IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MAINE

Friends of Merrymeeting Bay, Plaintiff, v. United States Environmental Protection Agency, Lee Zeldin, in his official capacity as the Administrator of the U.S. Environmental Protection Agency, Maine Board of Environmental Protection, Maine Department of Environmental Protection, and Malanie Loyzim in her official capacity as Commissioner of the Maine Department of Environmental Protection, Defendants.	Case No. 2:26-cv-00316-SDN

FEDERAL DEFENDANTS' MOTION TO DISMISS COUNTS 1 AND 2 OF PLAINTIFF'S FIRST AMENDED COMPLAINT

TABLE OF CONTENTS

Table of Contents i

Table of Authorities iii

Table of Exhibits vii

Introduction 1

Background 2

I. Statutory and Regulatory Background 2

A. Setting Water Quality Standards 2

B. Citizen Suits under the Clean Water Act 4

II. Factual Background 5

Standard of Review 7

Argument 7

I. This Court should dismiss Plaintiff's citizen suit cause of action for lack of subject matter jurisdiction. 8

A. EPA has no mandatory duty to review Maine's Antidegradation Program Guidance because it is not a water quality standard. 9

B. EPA has no mandatory duty to review Maine's Antidegradation Program Guidance because Plaintiff does not allege that it was submitted to EPA. 11

C. Because EPA did not act on Maine's Antidegradation Program Guidance, EPA has no mandatory duty to promulgate federal antidegradation implementation methods. 12

II. The Court should dismiss Plaintiff's APA causes of action for lack of subject matter jurisdiction, or failure to state a claim upon which relief can be granted. 13

A. Plaintiff lacks standing to challenge EPA's approval because EPA did not act on the Contested Segment. 13

B. Alternatively, Plaintiff fails to state a valid claim upon which relief can be granted because EPA's inaction on the Contested Segment does not constitute a final agency action. 15

C. Plaintiff cannot demonstrate that the Act requires EPA to promulgate federal standards in this case, or direct Maine to promulgate new or revised standards. 16

Conclusion 19

TABLE OF AUTHORITIES

Cases

Ashcroft v. Iqbal,
556 U.S. 662 (2009) 7, 17

Bennett v. Spear,
520 U.S. 154 (1997) 15

City of Dover v. EPA,
956 F. Supp. 2d 272 (D.D.C. 2013) 9, 10

Conservation L. Found., Inc. v. Pruitt,
881 F.3d 24 (1st Cir. 2018) 5, 8, 13

Davis v. FEC,
554 U.S. 724 (2008) 13

Fla. Pub. Int. Rsch. Grp. Citizen Lobby, Inc. v. EPA,
386 F.3d 1070 (11th Cir. 2004) 10

Friends of Merrymeeting Bay v. Olsen,
839 F. Supp. 2d 366 (D. Me. 2012) 10

Haley v. City of Boston,
657 F.3d 39 (1st Cir. 2011) 7

Katz v. Pershing, LLC,
672 F.3d 64 (1st Cir. 2012) 13

Lujan v. Defs. of Wildlife,
504 U.S. 555 (1992) 13

Luminant Generation Co., LLC v. EPA,
675 F.3d 917 (5th Cir. 2012) 10

Maine v. Thomas,
874 F.2d 883 (1st Cir. 1989) 11

Miccosukee Tribe of Indians of Fla. v. EPA,
105 F.3d 599 (11th Cir. 1997) 10

Mo. Coal. for the Env't Found. v. Jackson,
853 F. Supp. 2d 903 (W.D. Mo. 2012) 9, 16

Mo. Coal. for the Env't Found. v. Wheeler,
No. 2:19-cv-04215, 2021 WL 2211446 (W.D. Mo., June 1, 2021) 10

Nat'l Wildlife Fed'n v. Browner,
127 F.3d 1126 (D.C. Cir. 1997) 4

Norton v. S. Utah Wilderness All.,
542 U.S. 55 (2004) 11

NRDC v. EPA,
16 F.3d 1395 (4th Cir. 1993) 3

Nw. Env't Advocs. v. EPA,
855 F. Supp. 2d 1199 (D. Or. 2012) 10

PUD No. 1 of Jefferson Cnty. v. Wash. Dep't of Ecology,
511 U.S. 700 (1994) 3

R.I. Dep't of Env't Mgmt. v. United States,
304 F.3d 31 (1st Cir. 2002) 15

Sierra Club v. Thomas,
828 F.2d 783 (D.C. Cir. 1987) 11

U.S. Dep't of Energy v. Ohio,
503 U.S. 607 (1992) 11, 12

Woo v. Spackman,
988 F.3d 47 (1st Cir. 2021) 7

Statutes

5 U.S.C. § 704 15

5 U.S.C. § 706(2) 13, 14

33 U.S.C. § 1251(a)(2) 3

33 U.S.C. § 1251(b) 3, 10

33 U.S.C. § 1313 ..... 1, 9

33 U.S.C. § 1313(b) 3

33 U.S.C. § 1313(c) 3

33 U.S.C. § 1313(c)(1) 1, 3

33 U.S.C. § 1313(c)(2) 3

33 U.S.C. § 1313(c)(2)(A) 1, 2, 3

33 U.S.C. § 1313(c)(3) 1, 3, 4, 9, 10, 11, 16, 18

33 U.S.C. § 1313(c)(4) 4, 18

33 U.S.C. § 1313(c)(4)(A) 4, 17, 18

33 U.S.C. § 1313(c)(4)(B) 4, 17

33 U.S.C. § 1313(d)(4)(B) 3

33 U.S.C. § 1365(a) 5

33 U.S.C. § 1365(a)(2) 4, 11

Federal Rules of Civil Procedure

Fed. R. Civ. P. 12(b)(1) 7

Fed. R. Civ. P. 12(b)(6) 7

Code of Federal Regulations

40 C.F.R. § 131.10 2

40 C.F.R. § 131.11 2

40 C.F.R. § 131.12 3

40 C.F.R. § 131.12(b) 3

40 C.F.R. § 131.20 3

40 C.F.R. § 131.21 ..... 1, 3

40 C.F.R. § 131.21(a) 9

40 C.F.R. § 131.21(a)(2) 4, 18

40 C.F.R. § 131.21(c) 4

40 C.F.R. § 131.22(a) 4, 17, 18

40 C.F.R. § 131.22(b) 4, 17

40 C.F.R. § 131.3(i) 9

40 C.F.R. § 131.5(b) 9

Federal Register

80 Fed. Reg. 51020 (Aug. 21, 2015)..... 3, 9, 18

State Statutes

Me. Rev. Stat. Ann. tit 38, §§ 464-65 5

Me. Rev. Stat. Ann. tit 38, § 464 (2024)..... 5

Me. Rev. Stat. Ann. tit 38, § 465 (2024)..... 5

Me. Rev. Stat. Ann. tit 38, § 467 6

TABLE OF EXHIBITS

Exhibit 1: An Act To Update Certain Water Quality Standards and To Reclassify Certain Waters of the State, Me. Legis. 130-2, February 10, 2022 ("Maine 2022 Adoption").

Exhibit 2: Environmental Protection Agency, Review and Action on the State of Maine's Surface Water Quality Standard Revision contained in P.L. 2021, Ch. 551, November 16, 2022 ("EPA Approval").

Exhibit 3: Maine Department of Environmental Protection, Waste Discharge Program Guidance (2001) ("Maine Antidegradation Program Guidance").

INTRODUCTION

Under the Clean Water Act's ("CWA" or "Act") cooperative-federalism framework, States first adopt under State law water quality standards for the waters within their borders, then submit them to the U.S. Environmental Protection Agency ("EPA") for the agency's review of those standards to ensure that they comply with the Act's requirements. 33 U.S.C. § 1313. If EPA finds the standards comply with the Act's requirement, EPA approves them and they become effective under the CWA. If EPA finds the standards do not comply with the Act's requirements, EPA disapproves them and they do not become effective under the CWA.

States must hold public hearings at least once every three years (i.e., "triennially") to reassess their standards and, as appropriate, modify and adopt water quality standards under State law and then submit such newly adopted standards to EPA for review. *Id.* § 1313(c)(1). Whenever a State decides to revise or adopt a new standard, that revised or new standard adopted by the State must be submitted to EPA for review and approval or disapproval. *Id.* § 1313(c)(2)(A). The Act provides EPA authority to review only those submitted standards that are revised or new. *Id.* § 1313(c)(3); 40 C.F.R. § 131.21.

In reassessing its water quality standards for its 2020-2022 Triennial Review, Maine revised several standards by upgrading the classification of various water segments to ensure greater protection, including one segment of the Androscoggin River. In accordance with the CWA, Maine submitted those revised standards to EPA in October 2022, and EPA reviewed Maine's revised standards and lawfully approved them in November 2022.

Plaintiff brings this lawsuit in an attempt to require Maine or EPA to upgrade a different, unchanged segment of the Androscoggin River. First Amended Compl., ECF No. 17 ("Compl."). Specific to EPA, Plaintiff alleges two causes of action. First, Plaintiff argues that EPA violated the CWA by failing to perform a mandatory duty to review Maine's uncodified method for

implementing one component of its water quality standards and to promulgate federal implementation methods. Second, Plaintiff argues that EPA violated the Administrative Procedure Act ("APA") by not acting on the separate, contested segment of the Androscoggin River, which Maine reviewed but did not revise or submit to the agency, and by not exercising its discretion to promulgate or direct Maine to promulgate new or revised standards for the contested segment.

Both causes of action warrant dismissal for lack of subject matter jurisdiction or failure to state a valid claim. The CWA does not impose a mandatory duty for EPA to review a State's uncodified implementation method, nor does it require EPA to promulgate a federal standard in this circumstance. Further, Plaintiff lacks standing to challenge EPA's approval under the APA and cannot establish that the CWA requires EPA to promulgate federal standards or direct Maine to promulgate new or revised standards. Thus, this Court should dismiss Plaintiff's claims against EPA (Counts 1 and 2).

