Friends of Merrymeeting Bay

P.O. Box 233, Richmond, ME 04357 www.fomb.org

FOMB Additional Comments on Pejepscot WQC

6/6/22
Via Email

Kyle Olcott
Hydropower Coordinator
Bureau of Land Resources
Maine Department of Environmental Protection
207 641 9012
Kyle.Olcott@maine.gov

Kyle,

We have received no response to our request of last night as to whether or not a draft Water Quality Certificate (WQC) or 401 has been issued for the Pejepscot Project and if it has, to please email it to me. This evening I heard from John Burrows at ASF that you and he spoke today and that a draft WQC was issued. He forwarded it to me late this evening and said you needed comments by noon tomorrow (later today)-6/7. To our knowledge, the draft was never posted on the DEP website or made available for public comment although our understanding was it was sent to the applicant, Brookfield/Topsham Hydro, and to DMR. John only heard about it through DMR. We submit these additional comments on the draft for the record.

On **Page 7**, Footnote 9 appears to clarify that despite the upcoming upgrade in water quality classification to Class B, it is the Department's intention to lock in the lower Class C requirements for the next 40 years or term of the license:

"9 On March 31, 2022, the Governor signed Public Law 2021 Chapter 551 into law. This law reclassifies certain waters of the state, including changing the classification for a portion of the lower Androscoggin River that includes the Pejepscot Project from Class C to Class B. The reclassification becomes effective on August 8, 2022, which is after the issuance date of this Water Quality Certification. Therefore, this Water Quality Certification applies Class C water quality standards to the Pejepscot Project."

As I made clear in yesterday's letter, we believe you have the discretion and flexibility to change the draft language to reflect the Class B upgrade, particularly as the bill has been signed and an upgrade through this segment is clearly the legislative, BEP and Governor's intent.

Just as on **Page 18** of the draft it is noted that a comprehensive approach needs to be taken for fish restoration at the project:

"…The goal of both [*NMFS/FWS]* agreements is to improve upstream and downstream passage and, as stated in the Applicant's correspondence with FERC submitting the Settlement Agreements to the federal licensing agency, "to establish a comprehensive approach to safe, timely, and effective passage for all species at the Project."

So too is it the intent of the management agencies that that a comprehensive approach be taken to all the upcoming FERC license renewals in the lower watershed. The following excerpt is the Abstract from NOAA Fisheries *Androscoggin River Watershed Comprehensive Plan for Diadromous Fishes, 2020.* https://www.greateratlantic.fisheries.noaa.gov/policyseries/index.php/GARPS/article/view/20/15

"In the next ten years, multiple hydropower projects in the lower Androscoggin River watershed will begin relicensing; several have already started. Licensing actions present a rare opportunity to develop a comprehensive watershed plan prioritizing diadromous fish restoration and conservation efforts. A comprehensive plan outlines a framework that balances restoration of diadromous fishes, the interests of diverse stakeholders, and the need for sustainable energy production. Additionally, Section 10(A) of the Federal Power Act requires consideration of non-power generation uses of a waterway, such that a new or successive license shall, "…be best adapted to a *comprehensive plan* for improving or developing a waterway or waterways…" This includes the protection, mitigation, and enhancement of fish, wildlife, and habitat. The *Androscoggin River Watershed Comprehensive Plan for Diadromous Fishes* (Androscoggin CP) builds off existing management actions in the *Recovery Plan for the Gulf of Maine Distinct Population Segment of Atlantic Salmon (Salmo salar)* and *Draft Androscoggin Fisheries Management Plan* to provide synergistic restoration benefits. The geographic scope of the Androscoggin CP is the Androscoggin River watershed with a restoration focus downstream from Lewiston Falls, the Little Androscoggin River, the Sabattus River, and the Little River. These areas align with critical habitat for Atlantic salmon and represent a practical portion of the historical diadromous fish habitat on which we intend to focus our efforts. The vision for the Androscoggin CP is to support development of terms and conditions in the hydropower licensing process, foster coordination among agencies and stakeholders, and support a collaborative restoration approach."

