Friends of Merrymeeting Bay

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Testimony Supporting LD 676

An Act to Reclassify Part of the Androscoggin River to Class B

Senator Brenner, Representative Tucker, and members of the Joint Standing Committee On Environment and Natural Resources:

My name is Ed Friedman and I chair Friends of Merrymeeting Bay (FOMB). Our organization has for approximately 20 years conducted water quality monitoring on the lower Androscoggin, Kennebec and other Merrymeeting Bay tributaries. Our samples have been gathered under both EPA and DEP quality assurance plans and have in the past been used to support an upgrade of the lower Kennebec River. Our data set is the only lengthy comprehensive record for these waters. The 2020 FOMB/ Grow L+A lower Androscoggin upgrade proposal consisting of about 40 exhibits is linked at the third plus sign down here: http://cybrary.fomb.org/chemical.cfm

FOMB has worked years to reclassify this section of river and **supports this bill with a caveat**. Because of timing issues we recommend passage of an upgrade bill be delayed until the DEP has reissued discharge permits for Lewiston/Auburn, Lisbon and Brunswick wastewater plants, all of which expired in 2020.

Reissuing permits under the *current classification* allows DEP and dischargers ample time (5 year licenses) to both develop any new discharge parameters possibly necessary with an upgrade and to work towards timely compliance five years from now. This also allows all reclassifications including the Androscoggin, to work through the normal regulatory process while holding this bill in reserve (hopefully with a committee commitment for passage), should the BEP continue excluding the Androscoggin from its recommendation package.

To the extent possible, we would like the Committee to direct the Department to reissue expired discharge permits this year so that a reclassification upgrade can be passed in the second half of session, along with reclassifications of other proposed rivers.

As the committee knows or will learn at this hearing, reclassification is typically done through an administrative process known as the Triennial Review where the Department solicits reclassification candidates, makes recommendations to the BEP who in turn holds a public hearing and ultimately sends reclassification recommendations to the legislature via this committee. You are the only body with authority to set classifications for surface waters in Maine which from low to high quality, run from C to AA.

Why Upgrade?

1. It is the law.
2. Anti-degradation statutory language prohibits backsliding in water quality.
3. A cleaner river has well-documented economic and quality of life benefits.
4. Sixty percent of our wildlife species inhabit river corridors and all benefit as do we.

For nearly 20 years, sampling on the lower Androscoggin has shown the river to meet Class B conditions, yet the DEP continues to recommend against upgrading from Class C, Maine's lowest classification. The department has made clear, year after year that their modeling shows this section of river from L/A to Merrymeeting Bay will not meet Class B conditions under critical low flow conditions, even if all discharges into the river stopped. These conditions, known as 7Q10 refer to a 7 day low flow condition that might occur once in 10 years while dischargers are all discharging at maximum license limits. We have seen no evidence suggesting this confluence of negative circumstances has occurred anytime since passage of the Clean Water Act. (See Exhibit 8 as an example)

Ambient Surface Waters Meet Class B Standards Virtually All of the Time & an Upgrade is Required under the CWA & Maine Statute

FOMB regretfully, believes the DEP's position disingenuous because the law requires an upgrade based on actual ambient water quality, not based on modeling or critical flow conditions. This is what our ant-degradation statute says:

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. **The board shall recommend** to the Legislature that water be reclassified in the next higher classification."*

Thus, the BEP has a non-discretionary duty to act, to recommend an upgrade, when the actual water quality has improved to meet the next higher classification level.

The CWA & Maine Classification Standards are Aspirational in Nature

The Supreme Judicial Court of Maine states in Bangor Hydro Electric v. BD. OF ENV. PROT., 1991 ME, 595 A.2d 438, that the BEP must consider state water reclassification when engaged in the permitting process and that: **"classification is goal oriented as required by the federal Clean Water Act".** Nowhere in statute or case law does it say classification can, should or must be constrained by critical flows or discharges, point source or non-point source.

Moreover, from the DEP Reclassification Submission Guidelines:

> **Maine's Water Quality Classification System is goal-based.**
>
> *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.*

The CWA was designed to ratchet water quality levels upward. It does this by upgrading when ambient conditions are close to ("goal oriented") or actually attaining the next higher classification. Then, and only then, are discharge licenses tweaked during the process of their next relicensing to meet the new standards under critical flow conditions. If reclassification continues held hostage by the state to critical flow conditions and or modeling hypotheses, there will never be any upgrades (unless perhaps industries shut down and dams are removed). And, if discharge licenses (See Exhibit 8 comparing *actual* discharges with *licensed* discharges

to see large buffers) when renewed, are not revised to account for upgraded classifications, water quality would stop improving. As things presently stand with actual B conditions substantially better than the C classification, water quality could decrease significantly and still meet its current classification. That is a problem an upgrade will fix.

Cities along this stretch of river have done a great job of cleaning up, reducing or eliminating their discharges (see Exhibits 4 & 5) although Lisbon, a small contributor, needs some help improving their bacteria treatment. 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. This is something that probably requires the committee's attention.

For years, the river has met Class B standards under business as usual conditions. Please direct the DEP, with a resolve if necessary (or some other written record), to issue currently overdue licenses to the three lower river - publically owned treatment works (POTW's) and vote ***Ought to Pass*** pending these license renewals.

Thank you and I'm happy to answer any questions.

