

collectively, they have a strong interest in the health and well-being of the Crooked River, as set forth below:

- NRCM is a nonprofit membership organization committed to protecting, restoring, and conserving Maine's environment through, among other activities, working to improve the quality of Maine's rivers;
- Maine Rivers is a nonprofit membership organization with a mission to protect, restore, and enhance the health and vitality of Maine's rivers;
- Sebago Lake Anglers Association is a nonprofit educational organization organized to, *inter alia*, promote, protect, and enhance the quality and longevity of the ecosystem of the Sebago Lake Region watershed with a focus on the indigenous landlocked salmon species;
- Friends of the Presumpscot is a public interest organization with the mission of restoring and protecting the water quality, wildlife habitat, recreational opportunities, and shorelands of the Presumpscot River;
- Lakes Environmental Association is a public interest organization dedicated to preserving and restoring high water quality and the traditional character of Maine's lakes, watersheds, and related natural resources;
- The Maine Congress of Lake Associations is a nonprofit organization devoted to the protection and preservation of Maine's lakes;
- Maine Council of Trout Unlimited is a nonprofit organization charged with a mission of conserving, protecting and restoring Maine's trout and salmon fisheries and their watersheds;

- Western Foothills Land Trust was founded by citizens committed to land and natural resource protection in the greater Oxford Hills area of Western Maine; and
- Donald Gossett, Jr., Nicholas Moulton, Greg Murrer, and Jonathan Peterson are concerned citizens and avid fisherman dedicated to the restoration and preservation of Maine’s waterways.

The Public Interest *Amici* share a common interest in the protection of the Crooked River from environmental degradation. In pursuit of their common missions to preserve and improve the quality of Maine’s river resources, the Public Interest *Amici* have sought leave to file this *amicus* brief to provide needed context for the Board’s decision—correctly made—to deny SMPI a permit under the Maine Waterway Development and Conservation Act (the “Act”), 38 M.R.S. §§ 630–37, to erect a dam on the Crooked River, one of Maine’s most pristine waterways, a source of drinking water for nearly one–sixth of the State’s population, a valuable spawning ground for indigenous landlocked salmon, and a vibrant home to recreational fishing.

ARGUMENT

While mindful of the history of Scribner’s Mill, the Public Interest *Amici* write in support of the Board’s decision to make plain that this is not a close case. As the Board rightly concluded, SMPI failed to prove that a dam on the Crooked River satisfied the enumerated statutory criteria under the Act. Of special concern to the Public Interest *Amici* is the fact that the record is clear that any potential economic advantages of the SMPI dam are significantly *less* than “the direct and cumulative adverse impacts over the life of the project,” including “significant ... harm to fish and wildlife resources,” 38 M.R.S. § 636(7)(B), and that there is *not* a “reasonable assurance that the project will not violate applicable state water quality standards.” 38 M.R.S. § 636(8). Under such circumstances, the Board may not approve a permit for a new

dam under the Act, and was right not to do so in this instance. 38 M.R.S. § 636 (“The department shall approve a project when it finds that the applicant has demonstrated that the following criteria,” including subsections (7) and (8), “have been met.”). Accordingly, for at least these reasons, as well as the reasons cited by the Board in its decision and brief in this case, the Board’s decision to deny the permit application was not only correct, but required. The Public Interest *Amici* write to highlight three salient points.

The Environmental Stakes Are High. The Crooked River is one of Maine’s most precious waterways. A recent amendment to Maine’s water quality laws establishes “the Crooked River and its tributaries, except as otherwise provided, excluding existing impoundments” as a Class AA waterway. 38 M.R.S. § 467(9)(B)(2) (2009). Prior to that amendment, the entirety of the Crooked River except for the area around Scribner’s Mill was classified AA, with the area around the mill designated a Class A waterway. Class AA is the highest water quality classification in the State, and applies “to waters which are outstanding natural resources and which should be preserved because of their ecological, social, scenic, and recreational importance.” 38 M.R.S. § 465(1). “Class AA waters must be of such quality that they are suitable for the designated uses of drinking water after disinfection, fishing, agriculture, recreation in and on the water, navigation and as habitat for fish and other aquatic life. The habitat must be characterized as free-flowing and natural.” 38 M.R.S. § 465(1)(A).

Were SMPI to file its application today, the application would be denied out of hand because dams that impede the free and natural flow of a Class AA water may not be constructed. While this fact does not render SMPI’s application invalid on its face, it underscores the environmental significance of the Crooked River to the State and its citizens as one of Maine’s most pristine waterways, which the legislature has committed the Department and the Board to

protect. As the Board noted in its decision, the Crooked River is the primary spawning tributary for Sebago Lake landlocked salmon, one of only four indigenous populations of landlocked salmon in the State. The proposed SMPI dam would adversely affect the landlocked salmon population, diminishing a native resource of both intrinsic value and economic and recreational value to sportsmen and the sport fishing industry. Even SMPI admits as much. *See* Petitioner’s Rule 80C Brief (“Petitioner’s Brief”) at 14 (acknowledging that even under favorable estimates, erection of a dam will diminish fish passage and reduce salmon habitat).

