



CONSERVATION LAW FOUNDATION

October 2, 2008

Ernest Hilton, Chair
Maine Board of Environmental Protection
17 State House Station
Augusta, ME 04333-0017

Re: Maine Reclassification Initiative

Dear Mr. Hilton,

On behalf of the Conservation Law Foundation (CLF), I am pleased to submit these comments to supplement our testimony from the Sept. 18, 2008 hearing regarding the Maine waters reclassification initiative. CLF is a nonprofit, member-supported organization with offices in five New England states, working to protect the region's people, natural resources and communities. CLF has been involved in protection of water quality in Maine for many years, including several cases involving the waters under consideration for reclassification today.

Introduction and Legal Standards

State water quality standards are at the heart of the federal Clean Water Act's mandate to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a). This is not simple precatory language: embedded within the Act and its implementing regulations (both state and federal), are a set of core principals that mandate protection of existing good water quality and continuous improvement of impaired waters. Two provisions in particular are integral to the Board of Environmental Protection's consideration of this reclassification initiative.

First is the "*Anti-Degradation*" rule, which requires that existing uses of water and water quality necessary to sustain those uses must be protected and maintained. Thus, both federal and state regulations expressly require that,

"[w]here existing water quality standards specify designated uses less than those which are presently being attained, the state *shall* revise its standards to reflect the uses actually

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CONSERVATION LAW FOUNDATION

being attained.” 40 C.F.R. § 131.10(i) (emphasis added). See also *id.* § 131.6(d); 38 M.R.S.A. § 464(4)(F)(4) (same).¹

The equally important corollary to this rule is that a state also may not downgrade a water segment’s classification if that would eliminate or impair an existing use.² See 40 C.F.R. § 131.10(h)(1).

The second key provision is a strict limitation on downgrading waters to remove designated (but not currently attained) uses. Thus, as a matter of law the Board may not recommend downgrading waters that fail to attain a designated use, where such use is attainable through implementation of effluent limitations or national performance standards.³ 40 C.F.R. § 131.10(h)(2). Furthermore, the Board may only recommend downgrading of a water segment if, after conducting a Use Attainability Analysis (UAA), the Board determines that attainment is not technically or physically possible, or that more stringent controls would result in “substantial and widespread economic and social impact.” *Id.* at § 131.10(g).

In summary, if a given water body currently meets a classification higher than its designated uses, the Board must recommend to the Legislature that the classification be upgraded. The Board may not recommend lowering a classification if attainment is possible through implementation of effluent standards or national performance standards, and may only recommend lowering standards after completion of a UAA.

Based on the above provisions and evidence that existing uses and water quality are higher than current water quality standards, CLF supports the proposed recommendations to upgrade water quality classifications of the following waters: the Basin & Narrows, Abbott Brook, Aunt Hanna Brook, the Kennebec River from the Shawmut Dam to Messalonskee Stream, tidal sections of the Kennebec River and its tributaries, Alder Stream and tributaries, Seboeis Stream and tributaries, Mattamiscontis Stream and tributaries, Souadabscook Stream and tributaries, Brown/Reed Brook, Crooked River at Scribner’s Mill, South River and tributaries, Little River and tributaries, Beaver Brook and tributaries, Gardner Brook and tributaries, Violette Stream and tributaries, Pemaquid River and tributaries, Ducktrap River and tributaries, the Grand Falls Flowage, the lower Androscoggin River, and the Aroostock River.

CLF also offers the following specific comments.

¹ “Existing uses” are defined as those uses actually attained in the water body on or after Nov. 28, 1978, whether or not they are included in the water quality standards. 40 C.F.R. § 131.3(e). “Designated uses,” in contrast, are those uses specified in water quality standards whether or not they are being attained. *Id.* at 131.3(f).

² Use of water for industrial processes is a legitimate designated use and can be considered in the reclassification initiative. Waste discharge and waste transport, however, are not legitimate uses under either federal or state law and may not be part of the Board’s consideration. 40 C.F.R. § 131.10(a); 38 M.R.S.A. § 464(4)(F)(1)(d).