Exhibits: (hyperlinks to Exhibits in Grow L/A-FOMB Upgrade Proposal)

1. Organizational Upgrade Supporters
2. Dissolved O2-Geometric means. 2003-2019
3. E.coli bacteria-Geometric means 2006-2019
4. Lewiston CSO Improvements 200-2018
5. Auburn CSO Improvements 200-2018
6. Greenfire Law legal Memo, 2020
7. Conservation Law Foundation legal memo,
8. Licensed Dischargers: 2012/2013: Actual vs. Permitted

Exhibit 1

Upgrade Supporters: **Auburn Sewer District** 2008; **Town of Brunswick** 2008, 2010, 2020; **Brunswick Sewer District** 2017; **Brunswick Topsham Land Trust** 2008; **Conservation Law Foundation** 2008; **Town of Durham** 2008: **Friends of Casco Bay** 2008, 2013, 2020; **Friends of Merrymeeting Bay** 2006, 2008, 2011, 2013, 2017, 2020; **City of Lewiston** 2008, 2010, 2020; **Town of Topsham** 2008, 2010, 2020; **Trout Unlimited-Maine Council** 2020; **Androscoggin Land Trust** 2020; **Downeast Salmon Federation** 2020; **Atlantic Salmon Federation** 2020; **Friends of Sebago Lake** 2020; **City of Auburn** 2020; **Native Fish Coalition-Maine Chapter** 2020; **Lewiston-Auburn Metropolitan Chamber of Commerce** 2020

Exhibit 2

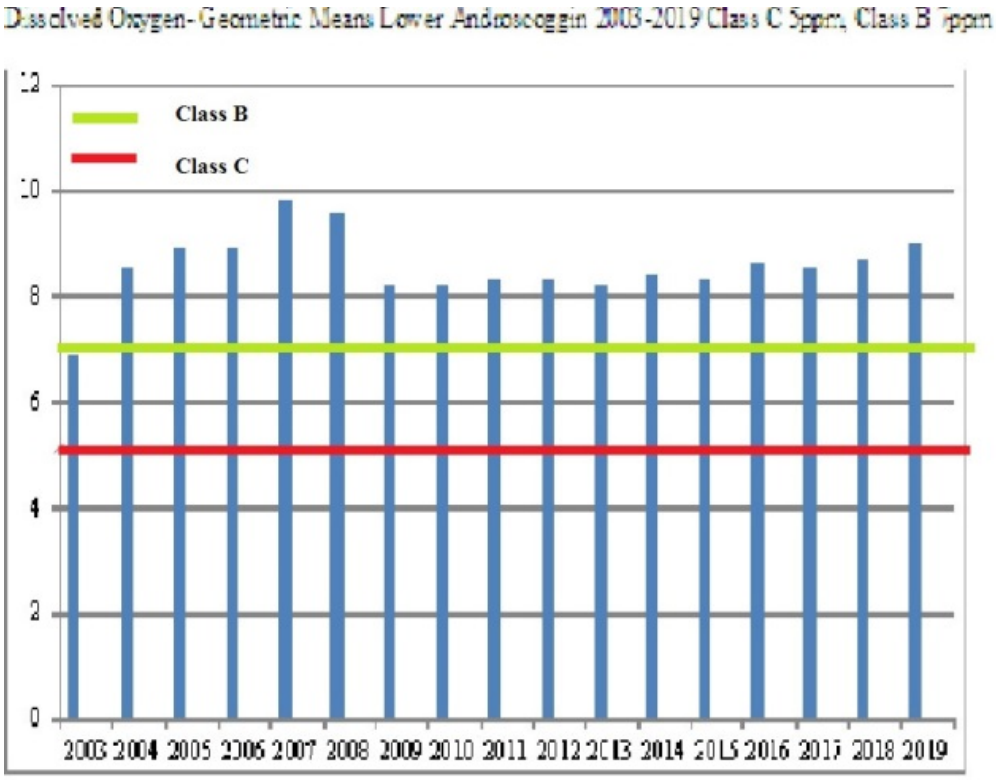
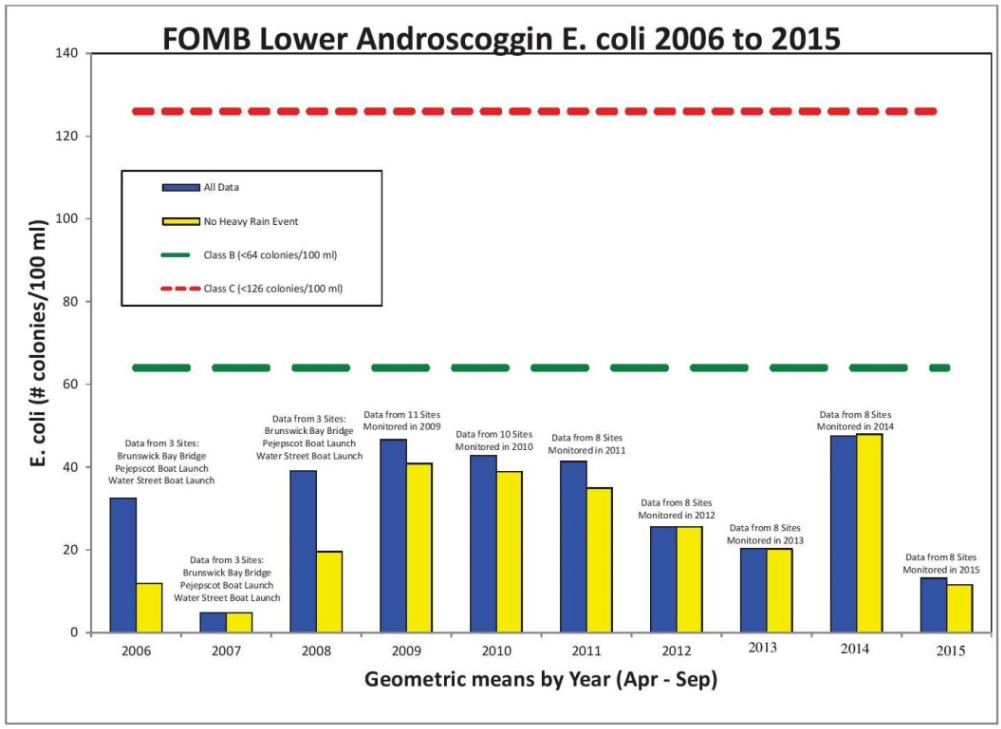


