Testimony before the
Joint Standing Committee on Environment and Natural Resources
by Sean Mahoney
Conservation Law Foundation
February 28, 2022
Re: LD 1979 - An Act To Sustain Good-paying Jobs in the Forest Products Industry by Ensuring Consistency between Comprehensive River Resource Management Plans and State Water Quality Standards.

Senator Brenner, Representative Tucker and members of the Environment and Natural Resources Committee, I am the state director of the Conservation Law Foundation and I appreciate this opportunity to testify in opposition to LD 1979, "An Act To Sustain Good-paying Jobs in the Forest Products Industry by Ensuring Consistency between Comprehensive River Resource Management Plans and State Water Quality Standards."

CLF, founded in 1966, is a public interest advocacy group that works to solve the environmental challenges that threaten the people, natural resources and communities in Maine and across New England. In Maine for almost four decades, CLF is a member-supported organization that has worked to ensure that laws and policies are developed, implemented and enforced that protect and restore our natural resources, are good for Maine's economy and environment and address the climate crisis in a manner that recognizes the fierce urgency of that crisis, as well as the need to do so in a just and inclusive way.

Relevant to this proposed legislation, CLF has been involved with the licensing, relicensing, modification and removal of hydropower projects here in Maine going back to the proposed Big A dam in the mid 1980's and up to last year's successful removal of the Saccarappa Dam in Westbrook as part of a settlement agreement with the State, the dam's owner, South African Pulp & Paper Inc. and the Friends of the Presumpscot River.

CLF understands that the intent of the Senate President in proposing changes to existing law is to protect jobs at the SAPPI Skowhegan Mill, whose operations could be threatened if the Shawmut Dam in Fairfield is removed. But those changes are not only unnecessary but counter to Maine's long term economic and environmental interests.

LD 1979 proposes to make changes to 12 MRSA § 407 and 38 MRSA § 464, statutes that affect water resources throughout Maine, in order to address the application of Maine's water quality standards to industrial operations on the Kennebec River. Specifically, we understand that the intent of LD 1979's sponsors is to limit the State's authority to recommend appropriate operational measures at the Shawmut Dam necessary to meet Maine's legislatively established water quality standards for the Kennebec River.

As a general matter, it is rarely a good idea to change statewide law to affect the licensing outcome at a single facility. In addition, changing these particular statutes in this manner may very well have adverse consequences for Maine's resource agencies and the state's ability to continue issuing discharge licenses under its delegated Clean Water Act authority from the U.S. Environmental Protection Agency (EPA).

Our specific concerns with LD 1979 are several. First, the requirement in Section 1 of the bill that the Department of Agriculture, Conservation and Forestry (DACF) develop river management plans for every major river has actually been an existing statutory requirement for close to a decade, but DACF has not developed a single such plan. DACF inherited this responsibility despite having neither the staff nor the expertise to do the work when the Legislature dissolved the State Planning Office in 2012 and distributed its responsiblilites to other agencies. Giving the responsibility of river management plans to DACF in the first place was a mistake and this bill would only confound that error. Developing these plans for every major river would require very significant staffing resources and a correspondingly high fiscal note, even if the Legislature reassigned this task to an agency, such as the Department of Marine Resources, which at least has some of the expertise and experience to carry it out.

Concerning Section 2, the Legislature has created a water classification system that is intended "to restore and maintain the chemical, physical and biological integrity of the State's waters and to preserve certain pristine state waters." 38 MRSA § 464(1). The Legislature has prescribed several goals to achieve these objectives in parts A-C of section 464(1). The statute addresses standards for fresh surface waters, lakes and ponds, estuarine and marine waters and groundwater and then specifically classifies all of Maine's major river basins, minor drainages, estuarine and marine waters and groundwater. Those standards and classifications are applied in two principle ways.

The first is to ensure that permits that allow the discharge of pollutants to Maine's waters meet the applicable water quality standards for that body of water. The State does this under its authority as a delegated state under the Clean Water Act and its ability to issue such discharge permits under the National Pollutant Discharge Elimination System. 33 USC §§ 1251, 1342. The second is to certify that any federal permit or license that might result in any discharge (this includes the discharge of water through dam turbines – *see S. D. Warren Co. v. Maine Board of Environmental Protection*, 547 U.S. 370 (2006)) meets those same water quality standards. Pursuant to section 401 of the Clean Water Act, the state has the authority to grant the application for certification, to condition its grant of approval, or to deny that approval altogether. If the state denies the application for certification, the federal permit or license cannot be issued.

The changes proposed by section 2 of LD 1979 would substantially alter Maine's water quality certification authority under section 401 in connection with licenses issued by the Federal Energy Regulatory Commission (FERC), which are primarily for hydropower projects. Under the Federal Power Act, FERC has sole authority to license and oversee such hydropower projects. The only power Maine has to influence such licenses is through section 401, and Maine has strategically and successfully used that authority to "restore and maintain the chemical, physical and biological integrity of the State's waters" in a number of Maine's major river basins, including the Penobscot, Kennebec, Androscoggin and Presumpscot Rivers. LD 1979 would remove that authority, replacing Maine's authority with FERC's judgment as to what condition (if any) is sufficient to meet the requirements of the Endangered Species Act or any other water quality standards, even if any such condition is not consistent with the broad or specific requirements of Maine's water classification system and standards. In our opinion, not only is this unprecedented but it also entirely removes a key check on a federal agency whose principal goal is the development of energy sources and not the restoration and maintenance of the chemical, physical and biological integrity of a State's waters. That alone should give the Committee great pause as it considers this bill.

In addition, any change to section 464 may require approval of the EPA pursuant to 40 CFR 131.21 before it can take effect. We are unaware of any communication with EPA concerning its willingness to provide such approval but would note that EPA has supported the application of Maine's water quality standards to hydropower projects in most cases. The only exception has been on the St. Croix River, where the Legislature had enacted a law that specifically closed fish passage facilities to prevent anadromous fish, such as alewives and blueback herring, from returning to their native waters in that watershed. As a result of a lawsuit, EPA was prepared to withhold approval of Maine's water quality standards until a subsequent Legislature repealed the law that required the fish passage to be closed to block the migration of these valuable native species.

Over the past 25 years, Maine has demonstrated that it can continue to harness its rivers for energy while at the same time "maintaining and restoring the chemical, physical and biological integrity" of those rivers. It has done so working with federal agencies, owners and operators of hydropower projects, local governments, and stakeholders, using the experts and tools at its disposal. LD 1979 would substantially alter that balance in a manner entirely inconsistent with Maine's long commitment to the Clean Water Act, the health of our natural resources, and the interests of Maine people.

LD 1979, while well-meaning in its intent to protect the livelihood of the men and women who work at the SAPPI mill, is not necessary, will weaken Maine's ability to protect its natural resources, and could have unintended consequences that could impact businesses and municipalities across the state. We urge the Committee to vote ought not to pass. Thank you.