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LD 2187

I'm testifying in support of LD 2187 with the caveat that a reclassification upgrade amendment of the upper lower Androscoggin River be included. Clean rivers are the life blood of Maine and water quality upgrades whenever possible to reflect and lock in actual improved conditions benefit all of us, providing a healthy environment and economy, overall, improving quality of life in Maine.

When the actual quality of the water exceeds that of its classification, this leaves room to pollute while still meeting the lower existing classification. This is the situation on the upper lower Androscoggin River from Worumbo dam in Lisbon Falls to Gulf Island Pond dam in Auburn. Because intensive sampling last summer by Friends of Merrymeeting Bay at ten sites in this section of river showed easy Class B compliance 100% of the time, I'm asking you to please support amendment language to lock in the improved water quality.

Here are some reasons why I believe this amendment is important and why I'm requesting your support for it:

[Pick a few from below or think of your own, include citations in written copy of oral testimony (20 copies) given to the Committee Clerk when you testify. If you testify electronically before the public hearing, your testimony will be printed out and distributed to Committee legislators by the Committee Clerk]

For years, the river has met dissolved oxygen and E. coli Class B standards under "business as usual" conditions.

http://cybrary.fomb.org/pages/20200331%20AUP%20Exhibit%2027%20DO_Geomeans_2003-2019.pdf (DO geometric mean graphs from lowest section of river-Worumbo to Merrymeeting Bay [now Class B!])

http://cybrary.fomb.org/pages/20200331%20AUP%20Exhibit%2026%20E_coli_geo_means_2006-2019-page-001.pdf (E. coli geometric mean graphs from lowest section of river-Worumbo to Merrymeeting Bay [now Class B!])

<https://cybrary.fomb.org/pages/CMP%20DO%20Lewiston%20Falls%201990-1995%20DO%20study.pdf> (1990-1995 continuous monitoring DO data collected by CMP below and above Lewiston Falls)

<https://cybrary.fomb.org/pages/1%20Page%20Summary%202026%20%20Androscoggin%20River%20Upgrade%201-13-26.pdf> (Great summary of 2025 FOMB sampling effort for amendment area including charts)

A cleaner river has well-documented economic, ecological and quality of life benefits and comprehensive plans support these.

http://cybrary.fomb.org/pages/20200331%20AUP%20Exhibit%2008%20Economic_Benefit_Articles.pdf (studies on economic benefits of clean waters)

http://cybrary.fomb.org/pages/20200331%20AUP%20Exhibit%2006%20Andro_Comp_Plan_Excerpts.pdf (Comprehensive Plan excerpts from Androscoggin communities on importance of clean water)

https://cybrary.fomb.org/pages/McNew%20et%20al%20eds.%202023%20Rangeland%20Wildlife%20Ecology%20and%20Conservation-Water%20is%20Life-Chapter%2007_compressed.pdf (See Chapter 7-70-80% percent of terrestrial wildlife species inhabit or utilize river corridors and benefit from high water quality)

The Lower Androscoggin upgrade has widespread support.

<http://cybrary.fomb.org/pages/20210502%20Exhibit%2007%20Androscoggin%20Reclassification%20Support%20letters.pdf> (Supporters)

It's the law.

38 M.R.S.A. § 464 (F) (4) "When the actual quality of any classified water exceeds the minimum standards of the next highest classification, that higher water quality must be maintained and protected."