Exhibit 3



2016-2019 E. coli geometric means-un-graphed. Class B <64 colonies/100ml, Class C <126 colonies/100 ml.: 2016-**13.5**, 2017-**17.5**, 2018-**38.2**, 2019-**42.5**

Exhibit 4

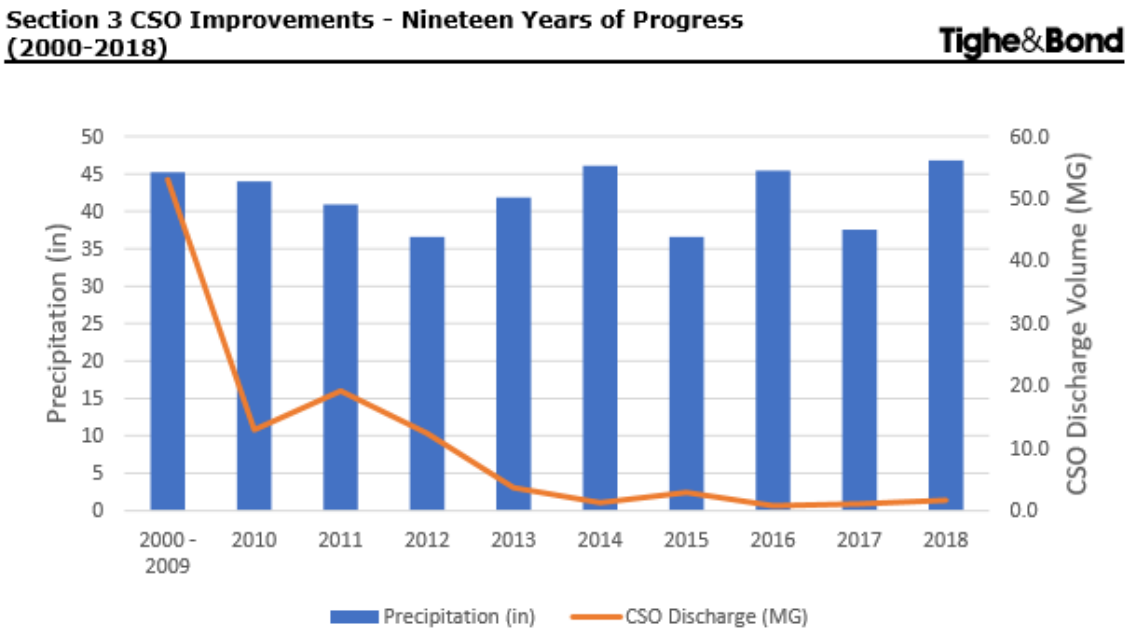


FIGURE 3-6
Auburn Sewer District 2000-2018 Precipitation vs. CSO Discharge

Exhibit 5

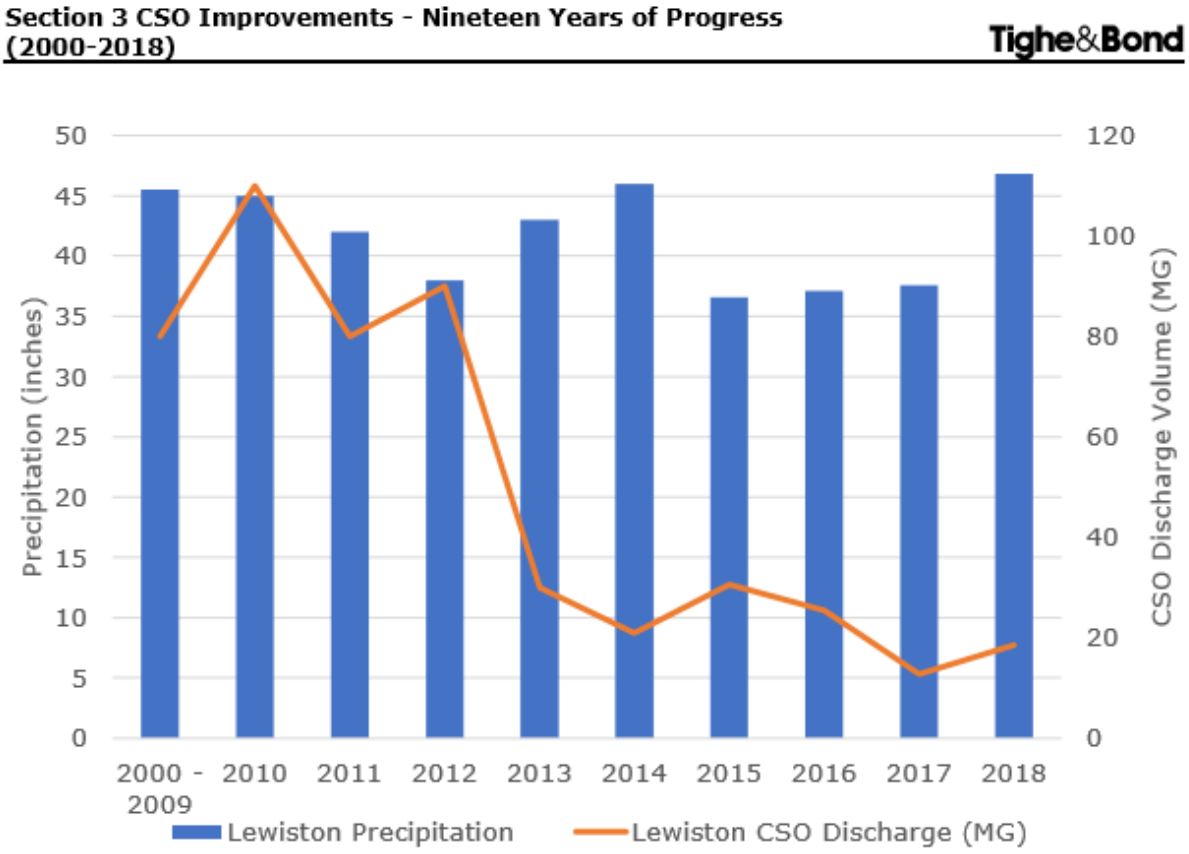


FIGURE 3-13
City of Lewiston 2000-2018 Precipitation vs. CSO Discharge

Memorandum of Law

RE: Reclassification of the Lower Androscoggin River to Class B

From: Rachel Doughty, Greenfire Law, PC

Date: March 31, 2020

The lower Androscoggin must be designated Class B because of its demonstrated achievement of the minimum standards for that classification. Maine has for many years resisted upgrading the water quality classification of the Lower Androscoggin from Class C to Class B by eliding the non-discretionary state and federal anti-degradation policy with the use attainability analysis, which can only be used to remove legally-designated uses.

Contents

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Analysis

Maine Department of Environmental Protection (DEP) is presently preparing recommendations to the legislature as part of the State's triennial mandatory review of water quality standards.[1] Under the federal and Maine anti-degradation laws, DEP must recommend a change in use classification for the lower Androscoggin from Class C to Class B because that is the standard of water quality it is actually achieving the overwhelming majority of the time. Maine may not avoid reclassification of the lower reach based on hypothetical, once-in-a-decade modeled events. Nor may the lower Androscoggin be kept in Class C to permit the greatest flexibility to accommodate industrial waste assimilation as a priority.

I. Maine DEP has a nondiscretionary duty to recommend the lower Androscoggin for reclassification because it attains the Class B standard.

