

## Office of Policy and Legal Analysis

Date: May 12, 2021  
To: Joint Standing Committee on Environment and Natural Resources  
From: Deirdre Schneider, Legislative Analyst  
Re: LD 676, An Act To Reclassify Part of the Androscoggin River to Class B

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### Summary

This bill reclassifies from Class C to Class B the lower section of the Androscoggin River from Gulf Island Dam to a line formed by the extension of the Bath-Brunswick boundary across Merrymeeting Bay in a northwesterly direction.

### List of People that Submitted Written Testimony and/or Spoke at the Hearing

**Proponents:** Senator Claxton (Sponsor); Senator Vitelli (Co-sponsor); Representative Cloutier (Co-sponsor); Peter Rubins, GROW L+A Working Group; Steve Heinz, Trout Unlimited; Janet Stenberg; Ed Friedman, Friends of Merrymeeting Bay; Emily Bastian, Native Fish Coalition; Neal Goldberg, MMA; John Burrows, Atlantic Salmon Federation; Paula Curtis-Everett; Susan Brown; Bonnie Lounsbury; Leonard Blanchette, Brunswick Sewer District; Jim Pross, Androscoggin Land Trust; Susan Drucker; Sean Seary; Bruce Kantner; Orman Hines; Sam Boss; John Nutting; and Gregory D'Augustine, Maine Rivers

**Opponents:** Senator Timberlake (Co-sponsor); Senator Keim; Brian Kavanah, DEP; George Bald; Denise Vallee, Town Manager, Gorham, NH; Steve Zuretti, Brookfield Renewable; Steve Aievoli, Town of Lisbon; Dean Gilbert, I.B.E.W.; Stacy Carter, Town Manager, Town of Rumford; Price Howard, White Mtn, Paper; Chuck Kraske, Pixelle Specialty Solutions; Scott Reed, ND Paper; Patrick Strauch, ME Forest Products Council; George O'Keefe, Town of Rumford; Kevin Averill, USW Local 900 at Nine Dragons; Ben Gilman, ME State Chamber of Commerce; Matt Marks, Associated General Contractors of Maine; Paul Grenier, Mayor, Berlin, NH; Bill Taylor, Gulf Island Pond Oxygenation Partnership; and Roland Arsenault, Rumford-Mexico Sewerage District

**Neither for nor against:** Fergus Lea, Androscoggin River Watershed Council; Tim Wade; MWEA; and Travis Peaslee, Lewiston Auburn Water Pollution Control Authority

### Summary of law regarding water classification and standard

- There are four standards for the classification of freshwater rivers (Class AA, A, B, C). In the higher classes (Classes AA and A), the law places more restrictions on human activities that might pose a risk of degradation of water quality. More allowances for human activities are allowed in Classes B and C.
- The classification system establishes the designated uses and the related characteristics of those uses for each class of water and also establishes water quality criteria necessary to protect those uses and related characteristics. "Designated uses" are those uses specified in water quality standards for each water body or segment whether or not they are being attained.

<b>Designated Uses and Criteria for Maine River and Stream Classifications*</b>					
<b>Class</b>	<b>Designated Uses</b>	<b>Dissolved Oxygen Numeric Criteria</b>	<b>Bacteria (E.coli) Numeric Criteria</b>	<b>Habitat Narrative Criteria</b>	<b>Aquatic Life (Biological)</b>
<b>Class B</b>	Habitat for fish and other aquatic life. Drinking water after treatment. Fishing, Agriculture, Recreation in/on the water. Navigation. Hydropower unless prohibited by 12 M.R.S. § 403. Industrial process/cooling water	7 ppm or 75% saturation from 10/1 to 5/14, 7-day mean concentration not less than 9.5 ppm and 1-day minimum concentration not less than 8.0 ppm in identified fish spawning areas	May not exceed geometric mean of 64/100 ml over 90-day interval or 236/100 ml in more than 10% of samples in any 90-day interval from 4/15 to 10/31	Unimpaired	Discharges may not cause adverse impact to aquatic life in that the receiving waters must be of sufficient quality to support all indigenous aquatic species without detrimental changes to the resident biological community
<b>Class C</b>	Habitat for fish and other aquatic life. Drinking water after treatment. Fishing, Agriculture, Recreation in/on the water. Navigation. Hydropower unless prohibited by 12 M.R.S. § 403. Industrial process/cooling water	5 ppm or 60% saturation but must maintain WQ sufficient for spawning in identified fish spawning areas 6.5 ppm (monthly average) at 22° and 24°C	May not exceed geometric mean of 100/100 ml over 90-day interval or 236/100 ml in more than 10% of samples in any 90-day interval from 4/15 to 10/31		Discharges may cause some changes to aquatic life, but the receiving waters must be of sufficient quality to support all species of indigenous fish and maintain the structure and function of the resident biological community

\*From DEP's Testimony and 2021 Triennial Review of Water Quality Standards (38 MRSA § 465)

- Federal regulations require states to adopt a statewide antidegradation policy. Maine's antidegradation policy is governed by 38 MRSA §464, sub§4, ¶F (Attached). In general, the State's antidegradation policy provides for the following:
  - Existing in-stream water uses and the level of water quality necessary to protect those existing uses must be maintained and protected. "Existing in-stream water uses" are defined as "those 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." Determinations of what constitutes an existing in-stream water use on a particular water body must be made on a case-by-case basis by the department.
  - When the actual water quality exceeds the minimum standards of the next highest classification, that higher water quality must be maintained and protected.