<https://www.mainelegislature.org/legis/statutes/38/title38sec464.html>

The DEP Reclassification Submission Guidelines are goal-based and aspirational in nature: When proposing an upgrade in classification, recommend waters that either presently attain or with reasonable application of improved treatment or Best Management Practices (BMPs), could reasonably be expected to attain, the standards and criteria of a higher proposed class.

https://www.maine.gov/dep/water/monitoring/classification/2017_SubmissionGuidelines-WQ-ReClass.pdf

Lewiston & Auburn have done a great job reducing combined sewage overflows since 2010. An upgrade recognizes and celebrates this. Treatment plants should not be held to an unreasonable standard nor penalized as long as what they discharge does not reduce ambient water quality. In times of increasing temperatures and drought, dams must be actively managed to allow sufficient flows for native river life, vertebrates and invertebrates.

http://cybrary.fomb.org/pages/20200331%20AUP%20Exhibit%2024%20Auburn_Lewiston_CS0_Charts_200-2018.pdf

The Clean Water Act dictates a state shall revise its standards to reflect uses and water quality actually being attained. 40 C.F.R. § 131.10.(j) See also id. §464. 4.F; 38 M.R.S.A

In addition to aquatic species, 70-80% of our terrestrial wildlife species inhabit river corridors and all benefit as do we. The lower Androscoggin is designated critical habitat for endangered Atlantic salmon and provides highest value wildlife habitat for multiple species

http://cybrary.fomb.org/pages/20200331%20AUP%20Exhibit%2009%20USFWS_Merrymeeting_Bay-Lower_Kennebec_Composite_HVH.pdf (USFWS composite high value habitat map for lowest Andro section, Merrymeeting Bay and lower Kennebec)

<https://media.fisheries.noaa.gov/dam-migration/atlanticsalmon-accessible.pdf> (NMFS map Atlantic salmon Critical Habitat)

https://cybrary.fomb.org/pages/McNew%20et%20al%20eds.%202023%20Rangeland%20Wildlife%20Ecology%20and%20Conservation-Water%20is%20Life-Chapter%2007_compressed.pdf (Value of riparian habitat to wildlife-See Chapter 7)

An upgrade must be based on existing water quality - not hypothetical modeling with point sources operating at maximum licensed discharge. Indeed, the Board, DEP and legislature are specifically prohibited from considering maximum licensed loads because both state and federal regulations prohibit consideration of waste discharge or transport as a designated use. 40 C.F.R. § 131.10(a); 38 M.R.S.A. § 464(4)(F)(1)(d).

Discharge licenses have very large buffers built in, far above actual discharges. Holding upgrades hostage to these limits (all dischargers discharging at maximum licensed loads under critical flow conditions at highest temperatures) is not only unrealistic but conflates discharge statutes (based on modeling) with upgrade statutes based on actual water quality. The Clean Water Act is crafted in such a way that classification and discharge statutes should work together to ratchet water quality upwards.

<http://cybrary.fomb.org/pages/20210502%20Exhibit%2040%20Andro%20Dischargers%20Actual%20vs.%20Licensed%202012-2013.pdf> (Chart showing example of Andro dischargers with actual vs. licensed discharges in specific loads, percent actual discharge is of licensed maximum and percent buffer the licensed amount provides)

Multiple legal opinions (from Greenfire Law, Conservation Law Foundation and Sells Law): support an Androscoggin upgrade and include such points as:

Use of the water body to receive waste water discharges is not a permissible consideration in establishing appropriate classification.

DEP expressly may not take into account industrial discharge capacity needs in

determining uses.³³ DEP improperly invited consideration of the waste-assimilative capacity of the River as part of the reclassification review, stating that waste permitting limits “is an important requirement [to consider] when a reclassification is being evaluated. . . It is highly recommended that the Legislature fully understands any new licensing requirements that will be imposed on any discharge prior to a reclassification decision being made.”³⁴ In short, the DEP was directing the legislature to be careful not to eliminate the ability of the water legally to support the waste disposal needs of industry, which is not allowed.³⁵ (Greenfire)

Naturally occurring conditions cannot be used as evidence of non-attainment of water quality standards

DEP’s analysis of dissolved oxygen deficiency relied on naturally occurring conditions. [Yet]“Where natural conditions, including, but not limited to, marshes, bogs and abnormal concentrations of wildlife cause the dissolved oxygen or other water quality criteria to fall below the minimum standards specified in sections 465, 465-A and 465-B, those waters shall not be considered to be failing to attain their classification because of those natural conditions.”³⁶ (Greenfire)

Upstream conditions must be ameliorated rather than used as an excuse to avoid protecting downstream water quality.