Under federal and Maine law, a water quality standard is composed of narrative or quantitative criteria, designated uses, and an anti-degradation policy. The Clean Water Act (CWA) and Maine's anti-degradation policy require that "[w]hen 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. The board shall recommend to the Legislature that that water be reclassified in the next higher classification."[2] Simply put, if actual data show that the lower Androscoggin in fact meets the standard for a Class B water, then the Maine Board of Environmental Protection has a non-discretionary duty to recommend to the legislature that it be so classified.

A. Field data demonstrates the lower Androscoggin meets Class B water quality criteria.

Actual field data shows the lower Androscoggin achieves Class B water quality criterion for dissolved oxygen (DO). Maine's dissolved oxygen criterion for Class B is:

> The dissolved oxygen content of Class B waters may not be less than 7 parts per million or 75% of saturation, whichever is higher, except that for the period from October 1st to May 14th, in order to ensure spawning and egg incubation of indigenous fish species, the 7-day mean dissolved oxygen concentration may not be less than 9.5 parts per million and the 1-day minimum dissolved oxygen concentration may not be less than 8.0 parts per million in identified fish spawning areas.[3]

FOMB has monitored the River since 1999 following EPA and or DEP protocols.[4] Using these DEP-approved protocols FOMB collected data spanning the years 1999 to present--731 individual DO

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[1] 33 U.S.C.S. § 1313(c)(1).

[2] 38 M.R.S. § 464.4.F.4 (emphasis added); see also 40 C.F.R. § 131.20(i) ("Where existing water quality standards specify designated uses less than those which are presently being attained, the State shall revise its standards to reflect the uses actually being attained.").

[3] 38 M.R.S. § 465.3.B.

