

**Friends of Merrymeeting Bay**  
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**Testimony of Ed Friedman, Chair, Friends of Merrymeeting Bay**  
*Before the Environment & Natural Resources Committee*

**In Opposition of L.D. 1398:**

**An Act to Amend the Laws Administered by the Department of Environmental  
Protection**

*April 26, 2011*

Senator Saviello, Representative Hamper and members of the committee, as most of you know I'm Ed Friedman, Chairman of Friends of Merrymeeting Bay [FOMB]. Thank you for allowing me to speak today regarding this bill. For those of you who don't know, Merrymeeting Bay, draining nearly 40% of Maine's waters lies at the junction of the Kennebec, Androscoggin, and four smaller rivers. The Bay, a unique freshwater tidal riverine ecosystem is known for its rare and endangered or threatened plants, fish, mussels and birds including Atlantic salmon, shortnose and Atlantic sturgeon, yellow lampmussel, bald eagle and Parker's Pipewort. It is also the largest staging ground in the northeast for migratory waterfowl. FOMB works to preserve, protect and improve this area through research, advocacy, education and land conservation.

Buried in LD 1398 is language of extraordinary significance attempting to downgrade water quality in the lower Kennebec River from Class SA prohibiting discharges, to Class SB which would permit them. We request this reclassification language be removed. As you may know, state [§464 F] and federal [40CFR § 131.2] antidegradation laws require the level of water quality necessary to protect existing uses be maintained and protected. To summarize: any change in water classification must be approved by the EPA. Any proposed downgrade must undergo a Use Attainability Analysis or UAA, which must be reviewed and ruled on by EPA before going into effect. At the end of these comments I have provided a brief legal review of the process and governing federal statute (1).

DEP would have you believe the subject Class SA area, clearly defined in Maine statute as the Kennebec River lying within the town of Phippsburg, was classified SA 21 years ago in error and should be downgraded *without going through the required process*. The amendment language is meant to facilitate a proposed US Army Corps of Engineers major dredging project in the river, designed in part for the specific autumn departure of a destroyer from Bath.

Unfortunately for DEP, there is nothing to support this position. One could just as easily argue the Georgetown side of the river was classified SB in error, because overall efforts have indeed been to improve water quality in the river; boosting wildlife populations and providing many economic benefits, whether for residents, tourists, shell fishermen, lobstermen or local businesses. Virtually all interests benefit from a clean river, virtually

no one benefits from a backsliding in water quality and many are hurt [clam flats close, beaches are closed to swimming, quality of fish worsen, odors and algae blooms proliferate, etc.].

We are not here to argue against dredging, but to suggest all parties could have their objectives met through a series of project changes to be made outside of this legislation and without the proposed downgrade.

**Problem:** *Guarantee depths for Spruance destroyer departure in September.*

**Discussion:** Currently, “sand waves” in the channel supposedly do not allow adequate departure depth although the ship has in fact made repeated trips in and out of the river during sea trials using a local pilot and sometimes leaving the channel as it is now marked. There are two endangered fish species in this part of the river: short nose sturgeon [moving back and forth] and Atlantic salmon [moving upstream] both whom are quite active during the planned dredging period in August. Atlantic sturgeon, leaving the river about this time, are considered threatened. Harbor seals are quite active here and protected under the Marine Mammal Protection Act. “Take” [including harassment, harm or killing] of any of these species is illegal without a permit from federal fishery and wildlife services. Shortnose sturgeon have been killed in past dredging operations here even in October. Typically and historically, major dredging occurs during late fall and winter months when all adverse impacts [visual, aural, navigational, wildlife, fishery, shell fishing, lobstering, and tourism] are minimized. In contrast, the current plan calls for major dredging at the height of summer when all of these activities are in full swing.

**Solution:** Major dredging is not needed. Minimal dredging taking off the “wave” tops will work. Picture a shovel, rake or grader versus an excavator or a rototiller versus a sub-soil chisel plow hooked up to an industrial suction unit. Ensure future maintenance dredging is well-planned by the Army Corps to take place off-season. The current proposal appears to reflect poor planning on the part of the Corps and perhaps a lack of coordination with the Navy.

**Problem:** *What to do with dredge spoils?*

**Discussion:** Dredge spoils can be composed of coarse to fine sediments sometimes containing hazardous and economically damaging concentrations of fecal coliform bacteria or toxic contaminants. Even if contaminant-free, large deposits of sediment can create anaerobic conditions suffocating organisms [from zooplankton to shellfish] on which they may be deposited. It is illegal to deposit spoils in Class SA waters. Dredge spoils routinely close shellfish flats, can interfere with normal sand nourishment and erosion processes and transport of spoils can interfere with other river and inshore users like lobstermen. Spoils also effect critically important coastal wetlands when deposits as deep as 12” cover native organisms integral to the river’s ability to function in a healthy way. Under Clean Water Act sections 401 and 404 and under Maine’s Natural Resources Protection Act, alternatives analyses must be conducted to seek out the least environmentally damaging alternatives to dredging activities. This has not been done.