### **Notes, Issues, Possible Amendments from Testimony**

- Brian Kavanah from the DEP noted in his testimony that the Department is currently evaluating the same proposal via the Triennial Review Process, which is a public process, including a comment period and public hearing, whereby changes in water quality standards are evaluated by the DEP and the BEP – the BEP may or may not recommend to the Legislature in the 2<sup>nd</sup> Session

a reclassification of the lower Androscoggin to Class B.

- Those in support of the bill state that sampling on the lower Androscoggin has shown this segment meets Class B standards nearly all of the time.
  - They also contend that the law has placed a nondiscretionary duty upon the BEP to act to recommend an upgrade because 38 MRSA §464(F)(4) states “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.”
- Those opposed to the bill, including the DEP state that under certain conditions, and in certain locations, the lower Androscoggin River meets the criteria for Class B water, but the DEP contends that §464(F)(4) does not require the BEP recommend to the Legislature that a water be reclassified to the next higher classification solely based on monitoring data that is not representative of critical conditions.
  - The DEP’s interpretation of §464(F)(4) is that it must generally be read 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.

## **Amendments**

- Carry this bill over to the 2<sup>nd</sup> Session to allow DEP to reissue discharge permits that expired in 2020 for Lewiston/Auburn, Lisbon, and Brunswick wastewater plants at the current Class C certification. This was suggested numerous times in testimony (Sen. Claxton; Rep. Cloutier; Ed Friedman, FOMB; Emily Bastian, Native Fish Coalition; John Burrows, Atlantic Salmon Fed.; Susan Drucker; Bruce Kantner; and Orman Hines)
  - Direct the DEP by letter to renew expired permits by 9/30/21 (Ed Friedman).
- Steve Zuretti, Brookfield. While opposed to the bill, if the Legislature moves forward with the proposal, he suggests that facilities currently operating or under development be offered legacy treatment and require future developments meet Class B discharge and water quality requirements.
- Matt Marks, AGC Maine. An economic study should be conducted for consideration before adopting a change to a river’s classification.

## **Fiscal Impact**

- Not yet determined.

## Reference

### 38 MRSA § 464(4)(F)

F. The antidegradation policy of the State is governed by the following provisions.

(1) Existing in-stream water uses and the level of water quality necessary to protect those existing uses must be maintained and protected. Existing in-stream water uses are those 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. Determinations of what constitutes an existing in-stream water use on a particular water body must be made on a case-by-case basis by the department. In making its determination of uses to be protected and maintained, the department shall consider designated uses for that water body and:

- (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. Use of the water body to receive or transport waste water discharges is not considered an existing use for purposes of this antidegradation policy; 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.

(1-A) The department may only issue a waste discharge license pursuant to section 414-A, or approve a water quality certification pursuant to the United States Clean Water Act, Section 401, Public Law 92-500, as amended, when the department finds that:

- (a) The existing in-stream use involves use of the water body by a population of plant life, wildlife, or aquatic, estuarine or marine life, or as aquatic, estuarine, marine, wildlife, or plant habitat, and the applicant has demonstrated that the proposed activity would not have a significant impact on the existing use. For purpose of this division, significant impact means:
  - (i) Impairing the viability of the existing population, including significant impairment to growth and reproduction or an alteration of the habitat which impairs viability of the existing population; or
  - (b) The existing in-stream use involves use of the water body for recreation in or on the water, fishing, water supply or commercial enterprises that depend directly on the

preservation of an existing level of water quality and the applicant has demonstrated that the proposed activity would not result in significant degradation of the existing use.

The department shall determine what constitutes a population of a particular species based upon the degree of geographic and reproductive isolation from other individuals of the same species.

If the department fails to find that the conditions of this subparagraph are met, water quality certification, pursuant to the United States Clean Water Act, Section 401, Public Law 92-500, as amended, is denied.

(2) Where high quality waters of the State constitute an outstanding national resource, that water quality must be maintained and protected. For purposes of this paragraph, the following waters are considered outstanding national resources: those water bodies in national and state parks and wildlife refuges; public reserved lands; and those water bodies classified as Class AA and SA waters pursuant to section 465, subsection 1; section 465-B, subsection 1; and listed under sections 467, 468 and 469.

(3) The department may only issue a discharge license pursuant to section 414-A or approve water quality certification pursuant to the Federal Water Pollution Control Act, Section 401, Public Law 92-500, as amended, if the standards of classification of the water body and the requirements of this paragraph are met. The department may issue a discharge license or approve water quality certification for a project affecting a water body in which the standards of classification are not met if the project does not cause or contribute to the failure of the water body to meet the standards of classification.

(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.

(5) The department may only issue a discharge license pursuant to section 414-A or approve water quality certification pursuant to the United States Clean Water Act, Section 401, Public Law 92-500, as amended, which would result in lowering the existing quality of any water body after making a finding, following opportunity for public participation, that the action is necessary to achieve important economic or social benefits to the State and when the action is in conformance with subparagraph (3). That finding must be made following procedures established by rule of the board.