[4] Exhibit 29, *Friends of Casco Bay EPA Quality Assurance Plan* under which FOMB operated until 2018, Exhibit 34, *MDEP VRMP Sampling Protocols* also used since 2009, Exhibit 28 FOMB, *Volunteer River Monitoring Program 2009-2018* (including DO and *E. coli* data) *See also* Exhibits 30 (Auburn Boat Launch DO data 2010-

samples--on the lower Androscoggin.[5] Of these samples, only 16--two percent--fell below the Class B 7mg/L criterion for DO, mostly within the acceptable range of calibration error of 0.6 mg/L.[6] Thus, actual sampling of the lower Androscoggin demonstrates attainment with the DO criterion for Class B 98% of the time.[7]

Likewise, field data shows the lower Androscoggin achieves Class B water quality criterion for *E. coli*. Maine's *E. coli* criterion for Class B is:

> Between May 15th and September 30th, the number of *Escherichia coli* bacteria of human and domestic animal origin in these waters may not exceed a geometric mean of 64 per 100 milliliters or an instantaneous level of 236 per 100 milliliters. In determining human and domestic animal origin, the department shall assess licensed and unlicensed sources using available diagnostic procedures.[8]

E. coli sampling has been done since 2006. Again, the results were overwhelmingly above the Class B criterion.[9]

DEP, in its 2018 Proposed Reclassifications seemed to imply that if a scenario can be imagined and modeled demonstrating a once in ten year failure to meet a criterion of a water quality standard for a particular class, then the reach cannot be reclassified to the standard it meets the overwhelming majority of the time.[10] The law is not that inflexible—certainly not in the direction implied.

First, there is no requirement to show even that the *actual* Class B water quality numeric standards need be attained one hundred percent of the time in every section of the reach being reviewed, much less that some remote, modeled scenario should dictate the classification of the reach. For example, some of the more stringent chemical criteria are stated as averages, meaning that measurements above and below that

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2011), 35, 36, 37 (Applied Biomonitoring-FOMB Reports covering DO and E. coli for years 2009-2012) and 38 (Complete FOMB raw data.1999-2019.

[5] *See* Exhibit 38 (FOMB Complete WQ Data Files and Exhibits).

[6] *See* Exhibit 27, Peter Milholland, *Quality Assurance Project Plan for Friends of Casco Bay Citizen Stewards Water Quality Monitoring Program* (Sept. 15, 2006) p. 52 (describing calibration protocol) and Table 2. Under the federal EPA Quality Assurance Plan governing DO sampling for Friends of Merrymeeting Bay and Friend of Casco Bay, during annual refreshers there was an allowance of 0.6 mg/L leeway between test reading and calibrated sample. In other words, a DO test result of as low as 6.4 would be within acceptable parameters for attainment of 7mg/L, the Class B standard. The occasional low DO reading over the years has generally been on the order of 6.8 or 6.9 well within the allowed margin of error.

[7] Calculated from Exhibit 38 (FOMB Complete WQ Data Files and Exhibits).

[8] 38 M.R.S. § 465.3.B.

[9] *See* attached, Exhibit 26: *Geomeric means chart for 2006-2019*; *See also*, Exhibit 38: FOMB Complete WQ Data Files and Exhibits 35, 36, 37: Applied Biomonitoring Reports 2010, 2011, 2013

[10] In a October 25, 2019, letter to Senators Libby and Claxton (Exhibit 30), the DEP stated at page 3 that it considered the anti-degradation mandate "in the full context of the water quality laws including the sections of law that establish the conditions under which a discharge may be licensed." So, citing findings made when determining the waste assimilative capacity of the water, the DEP concluded that a water cannot be recommended for a more protected classification if it cannot meet that standard in a modeled "7-day low flow that can be expected to occur with a frequency of once in 10 years."

number are to be expected.[11] Additionally, instances of non-attainment are anticipated as a designated use is maintained by law, "whether or not that use is being attained."[12] Finally, the EPA explicitly directs that "States are encouraged to designate uses that the State believes can be attained in the future."[13]

Second, flexibility is allowed in assessing the proper classification based upon the unique natural features of the water at issue. For example, some natural conditions, such as the incoming tides from Merrymeeting Bay and Sediment Oxygen Demand may cause the lower Androscoggin to fail to achieve a water quality criterion from time to time. But these natural conditions expressly may not be used to determine non-attainment of a use.[14]

DEP's interpretation would moor a reach to its lowest possibly quality days rather than pulling it towards its best uses attained since the Clean Water Act was adopted—and that is the exact opposite of what the law requires. After all, the purpose of the Clean Water Act is to eliminate water pollution, not to accommodate it by preventing progress towards more protective standards because of exceptionally rare hypothetical events.[15]

B. The actual uses of the lower Androscoggin are consistent with Class B designation.

Currently, the lower Androscoggin "[f]rom its confluence with the Ellis River to a line formed by the extension of the Bath-Brunswick boundary across Merrymeeting Bay in a northwesterly direction" is designated Class C.[16] The designated uses of Class B and Class C are substantially the same, differing only in whether the habitat supported by the reach is characterized as unimpaired:

> **Class B:** waters must be of such quality that they are suitable for the designated uses of drinking water supply after treatment; fishing; agriculture; recreation in and on the water; industrial process and cooling water supply; hydroelectric power generation, except as prohibited under

[11] *See, e.g.*, 38 M.R.S. § 465.3.B (describing even the most stringent criterion for Class B dissolved oxygen as a 7-day *mean*).

[12] 38 M.R.S. § 464.2-A.F.

[13] Section 2.4

[14]

> 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 section 465, 465-A and 465-B, those waters shall not be considered to be failing to attain their classification because of those natural conditions.