BACKGROUND

I. Statutory and Regulatory Background

A. Setting Water Quality Standards

The CWA requires States to adopt water quality standards "to protect the public health or welfare, enhance the quality of water and serve the purposes of th[e] [Act]." 33 U.S.C. § 1313(c)(2)(A). The water quality standards define the water quality goals for a water body and consist principally of the following three components. *Id.* Designated uses specify the appropriate water uses of the water body to be achieved and protected (e.g., fishing or recreation). *Id.*; 40 C.F.R. § 131.10. Water quality criteria define the amounts of pollutants, in either numeric or narrative form, that the waters can contain without impairment of their designated uses. 33 U.S.C. § 1313 (c)(2)(A); 40 C.F.R. § 131.11. And antidegradation requirements are designed to protect

and maintain existing uses and waters whose quality exceeds the levels necessary to support the uses specified in the CWA. 33 U.S.C. §§ 1251(a)(2), 1313(d)(4)(B); 40 C.F.R. § 131.12. EPA's regulations require States to develop antidegradation implementation methods, but States have discretion whether to promulgate such methods as regulations. 40 C.F.R. § 131.12(b); *see Water Quality Standards Regulatory Revisions*, 80 Fed. Reg. 51020, 51034 (Aug. 21, 2015).

States have primary authority for setting water quality standards. 33 U.S.C. §§ 1251(b), 1313(b), (c); *PUD No. 1 of Jefferson Cnty. v. Wash. Dep't of Ecology*, 511 U.S. 700, 704 (1994). EPA's role is largely one of oversight, in which it reviews a State's revised or new standards after they are adopted and submitted to EPA. 33 U.S.C. § 1313(c); *see also NRDC v. EPA*, 16 F.3d 1395, 1399 (4th Cir. 1993) (recognizing the same).

Under this framework, once States have adopted water quality standards, they must, at least once every three years, hold public hearings for the purpose of reviewing their existing water quality standards to determine if "revised or new" standards are necessary. 33 U.S.C. § 1313(c)(1), (2). This process is known as the "Triennial Review." Results of the Triennial Review "shall be made available to the [EPA] Administrator." 33 U.S.C. § 1313(c)(1); *see also* 40 C.F.R. § 131.20.

If the State decides to revise or adopt a new water quality standard as a result of the Triennial Review process, those revised or new water quality standards adopted by the State must be submitted to EPA for review and approval. 33 U.S.C. § 1313(c)(2)(A). The CWA provides EPA authority to review only those standards that are revised or new. *Id.* § 1313(c)(2)(A), (c)(3); 40 C.F.R. § 131.21.

Upon reviewing the revised or new water quality standards, EPA must determine whether the State's standards are consistent with the CWA's requirements and EPA's regulations. If EPA determines that they are, then EPA must approve them and the State's standards become effective

under the CWA. 33 U.S.C. § 1313(c)(3); 40 C.F.R. § 131.21(c). If EPA determines that the revised or new standards are not consistent with the CWA's requirements and EPA's regulations, then EPA must disapprove them, notify the State, and specify the changes needed. 33 U.S.C. § 1313(c)(3); 40 C.F.R. § 131.21(a)(2). Should the State fail to timely make those changes, then EPA must propose federal standards for the relevant waters in that State and finalize them, unless the State adopts, and EPA approves, acceptable standards in the interim. 33 U.S.C. § 1313(c)(4)(A); 40 C.F.R. § 131.22(a).

In addition to granting EPA authority to review new and revised water quality standards submitted by a State, the CWA also grants EPA discretion to *sua sponte* promulgate water quality standards for a State "in any case where the Administrator determines that a revised or new standard is necessary to meet the requirements [of the Act]" (an "Administrator's Determination"). 33 U.S.C. § 1313(c)(4)(B); 40 C.F.R. § 131.22(b); *see also Nat'l Wildlife Fed'n v. Browner*, 127 F.3d 1126, 1130 (D.C. Cir. 1997) (recognizing that EPA has discretionary authority to make such a Determination). To exercise this discretionary authority, EPA must first make an Administrator's Determination. *See Nat'l Wildlife Fed'n*, 127 F.3d at 1131. Then, EPA must propose a standard that meets the Act's requirements and finalize such standard, unless the State adopts, and EPA approves, an acceptable standard in the interim. 33 U.S.C. § 1313(c)(4); 40 C.F.R. § 131.22(a).

B. Citizen Suits under the Clean Water Act

The CWA allows any citizen with Article III standing to bring suit in district court against the Administrator for alleged failure to perform any act or duty under the Act "which is not discretionary with the Administrator." 33 U.S.C. § 1365(a)(2). If the plaintiff demonstrates that a mandatory duty exists and that EPA has failed to perform it, then the appropriate remedy is for

a court "to order the Administrator to perform such act or duty." *Id.* § 1365(a). If the plaintiff fails to demonstrate that a mandatory duty exists, then Congress has not waived the United States' sovereign immunity from the claim, and the claim must be dismissed for lack of subject matter jurisdiction. *See Conservation L. Found., Inc. v. Pruitt*, 881 F.3d 24, 28 (1st Cir. 2018).

II. Factual Background[1]

In 1985, Maine[2] adopted, and EPA approved, a classification system for the designated uses of its waters, including the Androscoggin River. Me. Rev. Stat. Ann. tit 38, §§ 464, 465 (2024); *see also* Compl. ¶ 50. There are four classifications (AA, A, B, and C) with AA being the most protective classification warranting the most stringent pollutant limits and C being the least protective. Me. Rev. Stat. Ann. tit 38, § 465; *see also* Compl. ¶ 51. To protect these classes of waters, Maine adopted, and EPA approved, water quality criteria and an antidegradation policy. Me. Rev. Stat. Ann. tit 38, §§ 464-65; *see also* Compl. ¶¶ 52-54; EPA, Water Quality Standards Regulations: Maine (Oct. 13, 2026), https://perma.cc/ZRH6-BMKV (identifying Maine's codified statutes as those that EPA approved). In addition to the state-adopted and EPA-approved antidegradation policy, Maine provided an "uncodified . . . interpretation" of its policy in a 2001 guidance document referred to as the "Antidegradation Program Guidance" and identified as an antidegradation implementation method. *See* Compl. ¶¶ 65, 85.

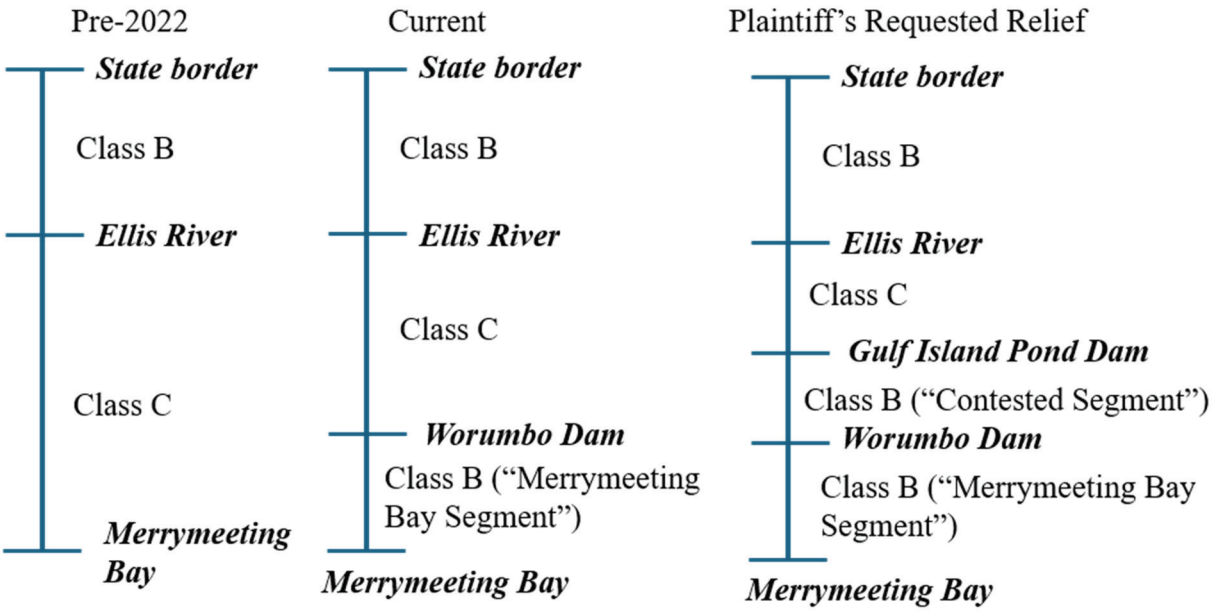
In 1989, Maine adopted two classifications for the Androscoggin River—classifying the upper portion as Class B and the lower portion as Class C—which EPA then approved. *See* Ex.

[1] EPA accepts the factual allegations in the Complaint (ECF No. 17) as true solely for the purposes of this motion.

[2] Maine's water quality standards are prepared by the Maine Department of Environmental Protection and are enacted by the Maine Board of Environmental Protection. *See* Compl. ¶¶ 17, 18. These entities will be jointly referred to as "Maine."

1, Maine 2022 Adoption at 5 (referred to in Compl. ¶ 74); *see also* EPA, Water Quality Standards Regulations: Maine (identifying Maine's codified statute, Me. Rev. Stat. Ann. tit 38, § 467, as one that EPA approved). During Maine's 2020-2022 Triennial Review, Maine upgraded a segment of the lower portion of the Androscoggin River (the "Merrymeeting Bay Segment") from Class C to Class B but did not revise the standards for any other segment of the River. Maine 2022 Adoption at 5; Compl. ¶¶ 57, 73. Maine then submitted its revised water quality standards, including the upgraded Merrymeeting Bay Segment, to EPA for review. *See* Ex. 2, EPA Approval (referred to in Compl. ¶ 75). As relevant here, EPA approved the upgraded classification of the Merrymeeting Bay Segment because "it affords greater protections to th[is] section of the Androscoggin River." *Id.* at 10.

Nearly four years later, Plaintiff sued EPA and Maine seeking to have an unchanged segment of the Androscoggin River upgraded to Class B (the "Contested Segment"). *See generally* Compl. An abstract depiction below shows the revision made during Maine's Triennial and Plaintiff's challenge.



As to EPA, Plaintiff pleads two distinct causes of action. First, Plaintiff argues that EPA violated the CWA for failing to perform a mandatory duty to (1) review Maine's uncodified antidegradation implementation method and (2) promulgate federal antidegradation implementation methods for Maine's waters. *Id.* ¶ 85. Second, Plaintiff argues that EPA violated the CWA and the APA by (a) failing to act on the Contested Segment, where no revisions were made, and (b) not exercising its discretion to promulgate or direct Maine to promulgate a new or revised standard for the Contested Segment. *Id.* ¶ 83.