**Solutions:** There are many ways of minimizing environmental, social and economic harm. Minimize dredging. Smaller amounts of dredged material will mean less material to move, less cost and time to move it, less disturbance of the dredging area, less damage to the area spoils are dumped and that may be more easily reabsorbed into the environment. Dump dredge spoils further off shore or at upland sites. Currently, spoils from Doubling Point and BIW are dumped just a short ways down river in the high flow

narrows of Fiddler's Reach where they either flow directly back to Doubling Point on an incoming tide or flow downstream into the clam flats and coastal wetlands of the lower Kennebec. Spoils from the Popham dredge site are dumped at Jackknife Ledge just offshore west of Popham Beach State Park. Easily able to block the mouth of the Morse River here, they can cause the river mouth to exacerbating major erosion at the Park.

Most of you have heard me testify at length over years on the improved water quality of the Androscoggin River and heard my frustration at the continued reluctance of the DEP and this Committee to recognize that improvement. The towns along the river are crying out for continued economic benefits from this and you continue to refuse them. About 8 years ago FOMB was also here producing water quality data supporting an upgrade of the Kennebec between Augusta and Merrymeeting Bay. This upgrade was approved and the lower Kennebec is now considered a recovering treasure.

Those of us who live and work along and on these rivers have done so far too long to accept any downgrade, especially when abundant alternatives exist to potential threats. We hope you will recognize this and vote Ought Not to Pass on LD 1398 as written. We request you strike the proposed language from the LD under §469 Sagadahoc County B (3) limiting Class SA water to a 500' strip around the south end of Atkins Bay and allow the 10 year old existing language, classifying all Kennebec water in Phippsburg as SA, to stand. I should note it appears disingenuous to not have the existing language shown in 1398 as a strike out.

Another problem we have with this bill is §343-D dealing with composition and selection of the relatively successful Pollution Prevention and Small Business Advisory or Assistance Committee or Panel. Existing statute dictates a 16 member panel. Of the 16 members, 6 are appointed by the Governor, 3 by the Senate President, 3 by the Speaker, 1 each by the 2 Minority leaders and 2 by the DEP. Members can serve 2 four year terms. Under the proposed amendment, of the 16 members, 12 are now appointed by the Governor and 1 each by the 4 leaders of the legislature. Term limits for members are removed. This is no longer an adequate system of checks and balances and every left, right and centrist member of the Committee should recognize this as an unhealthy situation. We urge you to also strike these changes from the bill.

Thank you for your consideration.

#### (1) Revising Water Quality Standards

The Clean Water Act [CWA] and EPA regulations under the CWA set forth mandatory procedural and substantive requirements for revising a state water quality standard. First, state water quality standards and any amendments to them must be approved by EPA before they become effective. 33 U.S.C. § 1313; 40 C.F.R. § 131.21. Any state law or regulatory action that amends or has the effect of amending water quality standards but that fails to receive EPA approval, is not legally effective.

Second, once a designated use is established in state water quality standards and approved by EPA, a less protective "sub-category" of that use for a specific waterbody may not be created, unless and until a Use Attainability Analysis ("UAA") is performed

and its conclusion approved by EPA. 40 C.F.R. § 131.10(g). A UAA is the federally required process through which water quality standards may be relaxed for a specific waterbody if attainment of the standards is not feasible. Id. 40 C.F.R. § 131.10(g). For instance, if “habitat for fish and other aquatic life” is a designated use of a particular waterbody in federally approved state water quality standards, that designated use cannot lawfully be removed from the standards, or weakened through the creation of a less protective sub-category of that use or classification, without complying with the UAA process and receiving EPA approval. A UAA considers a variety of factors, such as whether there are physical conditions or naturally occurring pollutant concentrations that preclude attainment of water quality standards. 40 C.F.R. § 131.10(g).

Third, under 33 U.S.C. 1313(d)(4)(B) and 40 CFR § 131.12, where waters are meeting their designated uses, water quality standards can be revised only in compliance with the anti-degradation policy. The CWA anti-degradation policy provides, in relevant part: (1) existing instream water uses and levels of water quality necessary to protect the existing uses shall be maintained and protected; and (2) where the quality of waters exceed levels necessary to support propagation of fish, shellfish, and wildlife and recreation in and on the water, that quality shall be maintained and protected unless a state finds, through a process that involves public participation, that allowing lower water quality is necessary to accommodate important economic or social development in the area in which the waters are located. 40 C.F.R. § 131.12(a)(1) & (2).