38 M.R.S. § 464.4.C.

[15] *See* 33 U.S.C. § 1251(a) ("The objective of this Act is to restore and maintain the chemical, physical, and biological integrity of the Nation's waters. In order to achieve this objective it is hereby declared that, consistent with the provisions of this Act—**(1)** it is the national goal that the discharge of pollutants into the navigable waters be eliminated by 1985.")

[16] 38 M.R.S. § 467.1.A(2).

> Title 12, section 403; navigation; and as habitat for fish and other aquatic life. The habitat must be characterized as unimpaired.[17]

"'Unimpaired' means without a diminished capacity to support aquatic life." 38 M.R.S. § 466.11. The lower Androscoggin has and does support unimpaired aquatic life, and is not listed as impaired on this section for any relevant parameter.[18] Biological monitoring of the freeflowing sections of the Lower Androscoggin demonstrates attainment of Class B aquatic life standards.[19]

In determining what uses must be protected and maintained, the DEP may consider the actually designated uses contained in the Class B and C standards, as well as:

> (a) Aquatic, estuarine and marine life present in the water body;
>
> (b) Wildlife that utilize the water body;
>
> (c) Habitat, including significant wetlands, within a water body supporting existing populations of wildlife or aquatic, estuarine or marine life, or plant life that is maintained by the water body;
>
> (d) The use of the water body for recreation in or on the water, fishing, water supply, or commercial activity that depends directly on the preservation of an existing level of water quality; [. . .] and
>
> (e) Any other evidence that, for divisions (a), (b) and (c), demonstrates their ecological significance because of their role or importance in the functioning of the ecosystem or their rarity and, for division (d), demonstrates its historical or social significance.[20]

The lower Androscoggin provides exceptional and unique habitat. It feeds tidal wetlands that have been recognized by the U.S. Fish and Wildlife Service "highest value habitat," including for multiple rare inter-tidal plants and endangered, threatened and species of special concern (e.g., creeper, tidewater mucket, yellow lamp mussels, dry land sedge, etc.). It sustains, silver maple floodplain and birch-oak rocky communities. It is a spawning and nursery area for endangered short nose sturgeon, and Atlantic salmon

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[17] 38 M.R.S. § 465.3.A (emphasis added)Compare:

> **Class C:** Class C waters must be of such quality that they are suitable for the designated uses of drinking water supply after treatment; fishing; agriculture; recreation in and on the water; industrial process and cooling water supply; hydroelectric power generation, except as prohibited under Title 12, section 403; navigation; and as a habitat for fish and other aquatic life.

38 M.R.S. § 465.4.A.

[18] It is listed as impaired for PCBs, but so are other reaches that are designated Class B.

[19] *See* Exhibit 31, Maine Department of Environmental Protection, *Lower Androscoggin River Basin Water Quality Study Modeling Report* (March 2011), Appendix D (Station 954 (below Pejepscot Dam, free-flowing) attained Class B aquatic life standard.) Other stations were taken from impoundments and impoundments attained Class C aquatic life criteria, which by law must be treated as attaining A or B criteria in these locations. 38 M.R.S. § 464. 10.A(1). *See also* Exhibit 32 (FOMB annotations to Exhibit 31, *Appendix D* (Aquatic Life)).

[20] 38 M.R.S. § 465.4.F.

and threatened Atlantic sturgeon. Other significant diadromous fish including alewives, blueback herring, sea lamprey, American eel striped bass, rainbow smelt and American shad. The river provides sites for multiple bald eagle nests [13 to GIP], and several Peregrine falcon nests. [21]

The maintenance of a clean and lower Androscoggin is a critical economic resource to Maine as well.[22] It is well loved for recreation-fishing, hiking and paddling.[23] As a result, there is overwhelming support for reclassifying the Lower Androscoggin to protect it as an economic and recreational asset.[24]

And, even if water has degraded since the Clean Water Act was adopted, any "uses which have actually occurred on or after November 28, 1975, in or on a water body whether or not the uses are included in the standard for classification of the particular water body" must be protected in the absence of a use attainability analysis and a specific finding to eliminate a use.[25]

The lower Androscoggin clearly meets the use, criteria, and anti-degradation components for Class B waters and DEP's analysis should end here with a recommended change to that classification for the Board.

II. DEP has relied on inappropriate factors to recommend against reclassification in the past.

In previous years DEP staff recommended against reclassification of the Androscoggin to Class B for the following reasons, none of which is appropriate in the face of actual attainment of the Class B standard:

a) Under modeled "critical" once-in-a-decade low flow, high temperature conditions, the lower Androscoggin might fail to meet Class B standard,

b) 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,

c) Impoundments create low dissolved oxygen concentrations, and

d) Upstream pollution.

A. Pollution assimilation modeling cannot be used to overcome classification based on demonstration of uses actually being attained.

DEP's recommendation against reclassification of the lower Androscoggin primarily was based on modeling. DEP determined that "the existing models provide sufficient information to support the Department's previous assessment that there is no feasible approach to ensure attainment of Class B

[21] *See* Exhibits 9 to 18

[22] *See* Exhibits 8,15, 16, and 17.

[23] *See id.* and Exhibits 18-22 (describing protected lands and trails along the River).

[24] Exhibit 7 (compiled support letters); Exhibit 8 (Economic Benefit Articles), Exhibit 6 (Comprehensive Plan Excerpts).