STANDARD OF REVIEW

Plaintiff bears the burden of establishing this Court's subject matter jurisdiction over its claims. *Woo v. Spackman*, 988 F.3d 47, 53 (1st Cir. 2021). In the absence of plausible allegations sufficient to demonstrate that jurisdiction exists, this Court must dismiss the complaint. *Id.*; Fed. R. Civ. P. 12(b)(1).

Plaintiff also bears the burden of pleading each element of a claim on the merits. Fed. R. Civ. P. 12(b)(6). To pass muster, a complaint must contain "sufficient factual matter" to "state a claim to relief that is plausible on its face." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (citation modified). Although the Court accepts as true the factual allegations contained in the complaint, this tenet does not apply to "[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements." *Id.* And the Court may "augment these facts and inferences with . . . documents incorporated by reference into the complaint, matters of public record, and facts susceptible to judicial notice." *Haley v. City of Boston*, 657 F.3d 39, 46 (1st Cir. 2011).

ARGUMENT

Plaintiff's claims against EPA fail to establish subject matter jurisdiction or fail to state a valid claim. Fed. R. Civ. P. 12(b)(1), (b)(6). As to Plaintiff's mandatory duty cause of action (Count 2), Plaintiff has not identified a mandatory duty. Thus, Congress has not waived EPA's

sovereign immunity, and this Court lacks subject matter jurisdiction over such claims. As to Plaintiff's first APA claim (Count 1(b)), this Court lacks jurisdiction over Plaintiff's challenge to EPA's approval of Maine's revised water quality standards, which did not include the Contested Segment, because Plaintiff lacks standing. Alternatively, Plaintiff fails to state a valid APA claim because EPA took no action on the Contested Segment. Lastly, as to Plaintiff's second APA claim (Count 1(a)), Plaintiff fails to state a valid claim because EPA is not required to promulgate or direct Maine to promulgate a new or revised antidegradation implementation method.

I. This Court should dismiss Plaintiff's mandatory duty cause of action for lack of subject matter jurisdiction.

This Court lacks subject matter jurisdiction over Plaintiff's mandatory duty cause of action brought under the CWA's citizen suit provision. Compl. ¶¶ 84-87. The CWA's citizen suit provision is a waiver of sovereign immunity. *Conservation L. Found.*, 881 F.3d at 28. And to bring a CWA citizen suit for failure to perform a nondiscretionary duty, Plaintiff must allege that EPA failed to perform a mandatory duty. If there is no mandatory duty, then there is no waiver of sovereign immunity, and this Court must dismiss for lack of jurisdiction.

Here, as explained below, there is no mandatory duty for EPA to review Maine's Antidegradation Program Guidance—characterized as an antidegradation implementation method in the Complaint—because it is not a water quality standard, and it was not submitted to EPA for review.[3] Compl. ¶¶ 84-85. Consequently, there is also no mandatory duty for EPA to promulgate federal antidegradation implementation methods. *Contra id.* ¶ 86.

[3] As to EPA's alleged duty to review, Plaintiff claims EPA violated two mandatory duties: to review (1) Maine's "'interpretation' and implementation of Maine's codified antidegradation policy" and (2) Maine's "Antidegradation Program Guidance." Compl. ¶¶ 84-85. However, the Complaint refers to Maine's uncodified interpretation of Maine's antidegradation policy as the Antidegradation Program Guidance. *Id.* ¶ 65. Thus, EPA reads Complaint ¶¶ 84 and 85 as raising

A. EPA has no mandatory duty to review Maine's Antidegradation Program Guidance because it is not a water quality standard.

The Act plainly limits EPA's mandatory duty to reviewing a State's "revised or new standard." 33 U.S.C. § 1313(c)(3); *Mo. Coal. for the Env't Found. v. Jackson*, 853 F. Supp. 2d 903, 908 (W.D. Mo. 2012). And, as Plaintiff does not dispute, EPA regulations define water quality standards as "provisions of State or Federal Law." 40 C.F.R. § 131.3(i). Thus, for a document to constitute a "revised or new [water quality] standard" that EPA must review, the State must promulgate it into law. *Id.*; *City of Dover v. EPA*, 956 F. Supp. 2d 272, 279 (D.D.C. 2013). This requirement extends to antidegradation implementation methods. *See Water Quality Standards Regulatory Revisions*, 80 Fed. Reg. at 51034. While antidegradation policies "must be adopted in rule or other legally binding form," *id.*, neither the Act nor EPA's regulations require the State to adopt antidegradation implementation methods into regulation, *see* 33 U.S.C. § 1313; 40 C.F.R. §§ 131.5(b), 131.21(a). Rather, States have "discretion and flexibility to adopt antidegradation provisions," including through binding regulation or "non-binding guidance." *Water Quality Standards Regulatory Revisions*, 80 Fed. Reg. at 51032, 51034. Accordingly, only new or revised antidegradation implementation methods that are "adopt[ed] in regulation or other legally binding form" constitute water quality standards subject to EPA's review. *See id.* at 51032, 51034.

Here, as Plaintiff admits, the Antidegradation Program Guidance is (at most) an "uncodified" antidegradation implementation method. Compl. ¶¶ 65, 85. It has not been adopted into Maine law. Thus, this Guidance does not constitute a new or revised "water quality standard" that EPA must review pursuant to the CWA. 40 C.F.R. § 131.3(i); *City of Dover*, 956 F. Supp. 2d

---

only one mandatory-duty claim. Yet, even if EPA is mistaken, Plaintiff's claims collapse into one and fail for the same reasons as detailed below.

at 279. And accordingly, the facts here are inapposite from other situations where courts have held that EPA has a mandatory duty "to review a law that changes a water quality standard regardless of whether a state presents it for review." *Friends of Merrymeeting Bay v. Olsen*, 839 F. Supp. 2d 366, 375 (D. Me. 2012).[4]

To hold otherwise would undermine the CWA's cooperative-federalism scheme that affords "primary responsibilities and rights of States" to implement the Act. 33 U.S.C. § 1251(b). It would require EPA to evaluate "any document that a state agency may later consider in interpreting its water standards" and take final agency action on documents that the States themselves do not consider final or binding. *City of Dover*, 956 F. Supp. 2d at 280; *see also Mo. Coal. for the Env't Found. v. Wheeler*, No. 2:19-cv-04215, 2021 WL 2211446, at *16 (W.D. Mo., June 1, 2021) (holding that EPA acted appropriately when not relying on a State's non-binding implementation plan as part of the Agency's own decision making process). And doing so would also "allow the state to impermissibly rewrite its own regulations outside of the rulemaking process." *Mo. Coal.*, 2021 WL 2211446, at *16.

Indeed, Plaintiff's claim against Maine illustrates that the proper course of action is to first proceed with that claim—that Maine unlawfully relied on its "interpretation of Maine's antidegradation policy." Compl. ¶ 91. Plaintiff must first prevail on that claim to obtain the relief—reclassification of the Contested Segment—it desires. If Plaintiff prevails, then Maine may well reassess its classifications of the Androscoggin River and may submit a revised standard, which would properly be before EPA for review. *See id.* ¶¶ 90-92; 33 U.S.C. § 1313(c)(3). Plaintiff's parallel claims against EPA improperly circumvent the CWA's cooperative-federalism

[4] *See also Miccosukee Tribe of Indians of Fla. v. EPA*, 105 F.3d 599, 602-03 (11th Cir. 1997); *Fla. Pub. Int. Rsch. Grp. Citizen Lobby, Inc. v. EPA*, 386 F.3d 1070, 1089 (11th Cir. 2004); *Nw. Env't Advocs. v. EPA*, 855 F. Supp. 2d 1199, 1211 (D. Or. 2012).

scheme by requiring EPA to impose itself into a State's interpretation of its own laws. *See Luminant Generation Co., LLC v. EPA*, 675 F.3d 917, 926 (5th Cir. 2012) (holding that EPA unlawfully disapproved a state plan for failing to comply with state law under the Clean Air Act, which employs a similar cooperative-federalism framework).

In short, EPA has no mandatory duty to review Maine's Antidegradation Program Guidance—the uncodified antidegradation implementation method—because it is not a water quality standard.

B. EPA has no mandatory duty to review Maine's Antidegradation Program Guidance because Plaintiff does not allege that it was submitted to EPA.

Even if the Antidegradation Program Guidance were a water quality standard (and it is not), Congress did not impose a mandatory duty on EPA because Maine did not submit the Guidance for EPA's review. Because the CWA's citizen suit provision is a waiver of the United States' sovereign immunity, it must be "construed strictly in favor of the sovereign," and "not enlarged beyond what the language requires." *U.S. Dep't of Energy v. Ohio*, 503 U.S. 607, 615 (1992). Thus, to bring a mandatory duty claim, there must be a "clear and unequivocal" command in the statutory language that the agency had no discretion to take the action in question. *Id.* at 619; *cf. Norton v. S. Utah Wilderness All.*, 542 U.S. 55, 63 (2004) (holding the same for an unreasonable delay claim under the APA).

In the context of the CWA's citizen suit provision, a mandatory duty exists if the Act imposes a date-certain deadline by which EPA must act. 33 U.S.C. § 1365(a)(2); *See Sierra Club v. Thomas*, 828 F.2d 783, 792 (D.C. Cir. 1987) (holding that duty in analogous citizen suit provision of the Clean Air Act is discretionary where Congress has not included a date-certain deadline); *see also Maine v. Thomas*, 874 F.2d 883, 888 (1st Cir. 1989) (recognizing that a date-certain deadline is necessary because it allows a court to "test whether the duty has been fulfilled").

And the Act imposes a date-certain deadline by which EPA must act on a water quality standard only after a State *submits* it to EPA. 33 U.S.C. § 1313(c)(3).

Here, Plaintiff fails to allege that Maine submitted the Antidegradation Program Guidance to EPA to trigger a date-certain deadline by which EPA needed to act. *See generally* Compl. Consequently, Plaintiff also fails to allege that EPA failed to meet its statutory deadline to act on Maine's Guidance by a date certain. Accordingly, Plaintiff fails to establish a mandatory duty claim with respect to EPA's inaction on Maine's Antidegradation Program Guidance.[5]

C. Because EPA did not act on Maine's Antidegradation Program Guidance, EPA has no mandatory duty to promulgate federal antidegradation implementation methods.

