



Friends of Merrymeeting Bay
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River Advocates Win Androscoggin River Appeal!

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On Thursday April 6, [Friends of Merrymeeting Bay](http://www.fomb.org) (FOMB) and co-appellants including [Grow L+A](#); [Downeast Salmon Federation](#); [Friends of Sebago Lake](#) and [Native Fish Coalition, Maine Chapter](#) won their appeal to the Maine Board of Environmental Protection (BEP) Subject of the appeal was the Department of Environmental Protection's (DEP) approval of a 40 year Class C Water Quality Certification (WQC) for the Pejepscot dam located in Class B Androscoggin River waters.

The appeal was brought over the DEP's apparent failure to recognize the democratic process that had upgraded the lower Androscoggin River classification to Class B from the minimum Class C in the most recent state water quality Triennial Review process. Had the approved Certification gone unchallenged it would have become part of a 40 year Federal Energy Regulatory Commission (FERC) hydropower license, setting a dangerous and unpredictable precedent for future permitting in both the reclassified and upstream waters.

In a very unique timing situation, the federal deadline for issuance of a state WQC for the Pejepscot dam came due on June 8, 2022 between March 31, 2022 when the upgrade legislation was signed into law and August 8, 2022 - 90 days after the end of legislative session when all new laws, including the Class B upgrade, became effective. The Pejepscot Project dam is currently owned and operated by Topsham Hydro, a subsidiary of Brookfield, the Canadian company owning most of the hydropower dams in Maine.

Rather than inserting language into the June 8th WQC requiring compliance with Class B beginning on its August 8th effective date as FOMB had requested during DEP's comment period, the new DEP hydropower coordinator specifically stated that despite the intended classification upgrade; by DEP rule, the Pejepscot Project need only meet and comply with the old Class C requirements for the new 40 year term of their FERC license renewal.¹ See the [Summer 2022](#) issue of FOMB's Merrymeeting News for background on this.

In the FERC dam licensing process, WQC's provide the only opportunity for states to certify dam owners meet current state water quality classifications and to insert any conditions, present or future, particular to that project, state and waterway. Often, in addition to the numeric and narrative standards unique to each waterway class, these involve present or future fish passage requirements. On approval state WQC's then become part of the FERC license. DEP has nearly unlimited discretion in setting WQC conditions and the BEP typically defers to the DEP's recommendations.

Just prior to last Thursday's BEP hearing on the appeal, the Board issued a draft Findings of Fact and Proposed BEP Order recognizing Class B conditions were and are being met in the project area from just below

Worumbo dam to below Pejepscot dam. However, “*their continued inclusion of Class C language in the Order (including that Class C conditions would apply to the Project) without any clarifying language made for a very confusing document,*” said Scott Sells, attorney for the appellants. “*The ambiguity of which classification applies for permits, licenses or certifications in the lower Andro going forward would also, at a minimum, open the door for future license or permit applicants to challenge what discharge or other requirements they are to be held to.*”

In his oral arguments at Thursday’s hearing, Attorney Sells successfully argued for the insertion of clarifying language into the Board Order, that Class B standards are not just being **met**, but actually currently **apply** to the Pejepscot Project Area.ⁱⁱ The Board Order gets attached to the WQC and takes precedence over the initial WQC language because it comes from the Board, not Department and has a more current date of issuance.

“*On one hand this whole effort was an unnecessary huge waste of time, money and resources because the classification change, which everyone knew about and the Board had initially recommended, should have been accounted for by the DEP prior to WQC issuance.*” said Ed Friedman, Friends of Merrymeeting Bay Chair “*On the other hand, **without our appeal**, virtually the entire upgrade area from Worumbo dam to Pleasant Point in the Bay would have continued to be subject and victim to the argument that in fact Class C (and not the higher Class B) limitations apply for the next 40 years*” Friedman added.

If that were the case, any degradation that might occur would be measured from Class C (5 parts per million [ppm] dissolved oxygen [DO] minimum) instead of Class B (7ppm minimum DO). While this may seem like a small difference, it has enormous significance from a compliance and water quality standpoint.

Peter Rubins, river coordinator for Grow L+A, FOMB’s primary partner in the upgrade effort noted “*Anyone who has followed or participated in the Triennial Review process knows how difficult it is to get a water segment upgraded and this oversight would have undermined a lot of hard work and the entire legislative process.*” Grow L+A hopes to extend the Class B upgrade upstream at least to Lewiston Falls.

Maintaining the higher DO classification levels makes a significant positive difference to aquatic life in the river. The entire project area is included in a larger reach classified by USFWS as Critical Habitat for endangered Atlantic salmon.

ⁱ “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.**” [WQC footnote 9, pg. 7]

ⁱⁱ B. Water Quality Standards in Effect Since August 8, 2022

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 of a portion of the lower Androscoggin River that includes the Pejepscot Project from Class C to Class B. The reclassification became effective on August 8, 2022, **and, therefore, Class B standards currently apply.** [Board Order On Appeal. 4/6/23, pg. 7]

Friends of Merrymeeting Bay utilizes research, education, advocacy, and land conservation to preserve, protect, and improve the unique ecosystems of Merrymeeting Bay and Gulf of Maine.