³ “Attainable” means standards or uses that can be attained by imposition of either technical- or water-quality-based effluent limits or national performance standards. 40 C.F.R. § 131.10(d).

CONSERVATION LAW FOUNDATION

The Lower Androscoggin River:

CLF strongly disagrees with the Department's recommendation and rationale for not upgrading this river segment. The Department has stated that proponents must provide water quality data and modeling showing "the likelihood of attainment of Class B water quality criteria at maximum licensed loads." See Reclassification Memorandum at 29. This makes no logical, legal or economic sense. First, no one operates at maximum licensed loads; rather a large buffer is generally built into all permits to avoid violations. Thus, DEP is requesting an impossible and unnecessary showing.

Second, the Department's recommendation violates the legal standard in the Clean Water Act that a state shall revise its standards to reflect uses and water quality actually being attained. 40 C.F.R. § 131.10(i). 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).

Third, as many of the dischargers in this watershed have already recognized, water quality upgrades are generally good for surrounding communities. As has been shown over and over again, clean water is an economic boon. Examples abound throughout New England, including the recent revival of Boston Harbor, the Portland Waterfront, the Auburn Riverfront, and the resurgence of Merrymeeting Bay and the Kennebec River. The Androscoggin River deserves the same.

CLF believes that the data, including both dissolved oxygen levels and recreational uses, shows that existing uses in the lower Androscoggin have improved over time and that the river currently attains the higher bacteria and dissolved oxygen standards set forth in the Class B designation. As noted by the Department, it has no reason to question the data; indeed, it has relied upon data supplied by the proponent in prior reclassifications. Therefore, barring a showing that the data is invalid, the Board must recommend upgrading this section.

Aroostook River

The Department has made the same error regarding the Aroostook River. In this case, as noted in the reclassification memo, the Department has conclusively determined that existing water quality in the Aroostook River meets Class B standards. Therefore, as a matter of law the Board must recommend the upgrade: it cannot require a showing that the river also meets class B at maximum licensed loads. 40 C.F.R. § 131.10(i). See also *id.* §§ 131.6(d), 131.10(a); 38 M.R.S.A. § 464(4)(F). Nor, for the same reasons, can the Board or Department require a showing that the Aroostook River will also meet Class B under some future nutrient standard that has not yet been promulgated. If such a standard is promulgated prior to finalization of this process it may be considered – but, as noted before, only based on existing water quality and not upon hypothesized modeling at maximum licensed loads.

CONSERVATION LAW FOUNDATION

Kennebec River

For the same reasons, the Board must recommend upgrading water quality standards in the Kennebec from Class C to Class B for the entire section of river that is currently meeting Class B standards.

Long Creek

CLF strongly opposes the Department's recommendation to "clarify" that the classification of Long Creek should be lowered from Class B to Class C. Long Creek in Westbrook was designated as Class B in 1990 and has been treated as a Class B stream by the Department ever since. There is no ambiguity regarding the classification, the Department does not contend that Long Creek was mislabeled or that the original legislative classification was otherwise in error.

Even if an error was alleged, the Department cannot now change this longstanding classification via "clarification." There is no such process. By law, the Board may recommend downgrading a classification only if, after completion of a UAA, it is shown that it is not possible to attain water quality standards through implementation of effluent limitations or national performance standards. 40 C.F.R. §§ 131.10(g),(h). In this case, no attempt has yet been made to regulate the stormwater discharges that are contributing to non-attainment of standards in Long Creek. In fact, CLF recently filed a petition with EPA seeking a determination that the stormwater discharges that contribute to non-attainment – a mix of hotels, golf courses, office buildings and big box stores; most of which were built in the upper Long Creek watershed after the Class B designation went into law – must obtain MEPDES permits and must implement pollution controls. A decision from EPA is overdue and expected shortly.