Plaintiff's second claim that EPA had to promulgate federal antidegradation implementation methods also fails to identify a mandatory duty. As Plaintiff admits, EPA "must promulgate water quality standards in two instances": (1) after EPA disapproves the State's standards and the State subsequently fails to adopt the changes specified in the disapproval, and (2) when EPA exercises its discretion and determines that a revised or new standard is necessary. Compl. ¶ 43. Neither applies.

Here, as Plaintiff acknowledges, EPA did not exercise its discretion and made no determination that a revised or new standard is necessary. *See id.* ¶ 83. Likewise, EPA did not act on, much less disapprove, Maine's Antidegradation Program Guidance. *Id.* ¶ 41. So even under

[5] While some cases hold that a mandatory duty may arise even where a State does not submit a revised or new standard to EPA, they are not binding on this Court. *See supra* pg. 10 & n.4 (listing out-of-circuit or district-court cases). This Court should not be persuaded by those holdings either, as none assessed the mandatory duty claim in light of long-standing and binding sovereign immunity principles that require waivers of sovereign immunity to be "unequivocal" and "construed strictly in favor of the sovereign." *Ohio*, 503 U.S. at 615.

Plaintiff's understanding of the Act, EPA took no action that would trigger a mandatory duty for EPA to promulgate federal standards.

* * *

In sum, the CWA imposes no mandatory duty on EPA to act on Maine's Antidegradation Program Guidance or to promulgate federal antidegradation implementation methods for Maine. Because there is no mandatory duty, there is no waiver of sovereign immunity, and the claim must be dismissed for lack of subject matter jurisdiction. *See Conservation L. Found.*, 881 F.3d at 28.

II. The Court should dismiss Plaintiff's APA causes of action for lack of subject matter jurisdiction, or failure to state a claim upon which relief can be granted.

This Court should also dismiss Plaintiff's two APA claims brought under 5 U.S.C. § 706(2). As to Plaintiff's challenge to EPA's approval of Maine's revised water quality standards, Plaintiff fails to allege standing and fails to state a valid claim because EPA took no action on the Contested Segment. As to Plaintiff's second claim, the CWA does not require EPA to promulgate federal antidegradation implementation methods in this instance or to direct Maine to do so.

A. Plaintiff lacks standing to challenge EPA's approval because EPA did not act on the Contested Segment.

Plaintiff's first APA claim contends that the challenged action is EPA's approval of Maine's revised water quality standards based on Maine's 2020-2022 Triennial. Compl. ¶¶ 75, 83, 94. Plaintiff lacks standing to challenge that approval. *Davis v. FEC*, 554 U.S. 724, 734 (2008) (plaintiffs must have standing for "each claim [they] seek[] to press").

To establish Article III standing at this stage of the proceedings, Plaintiff must allege (1) a concrete and actual injury (2) that is fairly traceable to the challenged agency action, and (3) that a favorable result would likely redress the alleged injury. *Lujan v. Defs. of Wildlife*, 504 U.S. 555,

560-61 (1992); *Katz v. Pershing, LLC*, 672 F.3d 64, 71-72 (1st Cir. 2012). Plaintiff fails to meet each element.

As to the first element, Plaintiff has not alleged any concrete injury in fact related to EPA's approval of Maine's revised water quality standards based on Maine's 2020-2022 Triennial. Compl. ¶¶ 75, 83, 94. In that Triennial, Maine "failed to recommend reclassifying the [Contested] segment." *Id.* ¶ 72. So the Contested Segment was not included in Maine's recommendation to "the Maine Legislature," was not "certified by the Maine Attorney General," and was not "submitted to the EPA for review." *Id.* ¶ 74. Maine did reclassify the Merrymeeting Bay Segment and submit that to EPA for review. *Id.* ¶¶ 73-74. And EPA approved that reclassification because it "affords greater protections to the Class B section of the Androscoggin River." *See id.* ¶ 75. Thus, Plaintiff fails to allege and cannot allege an injury from EPA's approval decision because it achieves Plaintiff's objective of "adequately protecting and maintaining the quality [of] Maine's waters." *Id.* ¶ 21.

To the extent Plaintiff implies that its injury stems from EPA's inaction on the Contested Segment, Plaintiff still fails to allege and cannot allege sufficient facts to make out an Article III standing. That injury is not traceable to the challenged action—EPA's approval—because the Contested Segment was not new or revised, nor was it submitted to EPA for review. *Id.* ¶ 74; *see* Maine 2022 Adoption; EPA Approval.

Indeed, Plaintiff does not state what redress it could obtain from a favorable ruling. Under the APA, this Court is limited to setting aside unlawful agency actions. 5 U.S.C. § 706(2). Setting aside EPA's approval of Maine's new or revised water quality standards would result in less protective classifications of the Androscoggin River, which runs contrary to Plaintiff's objective. *See* Compl. ¶ 21. And tellingly, Plaintiff does not seek an order requiring EPA to reevaluate

Maine's submission of its revised water quality standards. *Id.* ¶¶ 84-104. Further, because Maine (and thus, EPA) did not revise the classification for the Contested Segment, even if the Court were to set aside EPA's approval, the Contested Segment would remain Class C. Plaintiff fails to allege that it has standing to bring this APA claim and this Court should dismiss it for lack of subject matter jurisdiction.

B. Alternatively, Plaintiff fails to state a valid claim upon which relief can be granted because EPA's inaction on the Contested Segment does not constitute a final agency action.

Alternatively, to the extent Plaintiff argues that its APA challenge is to EPA's *inaction*, then this Court should still dismiss Plaintiff's APA claim because there is no final agency action.

The APA permits judicial review of final agency actions. 5 U.S.C. § 704. For an agency action to be "final," the action must (1) "mark the consummation of the agency's decisionmaking process" and (2) be one by which "rights or obligations have been determined, or from which legal consequences will flow." *Bennett v. Spear*, 520 U.S. 154, 177-78 (1997) (citation modified). Although the APA's finality requirement is not jurisdictional in this Circuit, "the question of whether [a plaintiff] otherwise has a valid cause of action is an important one that [this court] address[es] as a threshold issue." *R.I. Dep't of Env't Mgmt. v. United States*, 304 F.3d 31, 40 (1st Cir. 2002).

Here, EPA has in fact acted. The only final agency action challenged in the Complaint is EPA's approval of Maine's revised water quality standards based on Maine's 2020-2022 Triennial. Compl. ¶¶ 83, 94. But as explained above, Maine did not revise the water quality standards for the Contested Segment nor include the Contested Segment in its submission to EPA for review. *See id.* ¶ 74. Thus, EPA took no action, much less a final one, with respect to the Contested Segment.

And if Plaintiff attempts to argue that EPA should have evaluated the unchanged classifications of Maine's waters, that argument also fails to state a valid claim. *See id.* ¶ 38. As explained above, EPA's statutory authority is limited to evaluating a "*revised or new* standard." 33 U.S.C. § 1313(c)(3) (emphasis added); *see supra* Arg. I; *Mo. Coal.*, 853 F. Supp. 2d at 908 (holding that EPA's duty "is clearly limited by the plain text of the Act and the agency's regulations to approval or disapproval of the revised or new standards rather than the entirety of the submissions which [the State] is required to submit during the triennial review process"). Here, the Contested Segment is neither new nor revised. Rather, it remains classified as Class C as it has been since 1989. *See* Compl. ¶ 73.

Thus, to the extent Plaintiff's first APA claim challenges EPA's inaction, this Court should dismiss it for failure to state a valid claim upon which relief can be granted. *See id.* ¶ 83.

C. Plaintiff cannot demonstrate that the Act requires EPA to promulgate federal standards in this case, or direct Maine to promulgate new or revised standards.

Plaintiff's last APA challenge—that EPA must "promulgate or direct Maine to promulgate a new or revised antidegradation policy"—also fails to state a valid claim. *Id.* EPA reads the Complaint as objecting to Maine's *implementation* of its antidegradation policy rather than the codified, EPA-approved, policy itself given that Plaintiff supports the antidegradation policy and alleges that Maine is failing to follow that policy. *See id.* ¶¶ 90-91 (alleging that Maine unlawfully relies on its antidegradation implementation method, which is "in direct contradiction of" its codified antidegradation policy); *see also id.* ¶¶ 1, 8 (alleging similarly); Ex. 3, Maine Antidegradation Program Guidance at 3 (referred to in Compl ¶ 65) (noting that EPA approved Maine's codified antidegradation policy). In any event, Plaintiff points to no authority that would require EPA to promulgate either a new antidegradation policy or a new implementation method

in this circumstance, much less any authority for EPA to force the State to do so. As Plaintiff acknowledges, EPA must promulgate water quality standards in two instances:

> The first instance is following a state's submission of new or revised standards if the EPA disapproves of the standards and the state subsequently fails to adopt the changes specified in the disapproval. 33 U.S.C. § 1313(c)(4)(A); 40 C.F.R. § 131.22(a). The second instance is "in any case where the [EPA] determines that a revised or new standard is necessary to meet the requirements of the [Act]." 33 U.S.C. § 1313(c)(4)(B); 40 C.F.R. § 131.22(b).

Compl. ¶ 43. Neither applies here.

The first instance is inapposite here because EPA did not disapprove Maine's antidegradation implementation method or its antidegradation policy. *See generally* EPA Approval; *see also* Compl. ¶ 83.

Likewise, the second instance is inapposite because EPA did not make an Administrator's Determination. *See* Compl. ¶ 49. And Plaintiff does not claim that EPA acted unreasonably in not making an Administrator's Determination, *id.* ¶ 83, or request that the Court order EPA to take action on whether to make such a Determination, *id.* ¶¶ 94-104. Because Plaintiff does not establish this essential prerequisite, Plaintiff fails to state a claim that EPA unreasonably did not promulgate federal standards. *See Iqbal*, 556 U.S. at 680-81 (acknowledging that while courts accept well-pleaded *facts* in a complaint as true in a motion to dismiss, it does not accept *legal conclusions* as true when determining whether plaintiff alleged a claim that survives a motion to dismiss).