In addition, the Crooked River is the primary tributary to Sebago Lake, which is the drinking water source for approximately 200,000 Maine residents. The Public Interest *Amici* echo the comments of the Portland Water District in its January 24, 2008, letter to the Department opposing the dam application (Agency Record on Appeal, Doc. No. 150 at 29):

It is well-documented that impounding free-flowing river water has adverse impacts on river system function, ecology and water quality. Studies have shown that dams alter river morphology, change sediment and material transport, increase bank erosion, alter insect diversity and communities, impact fish migration and may have other consequences that are uncertain (Dr. Bednark, *Ecology of Dam Removal: A Summary of Benefits and Impacts*, for example). In part for these reasons, in recent years dams have been removed from the Kennebec and Presumpscot Rivers. The mill at Scribner’s Mills has historical significance and we understand the desire on the part of the owners to restore the site. However, we urge you to deny the application to dam the river as part of this restoration. We believe the potential cost to the Crooked River, Sebago Lake and the 200,000 water consumers exceeds the historic value of the dam.

The Public Interest Is Clear. Given the tremendous value of the Crooked River as a natural resource—as a habitat for landlocked salmon, a recreational fishing area, and a source of public drinking water—it is little wonder that public representatives of all stripes, including conservationists (NRCM, Maine Rivers, Friends of the Presumpscot, Lakes Environmental Association, Sebago Lake Anglers Association, and Maine Congress of Lake Associations),

sportsmen (Trout Unlimited, Waterford Fish and Game, and the Sebago Lake Anglers Association), and municipal agencies (the Portland Water District), agreed in their comments to the Department that the environmental harms to the Crooked River from the erection of the dam proposed by SMPI are significant, and significantly outweigh any potential economic benefit from the dam itself. The broad spectrum of public opinion is that the historic value of Scribner's Mill—which can and should be preserved by other means than damming the Crooked River—should not be advanced at the expense of one of Maine's cleanest rivers, home to one of Maine's unique indigenous landlocked salmon populations and one of Maine's finest fresh water fisheries.

The Board's Decision Was Correct. The Act authorizes the Board to approve a permit only if the applicant has demonstrated that it satisfies each of eight separate criteria. 38 M.R.S. § 636. If the applicant fails to meet its burden of proof on any one of these criteria, the application cannot be approved. The Board found that SMPI failed to satisfy four of these criteria—public benefits, environmental mitigation, environmental and energy considerations, and water quality, 38 M.R.S. § 636(3) & (6)–(8)—and so properly denied the application. Even if SMPI failed to satisfy but one of these criteria, *e.g.*, failed to provide “reasonable assurance that the project will not violate applicable state water quality standards,” the Board would be required to deny the application.

Despite SMPI's hyperbolic arguments that the Department and the Board have been hijacked by the Maine Department of Inland Fisheries & Wildlife, and that the Board used an improper alternative use analysis in balancing the environmental and energy considerations, SMPI offers no affirmative argument or proof that the dam project will provide reasonable

assurance that the project will not violate applicable state water quality standards. *See* 38 M.R.S. § 636(8).

With respect to the public benefit, the weighing of energy benefits versus environmental harms, and the economic benefit of the proposed dam, SMPI suggests that the Board employed an improper “alternatives analysis” by considering whether SMPI’s goals could be achieved through any feasible alternatives to the erection of a dam. SMPI simply misreads the Board’s decision. SMPI cannot dispute the evidence of harm to the landlocked salmon population, an intrinsically valuable natural resource and a major recreational resource. The Board found, and SMPI does not dispute, that the only value of the proposed dam is as one feature of an historic resource (*i.e.* a restored 19th century sawmill). It would not yield any of the other benefits listed in 38 M.R.S. § 636(7) (soil stability and coastal or inland wetlands, fish and wildlife resources, public rights of access, flood control, and hydroelectric energy generation). *See* Board Decision at 5 n.1. In order to measure the value of the proposed *dam*, the Board must determine whether the benefits claimed for the project “would not result but for the project.” 06–696 CMR Ch. 450, § 5(A)(3). Thus, the Board did not err in looking at evidence that the historic and economic value of Scribner’s Mill was not wholly or largely dependent on the erection of a new dam on the Crooked River. Rather, the dam was incidental to SMPI’s realization of that value.

In sum, the Board was right to conclude that the economic benefits of the proposed dam were speculative, while the environmental harms to a vital natural and recreational resource—the indigenous population of landlocked salmon—were certain, and that, regardless, SMPI could not demonstrate that its project would not violate the rigorous water quality standards applicable to the Crooked River. Any one of these reasons required the Board to reject SMPI’s application; together, they more than require that result.

CONCLUSION

For the reasons set forth above, and those set forth by the Board in its decision and brief, the Public Interest *Amici* respectfully request that the Court deny SMPI's Rule 80C petition.

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Respectfully submitted,

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