

Grow L/A * Friends of Merrymeeting Bay

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To: Susanne Meidel, Water Quality Standards Coordinator
Maine Department of Environmental Protection
SHS 17
Augusta, ME 04333
207-441-3612
Susanne.K.Meidel@maine.gov

From: Grow L/A, Peter Rubins prubins1@gmail.com 450 7217
FOMB, Ed Friedman, edfomb@comcast.net 666-3372

E-Filed

Subject: Lower Androscoggin Re-Classification Proposal

River/Sections: Androscoggin from Worumbo Dam to Merrymeeting Bay
Worumbo to Great Falls
Great Falls to Gulf Island Pond

Proposed Upgrade: C to B

Basis for Proposal: Actual conditions exceed those of present classification

Documentation: Supporting data from FOMB monitoring program approved by Maine DEP and USEPA, MDEP sonde data, Lewiston/Auburn POTW/CSO data

Data Collection Periods: DO-1999 to present; Coliform Bacteria-2006 to present

Sampling Intervals: Monthly or more: April-October

What's New: Expanded coalition plus additional VRMP data through 2019, DEP low flow sonde data, Lewiston/Auburn CSO data and wastewater report, extensive supporting exhibits and new comprehensive legal analysis

Ms. Meidel:

Multiple Segments for Consideration

Please consider this our formal upgrade proposal for the multiple segments of the lower section of the Androscoggin River from Gulf Island Pond to Merrymeeting Bay. The comprehensive data set exists for the segment between Merrymeeting Bay at the line from Pleasant Point in Topsham to North Bath extending upriver to Worumbo Dam in Lisbon Falls. As our data show, while classified as C, this section has long been actually meeting, Class B standards approximately 98% of the time. We therefore propose it be upgraded from C to B. We focus on this stretch of river because it is here we have the most complete data monitoring of dissolved oxygen (DO) and bacteria.

Excellent data exist for the Friends of Merrymeeting Bay (FOMB) Durham monitoring stations

as well but collecting of regular DO samples halted there in 2018 when switching from use of Winkler Titration to only DEP meters at more select sites. Bacteria samples are still collected in Durham. In 2019 DEP deployed two sondes in this reach during low flows. One was in the Durham Boat Launch area and the other below Great Falls. DO levels remained above the Class B threshold of 7mg/l at both sites as was also the case for a sonde deployed between Gulf Island Pond and Deer Rips dam (Ex. 1). An upgrade from Great Falls to the Bay seems well justified. FOMB also has limited DO data from Auburn Boat Launch collected in 2010 and 2011 (Ex. 30) with geometric means of 8.8 and 10.1 respectively. Since there are some to extensive data supporting upgrades for the three river segments between Worumbo and Gulf Island Pond, we request the department also consider recommending all these segments for reclassification to B.

FOMB has the most complete set of monitoring data for the reaches in this proposal. They began their monitoring program in 1999 and continue to this day with at times over twenty sampling sites on the Androscoggin, Kennebec and around Merrymeeting Bay. FOMB joined the VRMP in 2009 to further support and substantiate water classification upgrades.

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

Because the actual water quality of the lower Androscoggin sections described here exceeds that of their current classification, our request for a reclassification from C to B is supported by the State antidegradation policy as cited below (emphasis added):

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.”*

In the past, MDEP has sometimes said they cannot upgrade a river classification because under worse case (permitted) 7Q10 scenarios, proposed Class B (in this case) standards might be violated. At the same time, the Department has also said because receiving waters meet the *current* classification levels, Maine cannot upgrade classifications to meet actual conditions.

This condition, while often supported by industry, quite clearly violates Maine statute and the intents both of the Clean Water Act and NPDES creating an artificial ceiling on water quality improvement. In fact, reclassification and permitting **must** be used together to improve water quality. But, in the opposite way from that in which the DEP has been operating. 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 or must be constrained by critical flows or discharges, point source or non-point source.

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. 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)(1)(d).

The CWA & Maine Classification Standards are Aspirational in Nature

Moreover, from the DEP 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.

Widespread Public Support for Clean Water with its Economic, Environmental and Recreation Benefits

It has been nearly 50 years since the passage of the Clean Water Act and the changes that it brought about have been profound. Bates Mill in Lewiston ceased being a textile mill that completely exploited the Androscoggin River by taking its water and power and returning dyes, bleaches and untreated human waste from overboard discharge. The Bates Mill Complex is now the site of Baxter Brewing Co., TD Bank, Androscoggin Savings Bank offices and The Symquest Group, Fishbones Casual Fine Dining Restaurant, and Museum L-A: The Story of Work and Community in Lewiston-Auburn. The other river communities of Durham, Lisbon, Brunswick and Topsham have all embraced the newer, cleaner river in various economic and recreational ways. No one wants to turn back the clock.