Even if the Court were to read Plaintiff's complaint as arguing that EPA unreasonably failed to make an Administrator's Determination (and it should not), such argument still fails to state a valid claim because Plaintiff fails to allege that new or revised water quality standards are necessary. That is because Plaintiff does not challenge any of the three components that comprise water quality standards: (1) designated uses, (2) water quality criteria, or (3) antidegradation

policies. *See generally* Compl. Rather, Plaintiff argues that EPA should have promulgated antidegradation implementation methods. But, as explained *supra* Argument I.A., antidegradation implementation methods are not water quality standards unless and until a State promulgates them into some legally binding form. *See also Water Quality Standards Regulatory Revisions*, 80 Fed. Reg. at 51032, 51034. Since Maine did not do so, its Antidegradation Program Guidance is not a water quality standard, and Plaintiff fails to state a valid claim that EPA should have reviewed that non-binding guidance and should have made an Administrator's Determination that "revised or new antidegradation implementation methods [are] necessary." Compl. ¶ 99.

As for Plaintiff's claim that EPA failed to require Maine to promulgate new or revised antidegradation policies or an implementation method, *id.* ¶ 83, Plaintiff identifies no authority that requires EPA to take such action, *see generally id.* Indeed, the CWA does not provide EPA with such authority. As Plaintiff acknowledges, EPA reviews new or revised standards and approves them if they are consistent with the Act's requirements. *Id.* ¶¶ 37, 39-40; 33 U.S.C. § 1313(c)(3), (c)(4). If they are not, then EPA must disapprove them and notify the State of the specific changes needed. 33 U.S.C. § 1313(c)(3); 40 C.F.R. § 131.21(a)(2). Should the State fail to timely make those changes, then EPA must propose and finalize federal standards, unless the State adopts, and EPA approves, acceptable standards in the interim. 33 U.S.C. § 1313(c)(4)(A); 40 C.F.R. § 131.22(a). The CWA does not confer on EPA authority to force a State to promulgate a new or revised antidegradation policy or an implementation method, nor does Plaintiff identify any such authority. *See generally* Compl.

Accordingly, Plaintiff fails to state a valid APA claim with respect to EPA's inaction on whether to promulgate federal standards or ordering Maine to promulgate new or revised standards.

CONCLUSION

For the foregoing reasons, the Court should grant EPA's motion and dismiss Plaintiff's claims against EPA (Counts 1 and 2).

Dated: October 30, 2026

Respectfully submitted,

Of Counsel:
Valarie Kuschel
U.S. ENVIRONMENTAL PROTECTION AGENCY

/s/ Jin Hyung Lee
JIN HYUNG LEE
United States Department of Justice
Environmental Defense Section
P.O. Box 7611
Washington, DC 20044
(202) 598-7264
jin.hyung.lee@usdoj.gov

ANDREW B. BENSON
UNITED STATES ATTORNEY

JOHN G. OSBORN
Assistant United States Attorney
United States Attorney's Office
100 Middle Street
Portland, Maine 04101
(207) 780-3257
John.Osborn2@usdoj.gov

CERTIFICATE OF SERVICE

I hereby certify that on October 30, 2026, I filed the foregoing Federal Defendants' Motion to Dismiss using the Court's CM/ECF system, which will electronically serve all counsel of record registered to use the CM/ECF system.

/s/ *Jin Hyung Lee*
JIN HYUNG LEE

130th MAINE LEGISLATURE

SECOND REGULAR SESSION-2022

Legislative Document **No. 1964**

S.P. 690 In Senate, February 10, 2022

An Act To Update Certain Water Quality Standards and To Reclassify Certain Waters of the State

Reported by Senator BRENNER of Cumberland for the Joint Standing Committee on Environment and Natural Resources pursuant to Joint Rule 353.

Reference to the Committee on Environment and Natural Resources suggested and ordered printed pursuant to Joint Rule 218.

DAREK M. GRANT
Secretary of the Senate

Be it enacted by the People of the State of Maine as follows:

Sec. 1. 38 MRSA §361-A, sub-§1-L, as enacted by PL 2017, c. 319, §1, is repealed.

Sec. 2. 38 MRSA §363-D, as enacted by PL 1993, c. 579, §1, is amended to read:

§363-D. Waiver or modification of protection and improvement laws

The commissioner or the commissioner's designee may waive or modify any of the provisions of this chapter if that waiver or modification promotes or assists any oil spill response activity conducted in accordance with the national contingency plan, a federal contingency plan, the state marine oil spill contingency plan, or as otherwise directed by the federal on-scene coordinator, the commissioner or commissioner's designee. A waiver issued by the commissioner under this section must be in writing.

This section does not apply to state or federal water quality standards applicable to any waters of the State, including, but not limited to, designated uses, criteria to protect existing and designated uses and antidegradation policies.

Sec. 3. 38 MRSA §464, sub-§2, ¶C, as enacted by PL 1985, c. 698, §15, is amended to read:

C. ~~The~~ Pursuant to subsection 3, paragraph B, the board may recommend changes in classification it ~~deems~~ considers necessary to the Legislature.

Sec. 4. 38 MRSA §464, sub-§2-A, ¶E, as enacted by PL 1993, c. 344, §1, is amended to read:

E. If the board adopts a proposal to enact a designated use under paragraph A, subparagraph (1) or to remove a designated use or adopt a subcategory of a designated use under paragraph A, subparagraph (2), it shall ~~forward that proposal~~ submit to the joint standing committee of the Legislature having jurisdiction over environment and natural resources matters ~~at~~ during the next regular session of the Legislature a report that includes that recommendation and the joint standing committee may report out legislation to implement that recommendation. The board may not ~~forward~~ propose any other recommendation to the Legislature under this subsection. The Legislature has sole authority to make changes in the designated uses of the waters of the State, including the creation of a subcategory of a designated use.

Sec. 5. 38 MRSA §464, sub-§3, as amended by PL 2015, c. 124, §6, is further amended to read:

3. Reports to the Legislature. The ~~department~~ commissioner or the board, as applicable, shall periodically report to the Legislature as ~~governed by the following provisions~~ follows.

A. ~~The commissioner shall submit to~~ During the first regular session of each Legislature, the commissioner shall submit to the joint standing committee of the Legislature having jurisdiction over environment and natural resources matters a report on the quality of the State's waters ~~which~~ that describes existing water quality, identifies waters that are not attaining their classification and states what measures are necessary for the attainment of the standards of their classification.

B. The board shall, from time to time, but at least once every 3 years, hold public hearings for the purpose of reviewing the water quality classification system and related standards and, as appropriate, recommending changes in the standards ~~to the Legislature~~. After conducting the review, the board shall submit to the joint standing committee of the Legislature having jurisdiction over environment and natural resources matters a report describing the board's findings and any recommendations for changes to the water quality classification system and related standards and the joint standing committee may report out legislation to implement those recommendations.

C. ~~The commissioner shall report to~~ During the first regular session of each Legislature, the commissioner shall submit to the joint standing committee of the Legislature having jurisdiction over environment and natural resources matters a report on the status of licensed discharges.

Sec. 6. 38 MRSA §464, sub-§4, ¶A, as amended by PL 2017, c. 319, §2, is further amended by amending subparagraph (5) to read:

(5) Discharge of pollutants to any water of the State that violates sections 465, 465-A and 465-B, except as provided in section 451; causes the "pH" of fresh waters to fall outside of the ~~6.0 to 8.5~~ 6.5 to 9.0 range; or causes the "pH" of estuarine and marine waters to fall outside of the 7.0 to 8.5 range;

Sec. 7. 38 MRSA §464, sub-§4, ¶F, as amended by PL 1991, c. 66, Pt. B, §1, is further amended by amending subparagraph (2) to read:

(2) Where high quality waters of the State constitute an outstanding national resource, that water quality must be maintained and protected. For purposes of this paragraph, the following waters are considered outstanding national resources: those water bodies in national and state parks and wildlife refuges and in the Katahdin Woods and Waters National Monument; those water bodies in public reserved lands; and those water bodies classified as Class AA and SA waters pursuant to section 465, subsection 1; section 465-B, subsection 1; and listed under sections 467, 468 and 469.

Sec. 8. 38 MRSA §464, sub-§4, ¶F, as amended by PL 1991, c. 66, Pt. B, §1, is further amended by amending subparagraph (4) to read:

(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~~ Pursuant to subsection 3, paragraph B, the board shall recommend to the Legislature that that water be reclassified in the next higher classification.

Sec. 9. 38 MRSA §465, sub-§1, ¶B, as amended by PL 2017, c. 319, §4, is further amended to read:

B. The aquatic life, dissolved oxygen and bacteria content of Class AA waters must be as naturally occurs, except that the number of Escherichia coli bacteria in these waters may not exceed a geometric mean of 64 CFU or MPN per 100 milliliters over a 90-day interval or 236 CFU or MPN per 100 milliliters in more than 10% of the samples in any 90-day interval.

Sec. 10. 38 MRSA §465, sub-§2, ¶B, as amended by PL 2017, c. 319, §5, is further amended to read:

B. The dissolved oxygen content of Class A waters may not be less than 7 parts per million or 75% of saturation, whichever is higher, except that for the period from October 1st to May 14th, in order to ensure spawning and egg incubation of indigenous fish species, the 7-day mean dissolved oxygen concentration may not be less than 9.5 parts per million and the one-day minimum dissolved oxygen concentration may not be less than 8.0 parts per million in identified fish spawning areas. The aquatic life and bacteria content of Class A waters must be as naturally occurs, except that the numbers of Escherichia coli bacteria in these waters may not exceed a geometric mean of 64 CFU or MPN per 100 milliliters over a 90-day interval or 236 CFU or MPN per 100 milliliters in more than 10% of the samples in any 90-day interval.

Sec. 11. 38 MRSA §465, sub-§3, ¶B, as amended by PL 2017, c. 319, §6, is further amended to read:

B. Class B waters must be of sufficient quality to support all aquatic species indigenous to those waters without detrimental changes in the resident biological community. The dissolved oxygen content of Class B waters may not be less than 7 parts per million or 75% of saturation, whichever is higher, except that for the period from October 1st to May 14th, in order to ensure spawning and egg incubation of indigenous fish species, the 7-day mean dissolved oxygen concentration may not be less than 9.5 parts per million and the one-day minimum dissolved oxygen concentration may not be less than 8.0 parts per million in identified fish spawning areas. Between April 15th and October 31st, the number of Escherichia coli bacteria in these waters may not exceed a geometric mean of 64 CFU or MPN per 100 milliliters over a 90-day interval or 236 CFU or MPN per 100 milliliters in more than 10% of the samples in any 90-day interval.

