is not within the SRMC's jurisdiction, we find that DHEC possesses jurisdiction over the issuance of the 401 Certification and a Construction in Navigable Waters Permit for the Corps' proposed project for the NSBLD. See Savannah Riverkeeper, 400 S.C. 196, 733 S.E.2d 903; see, e.g., S.C. Code Ann Regs. 19-450.1(A) ("Unless expressly exempted, a permit issued by the Department of Health and Environmental Control is required for any dredging, filling or construction or alteration activity in, on, or over a navigable water, or in, or on the bed under navigable waters...."); S.C. Code Ann. Regs. 61-101.A.2. ("Any applicant for a Federal license or permit to conduct any activity which during construction or operation may result in any discharge to navigable waters is required by Federal law to first obtain a certification from the Department.").

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Conclusion

For the reasons set forth above, it is our opinion that a court would likely conclude that DHEC, rather than the SRMC, possesses responsibility to make determinations of suitability of the Corps' proposed project for the NSBLD under the governing law for a 401 Certification and Navigable Waters Permit for the issuance or denial of such authorizations.

Sincerely,



Robert D. Cook
Solicitor General