The language in various comprehensive plans (Ex. 4) tell the story:

In Lisbon's words: ***“With the improved water quality of the Androscoggin, the potential for recreational uses of both the water and shorelines has increased.”***

Topham says: ***“The return of millions of river herring to Merrymeeting Bay and improvement of water quality on the Androscoggin River are fantastic successes; we shouldn't stop there.”***

And Auburn adds: **“The state's water quality classification for the river should be increased from a Class C to a Class B by 2012.”**

The Clean Water Act set in motion a process to improve the quality of our waters that is still continuing. The initial phase changed the lower Androscoggin from an open sewer, one of the top ten polluted rivers in the country (Ex. 23), to the waters that we enjoy today, an asset to our communities for its aesthetics, economic benefits and recreational opportunities, yet the waters remain classified as Class C, Maine's lowest water quality classification. As long as classification remains lower than actual ambient water quality, deterioration is possible and to be avoided. Submitted data show the Androscoggin has been meeting Class B standards for years in large part due to former Senator John Nutting's leadership in legislative efforts including the

Color, Odor, Foam Bill, 1990; Dioxin Bill, 1996; and Phosphorus Bill passed in 2006; sewer system upgrades by the cities of Lewiston and Auburn providing storm overflow protection; and the Gulf Island Pond Oxygenation Project. Our goal for the upgrade is to lock in improved water quality as is the full intent of the Clean Water Act and Main law.

Exhibit List-Lower Androscoggin Upgrade Proposal 3/31/20

Exhibit 1 - Submission Required Responses

Exhibit 2 - Suggested Amendment Language

Exhibit 3 - Fact Sheet/Exec Summary

Exhibit 4 - Greenfire Legal Memorandum

Exhibit 5 - CLF Legal Memorandum

Exhibit 6 - Androscoggin Community Comprehensive Plan Excerpts

Exhibit 7 - Androscoggin Upgrade Support Letters, Past & Present

Exhibit 8 - Economic Benefits of Clean Water

Exhibit 9 - USFWS Merrymeeting Bay/Lower Kennebec High Value Habitat Composite Map

Exhibit 10 - Beginning with Habitat High Value Plant & Animal Habitat Map-Bowdoinham

Exhibit 11 - Beginning with Habitat-Kennebec Estuary Focus Area Intro

Exhibit 12 - Beginning with Habitat-Kennebec Estuary Focus Area Map

Exhibit 13 - Creeper Mussel Fact Sheet

Exhibit 14 - Maine Shad Habitat Plan-MDMR

Exhibit 15 - MDMR Androscoggin Fish Restoration Program

Exhibit 16 - MDMR Historical Sea Run Trap Counts 2008-2019

Exhibit 17 - Brookfield Brunswick 2019 Fishway Report

Exhibit 18 - Merrymeeting Bay/FOMB Conservation Lands Map

Exhibit 19 - USFWS Merrymeeting Bay Regional Conservation Planning Map

Exhibit 20 - Brunswick Topsham Land Trust Androscoggin Properties and Map

Exhibit 21 - Androscoggin River Greenway Trail

Exhibit 22 - Androscoggin Land Trust Preserves along or in Lower Androscoggin

Exhibit 23 - Defining a Nuisance Article

Exhibit 24 - Auburn-Lewiston CSO Charts 200-2018

Exhibit 25 - Auburn-Lewiston CWA 20 Year Master Plan Update 2019

Exhibit 26 - E. coli Geomeans 2006-2019

Exhibit 27 - DO Geomeans 2003-2019

Exhibit 28 - FOMB DEP VRMP Reports

Exhibit 29 - FOCB Quality Assurance Plan

Exhibit 30 - FOMB Auburn Boat Launch DO Data 2010-2011

Exhibit 31 - DEP Lower Androscoggin Modeling Report 2011

Exhibit 32 - Appendix D Aquatic Life from Ex. 31 Report, Annotated by FOMB

Exhibit 33 - DEP Kavanaugh Letter 10/25/19

Exhibit 34 - MDEP VRMP Sampling Protocols-2015

Exhibit 35 - Applied Biomonitoring-FOMB Androscoggin Monitoring Report 2010

Exhibit 36 - Applied Biomonitoring-FOMB Androscoggin Monitoring Report 2011

Exhibit 37 - Applied Biomonitoring-FOMB Androscoggin Combined Monitoring Report 2013

Exhibit 38 - FOMB WQ Data 1999-2019

Exhibit 39 - Topsham Hydro Pejepscot Dam 2018 Water Quality Summary from April, 2020 Relicensing Report