Sec. 12. 38 MRSA §465, sub-§4, ¶B, as amended by PL 2017, c. 319, §8, is further amended to read:

B. Class C waters must be of sufficient quality to support all species of fish indigenous to those waters and to maintain the structure and function of the resident biological community. The dissolved oxygen content of Class C water may not be less than 5 parts per million or 60% of saturation, whichever is higher, except that in identified salmonid spawning areas where water quality is sufficient to ensure spawning, egg incubation and survival of early life stages, that water quality sufficient for these purposes must be maintained. In order to provide additional protection for the growth of indigenous fish, the following standards apply.

(1) The 30-day average dissolved oxygen criterion of a Class C water is 6.5 parts per million using a temperature of 22 degrees centigrade or the ambient temperature of the water body, whichever is less, if:

(a) A license or water quality certificate other than a general permit was issued prior to March 16, 2004 for the Class C water and was not based on a 6.5 parts per million 30-day average dissolved oxygen criterion; or

(b) A discharge or a hydropower project was in existence on March 16, 2005 and required but did not have a license or water quality certificate other than a general permit for the Class C water.

This criterion for the water body applies to licenses and water quality certificates issued on or after March 16, 2004.

(2) In Class C waters not governed by subparagraph (1), dissolved oxygen may not be less than 6.5 parts per million as a 30-day average based upon a temperature of 24 degrees centigrade or the ambient temperature of the water body, whichever is less. This criterion for the water body applies to licenses and water quality certificates issued on or after March 16, 2004.

The department may negotiate and enter into agreements with licensees and water quality certificate holders in order to provide further protection for the growth of indigenous fish. Agreements entered into under this paragraph are enforceable as department orders according to the provisions of sections 347-A to 349.

Between April 15th and October 31st, the number of Escherichia coli bacteria in Class C waters may not exceed a geometric mean of 100 CFU or MPN per 100 milliliters over a 90-day interval or 236 CFU or MPN per 100 milliliters in more than 10% of the samples in any 90-day interval. The board shall adopt rules governing the procedure for designation of spawning areas. Those rules must include provision for periodic review of designated spawning areas and consultation with affected persons prior to designation of a stretch of water as a spawning area.

Sec. 13. 38 MRSA §465-A, sub-§1, ¶B, as amended by PL 2017, c. 319, §10, is further amended to read:

B. Class GPA waters must be described by their trophic state based on measures of the chlorophyll "a" content, Secchi disk transparency, total phosphorus content and other appropriate criteria. Class GPA waters must have a stable or decreasing trophic state, subject only to natural fluctuations, and must be free of culturally induced algal blooms that impair their use and enjoyment. The number of Escherichia coli bacteria in these waters may not exceed a geometric mean of 29 CFU or MPN per 100 milliliters over a 90-day interval or 194 CFU or MPN per 100 milliliters in more than 10% of the samples in any 90-day interval. The aquatic life of Class GPA waters must be as naturally occurs.

Sec. 14. 38 MRSA §465-B, sub-§1, ¶B, as amended by PL 2017, c. 319, §11, is further amended to read:

B. The estuarine and marine life, dissolved oxygen and bacteria content of Class SA waters must be as naturally occurs, except that the number of enterococcus bacteria in these waters may not exceed a geometric mean of 8 CFU or MPN per 100 milliliters in any 90-day interval or 54 CFU or MPN per 100 milliliters in more than 10% of the samples in any 90-day interval. The number of total coliform bacteria or other specified indicator organisms in samples representative of the waters in shellfish harvesting areas may not exceed the criteria recommended under the National Shellfish Sanitation Program, United States Food and Drug Administration as set forth in its publication "Guide for the Control of Molluscan Shellfish" (2019 revision) or any successor publication.

Sec. 15. 38 MRSA §465-B, sub-§2, ¶B, as amended by PL 2017, c. 319, §12, is further amended to read:

B. Class SB waters must be of sufficient quality to support all estuarine and marine species indigenous to those waters without detrimental changes in the resident biological community. The dissolved oxygen content of Class SB waters may not be less than 85% of saturation. Between April 15th and October 31st, the number of enterococcus bacteria in these waters may not exceed a geometric mean of 8 CFU or MPN per 100 milliliters in any 90-day interval or 54 CFU or MPN per 100 milliliters in more than 10% of the samples in any 90-day interval. The number of total coliform bacteria or other specified indicator organisms in samples representative of the waters in shellfish harvesting areas may not exceed the criteria recommended under the National Shellfish Sanitation Program, United States Food and Drug Administration as set forth in its publication "Guide for the Control of Molluscan Shellfish" (2019 revision) or any successor publication.

Sec. 16. 38 MRSA §465-B, sub-§3, ¶B, as amended by PL 2017, c. 319, §13, is further amended to read:

B. Class SC waters must be of sufficient quality to support all species of fish indigenous to those waters and to maintain the structure and function of the resident biological community. The dissolved oxygen content of Class SC waters may not be less than 70% of saturation. Between April 15th and October 31st, the number of enterococcus bacteria in these waters may not exceed a geometric mean of 14 CFU or MPN per 100 milliliters in any 90-day interval or 94 CFU or MPN per 100 milliliters in more than 10% of the samples in any 90-day interval. The number of total coliform bacteria or other specified indicator organisms in samples representative of the waters in restricted shellfish harvesting areas may not exceed the criteria recommended under the National Shellfish Sanitation Program, United States Food and Drug Administration as set forth in its publication "Guide for the Control of Molluscan Shellfish" (2019 revision) or any successor publication.

Sec. 17. 38 MRSA §466, sub-§2-C is enacted to read:

2-C. CFU. "CFU" means colony-forming units.

Sec. 18. 38 MRSA §466, sub-§8-B is enacted to read:

8-B. MPN. "MPN" means most probable number.

Sec. 19. 38 MRSA §467, sub-§1, ¶A, as affected by PL 1989, c. 890, Pt. A, §40 and amended by Pt. B, §68, is further amended to read:

A. Androscoggin River, main stem, including all impoundments.

(1) From the Maine-New Hampshire boundary to its confluence with the Ellis River - Class B.

(2) From its confluence with the Ellis River to ~~a line formed by the extension of the Bath-Brunswick boundary across Merrymeeting Bay in a northwesterly direction~~ Worumbo Dam in Lisbon Falls - Class C.

(3) From Worumbo Dam in Lisbon Falls to a line formed by the extension of the Bath-Brunswick boundary across Merrymeeting Bay in a northwesterly direction - Class B.

Sec. 20. 38 MRSA §467, sub-§1, ¶B, as amended by PL 2003, c. 317, §1, is further amended by amending subparagraph (2) to read:

(2) Little Androscoggin River, tributaries - Class B unless otherwise specified.

(a) Outlet of Thompson Lake in Oxford - Class C.

(b) Andrews Brook in Woodstock - Class A.

~~(c) Black Brook in Woodstock - Class A.~~

~~(d) Cushman Stream in Woodstock - Class A.~~

~~(e) Meadow Brook in Woodstock - Class A.~~

(f) Bog Brook and tributaries in Minot, Oxford and Hebron - Class A.

(g) Twitchell Brook and its tributaries in Greenwood and Albany Township - Class A.

(h) Tributaries upstream of the confluence with Twitchell Brook in Greenwood - Class A.

Sec. 21. 38 MRSA §467, sub-§1, ¶D, as amended by PL 2019, c. 333, §1, is further amended by amending subparagraph (6) to read:

(6) Nezinscot River, east and west branches above their confluence in Buckfield and their tributaries - Class A.

Sec. 22. 38 MRSA §467, sub-§1, ¶D, as amended by PL 2019, c. 333, §1, is further amended by enacting a new subparagraph (10) to read:

(10) Cushman Stream in Woodstock, an unnamed tributary to Meadow Brook at Cushman Hill Road - Class A.

Sec. 23. 38 MRSA §467, sub-§1, ¶D, as amended by PL 2019, c. 333, §1, is further amended by enacting a new subparagraph (11) to read:

(11) Meadow Brook in Woodstock - Class A.

Sec. 24. 38 MRSA §467, sub-§4, ¶G, as repealed and replaced by PL 1989, c. 228, §2, is amended by amending subparagraph (2) to read:

(2) Sandy River, tributaries - Class B unless otherwise specified.

(a) All tributaries entering above the Route 142 bridge in Phillips - Class A unless otherwise specified.

(a-1) South Branch Sandy River and its tributaries - Class AA.

(a-2) Cottle Brook and its tributaries - Class AA.

(b) Wilson Stream, main stem, below the outlet of Wilson Pond - Class C.

(c) Mount Blue Stream and its tributaries - Class A.

(d) Orbeton Stream above Toothaker Pond Road and its tributaries - Class AA.

Sec. 25. 38 MRSA §467, sub-§5, ¶B, as amended by PL 2017, c. 137, Pt. B, §4, is further amended by amending subparagraph (7) to read:

(7) Fletcher Brook ~~in Township 36 Middle Division~~ and its tributaries - Class AA.

Sec. 26. 38 MRSA §467, sub-§5, ¶B, as amended by PL 2017, c. 137, Pt. B, §4, is further amended by amending subparagraph (8) to read:

(8) Magazine Brook ~~in Township 43 Middle Division~~ - Class AA.

Sec. 27. 38 MRSA §467, sub-§5, ¶B, as amended by PL 2017, c. 137, Pt. B, §4, is further amended by amending subparagraph (10) to read:

(10) Chain Lakes Stream ~~in Day Block Township~~, also known as Chain Lake Stream - Class AA.

Sec. 28. 38 MRSA §467, sub-§6-A, ¶B, as amended by PL 2017, c. 137, Pt. B, §6, is further amended by amending subparagraph (12) to read:

(12) Little Narraguagus River in Township 22 Middle Division and Township 28 Middle Division - Class AA.

Sec. 29. 38 MRSA §467, sub-§7, ¶B, as amended by PL 2019, c. 333, §4 and c. 463, §7, is further amended by enacting a new subparagraph (2), division (f) to read:

(f) All tributaries entering the East Branch Penobscot River from the west, any portion of which is located within the boundaries of the Katahdin Woods and Waters National Monument - Class AA.

Sec. 30. 38 MRSA §467, sub-§7, ¶B, as amended by PL 2019, c. 333, §4 and c. 463, §7, is further amended by enacting a new subparagraph (2), division (g) to read:

(g) Those segments of any tributary of the Sebois River that are located within the boundaries of the Katahdin Woods and Waters National Monument - Class AA.

