Friends of Merrymeeting Bay
P.O. Box 233
Richmond, ME 04357
www.friendsofmerrymeetingbay.org

Testimony of Ed Friedman, Chair

Friends of Merrymeeting Bay
Before the Environment and Natural Resources Committee
In Support of L.D. 154: An Act to Change the Classification of the Lower Androscoggin River
February 8, 2011

Senator Saviello, Representative Hamper and members of the Committee,

Too long has the gorgeous Androscoggin remained the poor stepchild of Maine rivers. Friends of Merrymeeting Bay data collected since 1999 and intensively in 2009 and 2010 by volunteers trained to EPA and DEP standards demonstrate the lower river attains Class B standards and by law must be upgraded from Class C.

38 M.R.S.A. § 464 (4) (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 [assuming an upgrade proposal comes via the Board-brackets mine] shall recommend to the Legislature that water be reclassified in the next higher classification."***

Even if the Class B standards were not quite met, DEP guidelines for submitting goal-based upgrade proposals state:

"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."

In the past DEP has said they can't upgrade river classifications because under worse case scenarios, of maximum licensed loads in low flow, high heat conditions expected once in 10 years (7Q10)] proposed Class B [in this case] standards might be violated. At the same time the Department has said they can't raise permit standards to meet actual conditions because receiving waters meet the current classification levels of Class C.

This condition, a "Catch 22", quite clearly violates the intent of both the Clean Water Act and NPDES and creates an artificial ceiling on water quality improvement. In fact, reclassification and permitting **must** be used together to improve water quality. 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".**

The Department unfortunately continues to confuse the reclassification issue by citing re-licensing statute [§464 (4) (D)] when classification statute [§464 (4) (F) (4)] controls. It is classification that is the horse before the cart. If the Committee continues to put the Department cart first, the cart will never move. We will never get to where we were to be years ago. The rivers and communities will never improve. Another way to imagine this is if DO readings were for example always above the Class B threshold of 7, say 7.2. Without a doubt §464 (4) (F) (4) is the controlling statute and would apply, and yet there could still be

some days when due to some combination of weather, flow and discharge, DO levels could dip below 7 and dischargers would technically be in violation of their license. In order for this not to happen, at least using the current model of inflated license limits, actual classification conditions might have to have such a large buffer built in the water would need to be AA to have enough reserve to sustain Class B on a bad day.

An upgrade would be impossible and this is clearly not the intent of the law. In fact the Department has recommended aspirational upgrades from time to time including on the lower Kennebec in 2002 when they used our data. It hasn't happened on the Androscoggin yet in large part because of the false premise that even if pulp mills played a *major* role in conditions this far downstream that several hundred mill-related jobs somehow trump tens of thousands of other jobs in communities along the river. By law, relicensing statute and 7Q10 modeling are not part of the reclassification equation. This will be our fourth year before this Committee on the upgrade issue and our nexus of science and law just keep on coming to the same conclusion-an upgrade is required.

Normally the upgrade process goes through the BEP before coming to this committee. This is in large part due to the number of proposals submitted and the filtering service the Board provides you. In this case, this committee has heard far more about the lower Androscoggin than has the Board and it is only the legislature that can classify and reclassify rivers. You can refer this back to the Board and ask them to expedite-they will still need a 45 day notice period before a public hearing and then subsequent deliberations or you can just as legitimately consider in full, the bill before you now.

Will you take the bull by the horns and finally be the Committee to consider and vote ought to pass on this bill to upgrade the lower Androscoggin River from Worumbo Dam in Lisbon Falls to its mouth in Merrymeeting Bay? This can be a real boost for the river and one supported by communities along it. It will be good for fish and for the economy and good for Maine. Thirty-nine years since Sen. Muskie's amendments to the Clean Water Act seems long enough to wait, particularly when the Act actually set a deadline of 1983 to eliminate discharges into our rivers.

Thank you very much.