DEP concluded that “river sampling showed a nutrient loading from sources upstream.”³⁷ The States designation of those upstream sources should not negatively impact downstream waters.³⁸ Further, “[n]o waste load allocation can be developed or NPDES permit issued that would result in standards being violated. With respect to antidegradation, that means existing uses must be protected, water quality may not be lowered in [Outstanding Natural Resource Waters], and in the case of waters whose quality exceeds that necessary for the section 101(a)(2) goals of the Act, an activity cannot result in a lowering of water quality unless the applicable public participation, intergovernmental review, and baseline control requirements of the antidegradation policy have been met.”³⁹ (Greenfire)

The rationale given by the Department to recommend against re-classification is inappropriate and, in some cases, unlawful. It must be ameliorated rather than used as an excuse to avoid protecting downstream water quality.

Simply put, the Department’s “interpretation” of the statute is that certain other additional factors must be taken into account or considered. In summary these factors include:

1. Under modeled “critical” once-in-a-decade low flow, high temperature conditions, the lower Androscoggin might fail to meet Class B standard,
2. Waste discharge permits might have to be altered and might not be allowed at all under Class B designation because of the requirement to consider modeled once-in-a-decade low flow, high temperature conditions, and
3. Upstream and instream pollution (point and non-point source discharges) somehow can prevent lower reaches from being reclassified.

Importantly, none of these factors are appropriate when confronted with a segment of water that is actually meeting water quality standards and designated uses. Again, there is nothing – nothing - in the statute that allows for this and the overwhelming legal basis for both the Federal Clean Water Act and Maine’s Anti-degradation statute explicitly say so. (Sells Law)

Using the Department’s own method of statutory interpretation and the explicit language of federal and state statute, regulation and guidance – there is no reasonable legal interpretation that would justify denial.

There is no dispute over whether the Class B standards or the designated uses are being met here. However, the external considerations used by the Department in denying reclassification are not in accordance with the federal and state statute, regulation and guidance or the express purposes underlying those laws. Further, there is no assertion by the Department that the legislature intended to provide an exception for the rationale it has provided. The Department has made no showing that the actual data is disputed or that the designated uses are inconsistent with Class B designation. Instead, it offers justification for denial that is inconsistent with the plain language and purpose of the very statutes and programs it itself administers. (Sells Law)

(The points above are covered by all three entities-all experts in water quality law. CLF and Greenfire comments are from earlier efforts and while some specifics may apply to just the lowest section of river (upgraded to B in the last triennial without the world ending), all three legal analyses are generally applicable to the current upgrade effort)

http://cybrary.fomb.org/pages/20200331%20AUP%20Exhibit%2004%20Greenfire_Law%20Memo_re_Reclassification_3-31-20.pdf

http://cybrary.fomb.org/pages/20200331%20AUP%20Exhibit%2005%202009-10-02_CLF_BEP_Comments_abridged.pdf

<http://cybrary.fomb.org/pages/FOMB%20BEP%20Triennial%20Review%20Androscoggin%20Upgrade%20Legal%20Analysis-Scott%20Sells%2010-22-2.pdf>

2022 marked the 50th anniversary of the Clean Water Act championed by Maine Senator Ed Muskie in large part with the then foul Androscoggin as poster child for the Act's necessity. Now the Androscoggin is the only major Maine river mostly relegated to Class C status. Anniversary of the Act marks an appropriate time to finally recognize, honor and lock in improvements made over the last half century.

Please support an Androscoggin amendment reclassifying the section from Worumbo to Gulf Island Pond from C to B and then vote "Ought to Pass on LD 2187 as amended" ensuring the Lower Androscoggin Upgrade remains a part of the bill and locking in existing water quality.