Sec. 31. 38 MRSA §467, sub-§7, ¶B, as amended by PL 2019, c. 333, §4 and c. 463, §7, is further amended by enacting a new subparagraph (2), division (h) to read:

(h) Dry Brook, East Branch and West Branch Mud Brook and other tributaries located in T.3, R.7, W.E.L.S. that enter the East Branch Penobscot River from the east, any portion of which is located within the boundaries of the Katahdin Woods and Waters National Monument - Class AA.

Sec. 32. 38 MRSA §467, sub-§7, ¶C, as amended by PL 2019, c. 333, §5, is further amended by amending subparagraph (1), division (d) to read:

(d) From the McKay powerhouse to ~~its confluence with Ambajejus Lake~~ a point located 1,000 feet downstream - Class A.

Sec. 33. 38 MRSA §467, sub-§7, ¶C, as amended by PL 2019, c. 333, §5, is further amended by enacting a new subparagraph (1), division (d-1) to read:

(d-1) From a point located 1,000 feet downstream of the McKay powerhouse to its confluence with Ambajejus Lake - Class AA.

Sec. 34. 38 MRSA §467, sub-§7, ¶C, as amended by PL 2019, c. 333, §5, is further amended by amending subparagraph (2), division (a) to read:

(a) Those segments of any tributary that are located within the boundaries of Baxter State Park or the Katahdin Woods and Waters National Monument - Class AA.

Sec. 35. 38 MRSA §467, sub-§7, ¶C, as amended by PL 2019, c. 333, §5, is further amended by amending subparagraph (2), division (b) to read:

(b) Those tributaries ~~above~~ entering between Ripogenus Dam and the confluence with ~~the Debsconeag Deadwater, any portion of which is located within the boundaries of Baxter State Park~~ Ambajejus Lake - Class AA.

Sec. 36. 38 MRSA §467, sub-§7, ¶C, as amended by PL 2019, c. 333, §5, is further amended by enacting a new subparagraph (2), division (e) to read:

(e) Nahmakanta Stream and its tributaries including tributaries to Nahmakanta Lake and upstream lakes - Class AA.

Sec. 37. 38 MRSA §467, sub-§7, ¶E, as amended by PL 2009, c. 163, §5, is further amended by amending subparagraph (2), division (e) to read:

(e) Pleasant River, West Branch tributaries - Class A unless otherwise specified.

Sec. 38. 38 MRSA §467, sub-§7, ¶E, as amended by PL 2019, c. 333, §5, is further amended by enacting a new subparagraph (2), division (e-1) to read:

(e-1) Houston Brook and its tributaries - Class AA.

Sec. 39. 38 MRSA §467, sub-§7, ¶E, as amended by PL 2009, c. 163, §5, is further amended by amending subparagraph (2), division (k) to read:

(k) Schoodic Stream and its tributaries - Class A.

Sec. 40. 38 MRSA §467, sub-§7, ¶E, as amended by PL 2009, c. 163, §5, is further amended by amending subparagraph (2), division (l) to read:

(l) Scutaze Stream and its tributaries - Class A.

Sec. 41. 38 MRSA §467, sub-§7, ¶F, as amended by PL 2017, c. 137, Pt. B, §7, is further amended by repealing subparagraph (1).

Sec. 42. 38 MRSA §467, sub-§7, ¶F, as amended by PL 2017, c. 137, Pt. B, §7, is further amended by amending subparagraph (12) to read:

(12) Medunkeunk Stream and its tributaries - Class A.

Sec. 43. 38 MRSA §467, sub-§9, ¶A, as amended by PL 1999, c. 277, §12, is further amended by amending subparagraph (3) to read:

(3) From U.S. Route 202 to Saccarappa Falls, also known as Sacarappa Falls - Class B.

Sec. 44. 38 MRSA §467, sub-§9, ¶A, as amended by PL 1999, c. 277, §12, is further amended by amending subparagraph (4) to read:

(4) From Saccarappa Falls, also known as Sacarappa Falls, to tidewater - Class C.

Sec. 45. 38 MRSA §467, sub-§15, ¶F, as amended by PL 2019, c. 463, §13, is further amended by amending subparagraph (6) to read:

(6) Southwest Branch, from a point located 5 miles downstream of the international boundary to its confluence with the ~~Baker~~ Northwest Branch - Class AA.

Sec. 46. 38 MRSA §468, sub-§1, ¶C, as amended by PL 2017, c. 137, Pt. B, §11, is further amended by amending subparagraph (2) to read:

(2) ~~Finnard~~ Finnerd Brook - Class B.

Sec. 47. 38 MRSA §468, sub-§1, ¶J, as enacted by PL 2009, c. 163, §17, is repealed.

Sec. 48. 38 MRSA §468, sub-§2, ¶O, as enacted by PL 2019, c. 333, §10, is amended by enacting a new subparagraph (2) to read:

(2) Tributaries to Donnell Pond - Class A.

Sec. 49. 38 MRSA §468, sub-§2, ¶P, as enacted by PL 2019, c. 333, §10, is amended by enacting a new subparagraph (2) to read:

(2) Tributaries to Donnell Pond - Class A.

Sec. 50. 38 MRSA §468, sub-§2, ¶Q is enacted to read:

Q. Township 9 Southern Division.

(1) Tributaries to Donnell Pond - Class A.

Sec. 51. 38 MRSA §468, sub-§2, ¶R is enacted to read:

R. Franklin.

(1) Tributaries to Donnell Pond - Class A.

SUMMARY

This bill, which is reported out by the Joint Standing Committee on Environment and Natural Resources pursuant to Joint Rule 353, implements recommendations of the Board of Environmental Protection resulting from its review of the State's water quality classification system and related water quality standards pursuant to the Maine Revised Statutes, Title 38, section 464, subsection 3, paragraph B. As recommended by the board, the bill includes specific updates to certain water quality standards and water quality classifications based on water quality data and the recommendations of the United States Environmental Protection Agency, the Department of Environmental Protection and other parties. In addition to those recommended changes, the bill also includes technical clarifications to certain board reporting responsibilities and the corresponding authority for legislation of the joint standing committee of the Legislature having jurisdiction over environment and natural resources matters.

The committee has not taken a position on the substance of the bill and by reporting this bill out, the committee is not suggesting and does not intend to suggest that it agrees or disagrees with any aspect of this bill. The committee is reporting the bill out for the sole purpose of obtaining a printed bill that can be referred to the committee for a public hearing and subsequent committee action in the normal course.

Waste Discharge Program Guidance

TO: Water Licensing & Compliance Staff

FR: Brian Kavanah, DWRR Director

DA: 06/13/2001 **FINAL**

RE: **Antidegradation**

****

The purpose of this memo is to provide guidance in implementing the provisions of the State's antidegradation policy with respect to the licensing of point source discharges of waste water (either an existing discharge or a new or expanded discharge). This memo has been prepared in consultation with EPA, the DEP Division of Environmental Assessment, and the Maine Attorney General's Office.

This program guidance supercedes all previous memos and draft rulemaking proposals dealing with this topic.

Meeting the requirements of antidegradation is usually easy, because most licensing actions involve receiving waters that meet their assigned classification standards and that do not meet any higher standards. It is only infrequently—where a new or expanded discharge will lower water quality or where a receiving water meets the standards of a higher classification—that determining compliance with antidegradation becomes more involved.

WATER CLASSIFICATION PROGRAM

The objectives of Maine's water classification program, of which the State's antidegradation policy is a part, are set forth in State law at 38 MRSA § 464(1) as follows:

> The Legislature declares that it is the State's objective to restore and maintain the chemical, physical and biological integrity of the State's waters and to preserve certain pristine state waters. The Legislature further declares that in order to achieve this objective the State's goals are:

A. That the discharge of pollutants into the waters of the State be eliminated where appropriate;

B. That no pollutants be discharged into any waters of the State without first being given the degree of treatment necessary to allow those waters to attain their classification; and

C. That water quality be sufficient to provide for the protection and propagation of fish, shellfish and wildlife and provide for recreation in and on the water.

ANTIDEGRADATION POLICY

The State's antidegradation policy is set forth in State law at 38 MRSA § 464(4)(F). In summary, the provisions of the antidegradation policy are as follows:

(1) Existing in-stream uses and the level of water quality necessary to protect those existing uses must be maintained and protected. [NOTE: 38 MRSA § 464(4)(F)(1) provides that existing uses are those uses which have actually occurred in or on a water body on or after November 28, 1975, whether or not the uses are included in the standards of the assigned classification.]

(2) The existing water quality of outstanding national resource waters must be maintained and protected. [NOTE: 38 MRSA § 464(4)(F)(2) designates the following as outstanding national resource waters in Maine: waters in national and state parks and wildlife refuges; waters in public reserved lands; and waters classified as Class AA or Class SA.]

(3) The DEP may only issue a discharge license or approve water quality certification if the standards of classification of the water body and all provisions of the antidegradation policy are met. [NOTE: 38 MRSA § 464(4)(F)(3) provides that a license may be issued where the discharge does not cause or contribute to the failure of the water body to meet standards.]

(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. [NOTE: 38 MRSA § 464(4)(F)(4) provides that, when this provision is met, the Board of Environmental Protection shall recommend to the Legislature that the water body be reclassified.]

(5) The DEP may only issue a discharge license or approve water quality certification which would result in lowering the existing quality of any water body after making the finding, following opportunity for public participation, that the action is necessary to achieve important economic or social benefits to the State. [NOTE: 38 MRSA § 464(4)(F)(5) provides that, in approving any lowering of existing water quality, the DEP must still find that the standards of classification of the water body and all other provisions of the antidegradation policy are met.]

The State's antidegradation policy has been duly and fully approved by EPA (letters dated July 16, 1986; May 21, 1987; and December 20, 1990) as being in conformance with the requirements of the Clean Water Act and EPA's Water Quality Standards regulation (40 CFR Section 131.12).

ANTIDEGRADATION PROCEDURES AND CONSIDERATIONS

When issuing any discharge license, the DEP will include appropriate findings and conclusions regarding antidegradation. In cases involving a new or increased discharge, the DEP will include specific findings and determinations with respect to whether the discharge will result in a significant lowering of existing water quality and whether the lowering of water quality is necessary to achieve important economic or social benefits to the State.