And DMR's 2017 *Draft Fisheries Management Plan for the Lower Androscoggin River, Little Androscoggin River and Sabattus River* states in the Introduction: https://www.auburnmaine.gov/CMSContent/Planning/Rivers_and_Hydropower/11_2017%20Docs/2017%20Draft%20Fisheries%20Management%20Plan%20for%20the%20Lower%20Andro,%20Little%20Andro%20and%20Sabattus%20Rivers.pdf

"The goal of this management plan is to protect, conserve, and enhance the fisheries resources of the Androscoggin River for their intrinsic, ecological, economic, recreational, scientific, and educational values and for use by the public."

With the comprehensive fishery management intent clearly articulated by fishery management agencies, it would be anathema to create a lower quality carve out, particularly in the middle of higher quality habitat. As you know, the entire project area constitutes Critical Habitat for endangered Atlantic salmon.

The draft makes a number of errors regarding current classification, low-balling it in regards to aquatic invertebrates below the dam and dissolved oxygen above and below the dam. Examples include:

"The Department input the study data into its linear discriminant model and the results of the model indicate that the area below the Project dam meets Class C aquatic life criteria." [**pg. 13**]

"The Applicant demonstrated through a Benthic Macroinvertebrate study and the Department determined using its linear discriminant model that the benthic community downstream of the Project meets Class C aquatic life criteria." [**pg. 13**]

"The Department, therefore, determines that flows provided by current and proposed Project operations provides sufficient water quality and sufficient water quantity to support the Class C designated use of habitat for fish and other aquatic life downstream of the Project." [**pg. 14**]

"Based on evidence in the record, the Department finds that upstream of the dam the Project meets Class C water quality standards under current and proposed operating conditions." [**pg. 21, 22**]

In all these cases, the water quality does not meet Class C water quality standards. Water quality *surpasses* not only Class C but also Class B standards. In fact for the tail race area below the dam, the modelled classification for aquatic life was Class A (Gomez & Sullivan, 2020 pg. 31).

Page 15 in the draft is but one place where the totally unsatisfactory nature of fish passage based on radio telemetry studies is detailed:

"The results of the upstream passage studies indicate that overall fish lift effectiveness was poor, with passage rates of 19.8% for river herring and 0% for American shad. The results of the downstream passage studies indicate that the downstream fish bypass is similarly ineffective,… Specifically, 22% of adult river herring, 31% of juvenile river herring, 9% of adult American shad, and 2% of adult American eels passed downstream of the dam via the downstream fish bypass. These study results demonstrate that the Project's existing upstream and downstream fish passage facilities do not provide safe, timely, and effective fish passage."

Despite the near total absence of decent and effective upstream and downstream fish passage (dare we say egregious?), the WQC will be issued because fish passage improvements under the Settlement Agreements are to be phased in over time. In contrast, ambient water quality conditions actually surpass those of the current Class C classification (surpassing even Class B) but the draft WQC holds the river hostage to Class C for the next 40 years. As Footnote 9 articulates:

"The reclassification becomes effective on August 8, 2022, which is after the issuance date of this Water Quality Certification. Therefore, this Water Quality Certification applies Class C water quality standards to the Pejepscot Project."

These two differing approaches are inconsistent and illogical. While the Department may be reticent to hold the licensee at present to a legal standard in statute but not technically effectuated for another month or so, actions taken vis a vis fish passage in the instant case (and in virtually all fish passage or relicensing proceedings) demonstrate a phased in approach is not only acceptable but is the norm. So, if the Department possibly feels on shaky legal ground requiring Class B compliance at time of WQC issuance, there is absolutely no good reason not to require as a condition in the WQC, that Class B be phased in by August 8, 2022 when the upgrade legislation becomes effectuated. This approach would be consistent with fish passage provisions and without the heavy lifting for goal attainment passage requirements have.

Thank you for your prompt attention and inclusion of our comments and attachments into the record.

Sincerely,

Ed Friedman, Chair
666-3372
edfomb@comcast.net

Enclosures (hyperlinked):
Androscoggin River Watershed Comprehensive Plan for Diadromous Fishes, 2020.
https://www.greateratlantic.fisheries.noaa.gov/policyseries/index.php/GARPS/article/view/20/15

C.C. Scott Sells, sls@sellslawfirm.com ; John Burrows jburrows@asfmaine.org ; Steve Heinz, heinz@maine.rr.com ; Sen. Stacey Brenner, Stacy.Brenner@Legislature.Maine.gov , Rep. Ralph Tucker, Ralph.Tucker@legislature.maine.gov ; Ruth Ann Burke, ruth.a.burke@maine.gov