As a practical matter, the state cannot complete a UAA until and unless it requires pollution controls and determines whether or not Class B is legally attainable. See 40 C.F.R. § 131.10(d). For this reason, CLF recommends that the Board reject the proposed lowering of standards on Long Creek and direct the Department to instead implement stormwater controls as needed to meet water quality standards.

Jepson Brook

Regarding this stream, we agree with the Department that there is no legal process to delist a water segment so that it is no longer deemed "waters of the US." The problem with the proposed recommendation to conduct a UAA is, as with Long Creek, the Department has never attempted to improve water quality through implementation of effluent controls on the stormwater discharges that are causing the violations, culvert daylighting, channel restoration, or any other strategy. See 40 C.F.R. §§ 131.10(g)(3),(4),(6). If DEP has never tried to remediate

CONSERVATION LAW FOUNDATION

the urban stormwater pollution and hydrologic modifications that contribute to non-attainment in Jepson Brook, how can it determine that attainment is not possible? See id. § 131.10(h)(2).

A more reasonable approach would be to direct the Department to first identify, through a TMDL process and/or its “residual designation authority,” 33 U.S.C. § 1342(p)(2)(E); 40 C.F.R. §§ 122.26(a)(9)(i)(C)-(D), those discharges that contribute to non-attainment and which must implement pollution controls and best management practices. Similarly, the Department should also analyze potential modifications to restore or improve hydrologic conditions. The UAA process should only be used as a measure of last resort.

Crooked Creek

It appears from public testimony that the sole objection to upgrading the classification of Crooked Creek to Class AA (free flowing Class A waters) is concern that the upgrade would prevent the proposed Scribner’s Mill reconstruction project. In regard to this objection, we note that the hydropower permitting criteria under the Maine Waterway Development and Conservation Act incorporates by reference the very same anti-degradation criteria explained above. See 38 M.R.S.A. § 636(8) (hydropower permits must be based upon a finding of “reasonable assurance that the project will not violate applicable water quality standards, including the [anti-degradation] provisions of section 464, subsection 4, paragraph F... This finding is required both for the proposed impoundment and any affected classified water bodies downstream of the proposed impoundment.”).⁴

Thus, whether considered as part of the hydropower permitting process or this reclassification process the same criteria apply. That is, under the anti-degradation rule, to the extent Crooked Creek currently meets the higher Class AA narrative standard of being an “outstanding natural resource that should be preserved because of its ecological, social, scenic and recreational importance,” 38 M.R.S.A. § 465(1), the department may not permit activities that will result in significant degradation of those existing uses, and must in fact recommend to the Legislature that the waters be reclassified to the next higher classification necessary to protect those existing uses. Id. at 464(4)(F).

For this reason, we ask the Board to move forward now with a recommendation to the Legislature to upgrade all of Crooked Creek to Class AA.

⁴ The Maine Waterway Development and Conservation Act’s, 38 M.R.S.A. § 636(8), very specific and express incorporation of the anti-degradation rule as a mandatory criterion for hydropower permitting necessarily trumps the general provisions in Maine’s water classification provisions, id. § 464(4)(h), regarding hydropower project impacts to habitat and aquatic life. See Fleet Nat. Bank v. Liberty, 845 A.2d 1183, 1186 (Me., 2004) (the principles of statutory construction favor specific statutes over general ones). Regardless, § 464(4)(h) is inapplicable here since it only authorizes limited impacts to “habitat and aquatic life.” It does not authorize changes to any other aspect of Maine’s water quality standards, such as the Class AA narrative standards protecting “waters which are outstanding natural resources and which should be preserved because of their ecological, social, scenic or recreational importance.” Id. at 465(1).

CONSERVATION LAW FOUNDATION

Conclusion

In closing, we wish to convey our appreciation for the opportunity to comment. CLF remains available to answer any further questions or assist as needed.

Sincerely,

A handwritten signature in black ink, reading "Stephen F. Hinchman". The signature is written in a cursive style with a large, prominent initial "S".

Stephen F. Hinchman,
Staff Attorney, for
Conservation Law Foundation