[25] *See* 38 M.R.S. § 464.F.(1).

dissolved oxygen criteria in the lower Androscoggin River."[26] But the models DEP relied upon are used to minimize risk of harm to aquatic resources when permitting a discharge, not to determine whether a use is present in a river stretch. As such, they are designed to be conservative in permitting harmful impact to waters—emphasize worst-case scenarios to build in a margin of safety to guard against degradation of the nations' waters. The models are not intended to be used to thwart the purpose of the anti-degradation policy.

What DEP essentially did was perform a perfunctory Use Attainability Analysis to argue that the River should not be classified as the law would otherwise require.[27] But, a Use Attainability Analysis is appropriate in only two circumstances: when designating a use not included in the CWA and if removing a designated use.[28] DEP has been called upon to do neither of these things with regard to the lower Androscoggin, and the DEP may not use a use attainability analysis to avoid its *non-discretionary obligation* to recommend reclassification to a higher standard reflective of actual use and water quality.[29] Only *after* a use has been designated may the DEP perform a Use Attainability Analysis and consider the sort of things put before the Board here (e.g., economic effect on permits of reclassifying the River).[30]

Essentially, there is *supposed to be* a rebuttable presumption that water quality standards consistent with actual water quality should stand.[31] And, there is no ability to constrain a reach at a lower classification where the water is actually attaining the designated uses and standards of a more protective classification.[32] Thus, there is not properly room for a Use Attainability Analysis here. Anti-degradation policy—the ratcheting always towards improved quality--ensures that water quality is continually improved over time and that improvements are maintained. Effectively, DEP's attachment of proof of attainment under the most dire possible modeled scenario reverses the ratchet direction of the state and federal anti-degradation policy and statute.

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[26] Oct. 25, 2019 Kavanaugh letter at pp. 7-8.

[27] To remove a designated use, DEP must make a number of findings demonstrating why that use is not attainable, hold a public hearing, and demonstrate that the conditions of 40 C.F.R. § 131.10(g) are met.[27]

[28] 38 M.R.S. § 464.2-A.A; *see also* 40 C.F.R § 131.10(h).

"'Use attainability analysis' means a structured scientific assessment of the factors affecting the attainment of a designated use in a water body. The assessment may include consideration of physical, chemical, biological and economic factors." 38 M.R.S. § 466.11-A.

[29] 38 M.R.S. § 464.4.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. The board shall recommend to the Legislature that that water be reclassified in the next higher classification.") (emphasis added).

[30] *See* above, Section I, discussing what the Board can consider in making its classification recommendation.

[31] *Idaho Mining Ass'n v. Browner*, 90 F. Supp. 2d 1078, 1097-98 (D. Idaho 2000).

[32] *Kan. Nat. Res. Council, Inc. v. Whitman*, 255 F. Supp. 2d 1208, 1209 (D. Kan. 2003)

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

There are no other factors that should be considered in determining what class the lower Androscoggin is actually attaining. 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]

C. 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. "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]

D. 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

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[33] 38 M.R.S. § 465.4.F (d) ("Use of the water body to receive or transport waste water discharges is not considered an existing use for purposes of this antidegradation policy"); 40 C.F.R. § 131.10 ("In no case shall a State adopt waste transport or waste assimilation as a designated use for any waters of the United States.")

[34] Exhibit 33, Oct. 25, 2019 letter at p. 5.

[35] *See* above, n. 33.

[36] 38 M.R.S. § 464.4.C.

[37] Oct. 25, 2019 letter at 7.

[38] 40 C.F.R. § 131.10(b).

water quality unless the applicable public participation, intergovernmental review, and baseline control requirements of the antidegradation policy have been met."[39]

III. Conclusion

In conclusion, the DEP should present to the Board of Environmental Protection and the legislature the factual basis for the lower Androscoggin's attainment of Class B criterion and character and refrain from including within that recommendation any argument that might be construed as a Use Attainability Analysis.

[39] U.S. EPA, Clean Water Act Handbook, Chapter 4, p. 14.

Exhibit 7

A Legal Opinion: Excerpt from Conservation Law Foundation BEP Comments 10/2/2008 The Lower Androscoggin River

"The Department's refusal to recommend an upgrade violates the legal standard in the Clean Water Act that a state shall revise its standards to reflect uses and water quality actually being attained. 40 C.F.R. §131.10(i). See also id. §131.6(d); 38 M.R.S.A. §464(4)(F). Thus, the Committee's [or Board's] analysis must be based on existing water quality-not hypothetical modeling with point sources operating at maximum licensed discharge. Indeed, the Committee [or Board] is 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).

CLF strongly disagrees with the Department's recommendation and rationale for not upgrading this river segment. The Department has stated that proponents must provide water quality data and modeling showing "the likelihood of attainment of Class B water quality criteria at maximum licensed loads." See Reclassification Memorandum at 29. This makes no logical, legal or economic sense. First, no one operates at maximum licensed loads; rather a large buffer is generally built into all permits to avoid violations. Thus, DEP is requesting an impossible and unnecessary showing.

Second, the Department's recommendation violates the legal standard in the Clean Water Act that a state shall revise its standards to reflect uses and water quality actually being attained. 40 C.F.R. §131.10(i). See also id. § 131.6(d); 38 M.R.S.A. § 464(4)(F). Thus, the Board's analysis must be based on existing water quality - not hypothetical modeling with point sources operating at maximum licensed discharge. Indeed, the Board is 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)(l)(d).

Third, as many of the dischargers in this watershed have already recognized, water quality upgrades are generally good for surrounding communities. As has been shown over and over again, clean water is an economic boon. Examples abound throughout New England, including the recent revival of Boston Harbor, the Portland Waterfront, the Auburn Riverfront, and the resurgence of Merrymeeting Bay and the Kennebec River. The Androscoggin River deserves the same.

CLF believes that the data, including both dissolved oxygen levels and recreational uses, shows that existing uses in the lower Androscoggin have improved over time and that the river currently attains the higher bacteria and dissolved oxygen standards set forth in the Class B designation. As noted by the Department, it has no reason to question the data; indeed, it has relied upon data supplied by the proponent in prior reclassifications. Therefore, barring a showing that the data is invalid, the Board must recommend upgrading this section."

Exhibit 8 - Androscoggin Dischargers: Actual Discharges vs Licensed Limitations 1/2012-2/2013 - Source: DEP					
Brunswick POTW					
	Monthly Avg. Actual/License	**Daily Max. Actual/Lic.**	**Monthly Avg. Concentration, A/L mg/l**	**Daily Max. Concentration, A/L**	**Monthly Avg A/L**
	% of Limit %Lic. Buffer		mg/litre		
Flow (MGD)	2/3.85 52% 48%	2.9 actual	No Data (ND)	ND	
BOD (lbs/day)	295/963 31% 69%	364/1605 23% 77%	13/30 43% 57%	18/50 36%	
TSS (lbs/day)	309/963 32% 68%	485/1605 30% 70%	17/30 57% 43%	23/50 46%	
E. coli (/100ml)					
Lisbon POTW					
Flow (MGD)	.62/2.03 30% 70%	ND	ND	ND	
BOD (lbs/day)	26/507 5% 95%	53/845 6% 94%	5/30 17% 83%	10/50 20% 80%	
TSS (lbs/day)	20/507 4% 96%	41/845 5% 95%	4/30 13% 87%	8/50 16% 84%	6/126 5% 95%
E. coli (/100ml)	ND	ND	ND	ND	
LAWPCA POTW					
Flow (MGD)	11 actual	21 actual	ND	ND	
BOD (lbs/day)	1307/3553 37% 63%	4579actual	14/30 47% 53%	41/50 82% 18%	
TSS (lbs/day)	ND	ND	ND	ND	
E. coli (/100ml)	ND	ND	ND	ND	19/126 15% 85%
Livermore Falls					
Flow (MGD)	.53/2.0 27% 73%	1 actual	ND	ND	
BOD (lbs/day)	40/500 8% 92%	82/834 10% 90%	10/30 33% 67%	15/50 30% 70%	
TSS (lbs/day)	ND	ND	ND	ND	
E. coli (/100ml)	ND	ND	ND	ND	15/126 12% 88%
Verso Pipe #001A			% of Limit %Lic. Buffer	% of Limit %Lic. Buffer	
Flow (MGD)	36 actual	41/51	ND	ND	
BOD (lbs/day)	2429/4400summer*,7400winter**	3633/8000S^, 13,875W^^	ND *55% 45%, **33% 66%	ND ^45% 55%, ^^26% 74%	
TSS (lbs/day)	6796/12,000S*, 25,000W**	8521/22,300S^, 44,600W^^	ND *57% 43%, **27% 73%	ND ^38% 62%, ^^19% 81%	
Tot. Phos. (lbs/day)	84/130 64% 36%	113 actual	.27 actual	.35 actual	
Ortho Phos. (lbs/day)	15/28 54% 46%	29.3 actual	ND	ND	
Ads. Org. Halo (AOX)	739/1495 49% 51%	801/2282 35% 65%	ND	ND	

Rumford POTW					
	Monthly Avg. Actual/License	**Daily Max. Actual/Lic.**	**Monthly Avg. Concentration, A/L mg/l**	**Daily Max. Concentration, A/L**	**Monthly Avg A/L**
	% of Limit %Lic. Buffer		mg/litre		
Flow (MGD)	2.65 Limit	ND	ND	ND	
BOD (lbs/day)	150/663 23% 77%	357/1105 32% 68%	13/30 43% 57%	20/50 40% 60%	
TSS (lbs/day)	202/663 30% 70%	465/995 47% 53%	17/30 57% 43%	26/50 52% 48%	
E. coli (/100ml)	ND	ND	ND	ND	19/126 15% 85%
Rumford Paper					
			% of Limit %Lic. Buffer	% of Limit %Lic. Buffer	
Flow (MGD)	29/34 85% 15%	33 actual	ND	ND	
BOD (lbs/day)	1772/8330S*, 14,400W **	4,650/18,750S^, 32,300W^^	ND * 21% 79%, ** 12% 88%	ND ^25% 75%, ^^14% 86%	
TSS (lbs/day)	3782/15,500S*, 32,900W **	11,311/40,000S^, 50,000W^^	ND * 24% 76%, ** 11% 89%	ND ^28% 72%, ^^23% 77%	
Tot. Phos. (lbs/day)	88/152 58% 42%	173 actual	ND	ND	
Ortho Phos. (lbs/day)	97 Limit	ND	ND	ND	
Ads. Org. Halo (AOX)	914/1873 49% 51%	1123/2859 39% 61%	ND	ND	