EPA has provided guidance on the interpretation and implementation of state antidegradation policy. This guidance includes *Chapter 4 (Antidegradation) of EPA's Water Quality Standards Handbook (Second Edition, August 1994)*; "Questions and Answers on: Antidegradation" (August 1985), which has been published as Appendix G of EPA's Water Quality Standards Handbook; and "Region 1 Guidance for Antidegradation Policy Implementation for High Quality Waters" (March 10, 1987).

Drawing from the statutory language and EPA's guidance documents, the Department will base its implementation of the State's antidegradation policy in waste discharge licensing actions on the following considerations:

1. DETERMINATION OF EXISTING USES. In accordance with the provisions of 38 MRSA § 464(4)(F)(1), existing in-stream uses are those uses which have actually occurred on or after November 28, 1975, in or on a water body whether or not the uses are included in the standards of classification of the particular water body. The determination of what constitutes an existing in-stream water use on a particular water body will be made by the DEP on a case-by-case basis. In making its determination of uses to be protected and maintained, the DEP shall consider designated uses for the water body and the following:

(a) Aquatic, estuarine and marine life present in the water body;

(b) Wildlife that utilize the water body;

(c) Habitat, including significant wetlands, within a water body supporting existing populations of wildlife or aquatic, estuarine or marine life, or plant life that is maintained by the water body;

(d) The use of the water body for recreation in and on the water, fishing, water supply, or commercial activity that depends directly on the preservation of an existing level of water quality. Use of the water body to receive or transport waste water discharges is not considered an existing use for purposes of this antidegradation policy; and

(e) Any other evidence that, for considerations (a), (b) and (c) above, demonstrates their ecological significance because of their role or importance in the functioning of the ecosystem or their rarity (for example, threatened or endangered species) and, for consideration (d) above, demonstrates its historical or social significance.

2. EXISTING USES MAINTAINED AND PROTECTED. The determination of whether existing in-stream water uses and the level of water quality necessary to protect those existing uses is maintained and protected will be made by the DEP on a case-by-case basis. In accordance with the provisions of 38 MRSA § 464(4)(F)(1-A), the DEP may only issue a waste discharge license or approve water quality certification when it finds that:

(a) The existing in-stream use involves use of the water body by a population of plant life, wildlife, or aquatic, estuarine or marine life, or as aquatic, estuarine, marine, wildlife, or plant habitat, and the applicant has demonstrated that the proposed activity would not have a significant impact on the existing use. "Significant impact" here means impairing the viability of the existing population, including significant impairment to growth and reproduction or an alteration of the habitat which impairs viability of the existing population; or

(b) The existing in-stream use involves use of the water body for recreation in and on the water, fishing, water supply or commercial enterprises that depend directly on the preservation of an existing level of water quality and the applicant has demonstrated that the proposed activity would not result in significant degradation of the existing use.

In accordance with the provisions of 38 MRSA § 464(4)(F)(1-A), the DEP shall determine what constitutes a population of a particular species based upon the degree of geographic and reproductive isolation from other individuals of the same species.

3. OUTSTANDING NATIONAL RESOURCE WATERS. No license will be issued or renewed for any new, increased or existing point source discharge to outstanding national resource waters, as designated under 38 MRSA § 464(4)(F)(2).

4. STANDARDS OF CLASSIFICATION MET. In order to issue a discharge license, the DEP must find that (a) the standards of the assigned classification of the receiving water are met, or (b) where the standards of the assigned classification are not met, that the discharge does not cause or contribute to the failure of the receiving water to meet standards. The receiving water includes all waters, however distant, for which an effect from a discharge can be measured or modeled.

5. WATER QUALITY EXCEEDS CLASSIFICATION. Where any criterion of water quality (for example, dissolved oxygen, or bacteria, or aquatic life) exceeds the minimum standards of the next highest classification under critical water quality conditions, then that higher water quality criterion must be maintained and protected.

   Critical water quality conditions include, but are not limited to, conditions of low flow, high water temperature, maximum loading from point source and non-point source discharges, and conditions of acute and chronic effluent toxicity.

6. EXISTING DISCHARGE. Where a licensing action involves an existing discharge for which no increase is proposed, and where the DEP determines that (1) existing in-stream water uses will be maintained and protected, and (2) the discharge is not to an outstanding national resource water, and (3) the standards of the assigned classification will be met in all receiving waters affected by the discharge or that the discharge will not cause or contribute to the failure of the receiving waters to meet standards, and (4) actual water quality is maintained and protected where any criterion of water quality exceeds the minimum standards of the next highest classification, then the requirements of the State's antidegradation policy will be deemed to be met.

7. NEW OR INCREASED DISCHARGE. Water quality that exceeds the minimum applicable standards will be managed by the DEP for the environmental, economic and social benefit of the State. Where a new or increased discharge is proposed, the DEP will determine whether the discharge will result in a significant lowering of existing water quality. For purposes of antidegradation:

- "New discharge" means a discharge that does not now exist or that is not currently licensed.

- "Increased discharge" means a discharge that would add one or more new pollutants to an existing effluent, increase existing levels of pollutants in an effluent, or cause an effluent to exceed one or more of its current licensed discharge flow or effluent limits, after the application of applicable best practicable treatment technology, as defined at 38 MRSA § 414-A(1)(D), or new source performance standards to the discharge.

- "Existing water quality" means the water quality that would exist under critical water quality conditions. Critical water quality conditions include, but are not limited to, conditions of low flow, high water temperature, maximum loading from point source and non-point source discharges, and conditions of acute and chronic effluent toxicity.

8. DETERMINATION OF SIGNIFICANT LOWERING OF WATER QUALITY. In making a determination as to whether a new or increased discharge will result in a significant lowering of existing water quality, the DEP shall consider the following:

A. The predicted change in ambient water quality, concentrations of chemical pollutants, or mass loading of pollutants under critical water quality conditions.

B. The predicted consumption of the remaining assimilative capacity of the receiving water. The remaining assimilative capacity is the increment of existing water quality above the minimum standards of the assigned classification under critical water quality conditions.

C. The predicted change in the ability of the receiving water to support aquatic life and to meet applicable aquatic life and habitat criteria.

D. The possible additive or synergistic effects of the discharge in combination with other existing discharges.

E. The cumulative lowering over time of water quality resulting from the proposed discharge in combination with previously approved discharges.

Based on the above considerations, the DEP will make a case-by-case determination as to whether a new or increased discharge will result in a significant lowering of existing water quality. However, in any case where the new or increased discharge will consume 20% or more of the remaining assimilative capacity for dissolved oxygen or other water quality parameter, the resulting lowering of water quality will be determined to be significant.

9. NO SIGNIFICANT LOWERING OF WATER QUALITY. Where the DEP determines that a new or increased discharge will not result in a significant lowering of existing water quality, and where the DEP further determines that (1) existing in-stream water uses will be maintained and protected, and (2) the discharge is not to an outstanding national resource water, and (3) the standards of the assigned classification will be met in all receiving waters affected by the discharge or that the discharge will not cause or contribute to the failure of the receiving waters to meet standards, and (4) actual water quality is maintained and protected where any criterion of water quality exceeds the minimum standards of the next highest classification, then the requirements of the State's antidegradation policy will be deemed to be met.

The posting of public notice, the opportunity to request a public hearing, and the opportunity for public comment on an application or draft license in which a determination is made that a new or increased discharge will not result in a significant lowering of water quality shall be provided in accordance with existing DEP rules (see Chapter 2 “Rules Concerning the Processing of Applications” and Chapter 522 “Application Processing Procedures for Waste Discharge Licenses”).

10. DETERMINATION OF ECONOMIC OR SOCIAL NECESSITY. Where the DEP determines that a new or increased discharge will result in a significant lowering of existing water quality, the DEP will then determine whether the lowering of water quality is necessary to achieve important economic or social benefits to the State. In making this determination, the DEP shall consider the following:

A. Whether the lowering of water quality is necessary to accommodate new or increased commercial activity or industrial production while providing that (1) the discharge consistently complies with applicable effluent limitations requiring application of best practicable treatment or new source performance standards and (2) any existing treatment facility is appropriate and is optimally maintained.

B. Whether the lowering of water quality is necessary to accommodate operation of a new publicly owned treatment works or increased loading to an existing publicly owned treatment works while providing that the discharge consistently complies with applicable effluent limitations requiring application of best practicable treatment, as defined at 38 MRSA § 414-A(1)(D), and that any existing treatment facility is appropriate and is optimally maintained. Evidence that increased loading to a POTW is necessary may include, but is not limited to, population growth projections from a municipal comprehensive plan, additional waste water treatment requirements based on a combined sewer overflow (CSO) master plan, and the extension of public sewers to previously unsewered areas.

C. The economic and social benefits that would result from the lowering of water quality. These benefits may include, but are not limited to, increases in employment, increases in local or regional income or purchasing power, increases in the community tax base, correction of an environmental or public health problem or nuisance situation (e.g., removal of overboard discharges or failing or substandard septic systems) and improved community stability. In the case of a lowering of water quality due to community growth, benefits may include an assessment of the economic and social consequences that would result if the new or increased discharge and the resulting lowering of water quality were not approved.

D. The technical availability, economic feasibility, and environmental effectiveness of alternatives that could reduce or eliminate the lowering of water quality. Alternatives may include, but are not limited to, alternative discharge locations, non-discharging alternatives, alternative methods of production, improved process controls, waste water minimization technologies, improved waste water treatment facility operation and maintenance, alternative waste water treatment methodologies, and advanced treatment beyond applicable technology requirements.

E. Public comments received in response to the public notice of an application for a waste discharge license, or as part of the official record of any public hearing held by the DEP on the application, or in response to any draft waste discharge license prepared by the DEP.

The posting of public notice, the opportunity to request a public hearing, and the opportunity for public comment on an application or draft license in which a determination is made as to whether a lowering of water quality resulting from a new or increased discharge is necessary to achieve important economic or social benefits to the State shall be provided in accordance with the DEP's existing rules (see Chapter 2 "Rules Concerning the Processing of Applications" and Chapter 522 "Application Processing Procedures for Waste Discharge Licenses").

Based on the above considerations, the DEP will make a case-by-case determination as to whether the lowering of existing water quality resulting from a new or increased discharge is necessary to achieve important economic or social benefits to the State.

11. LOWERING OF WATER QUALITY NOT APPROVED. Where the DEP determines that the lowering of water quality resulting from a new or increased discharge is not necessary to achieve important economic or social benefits to the State, then this lowering of water quality will not be approved, and the new or increased discharge will be denied or conditioned to prevent any lowering of water quality.

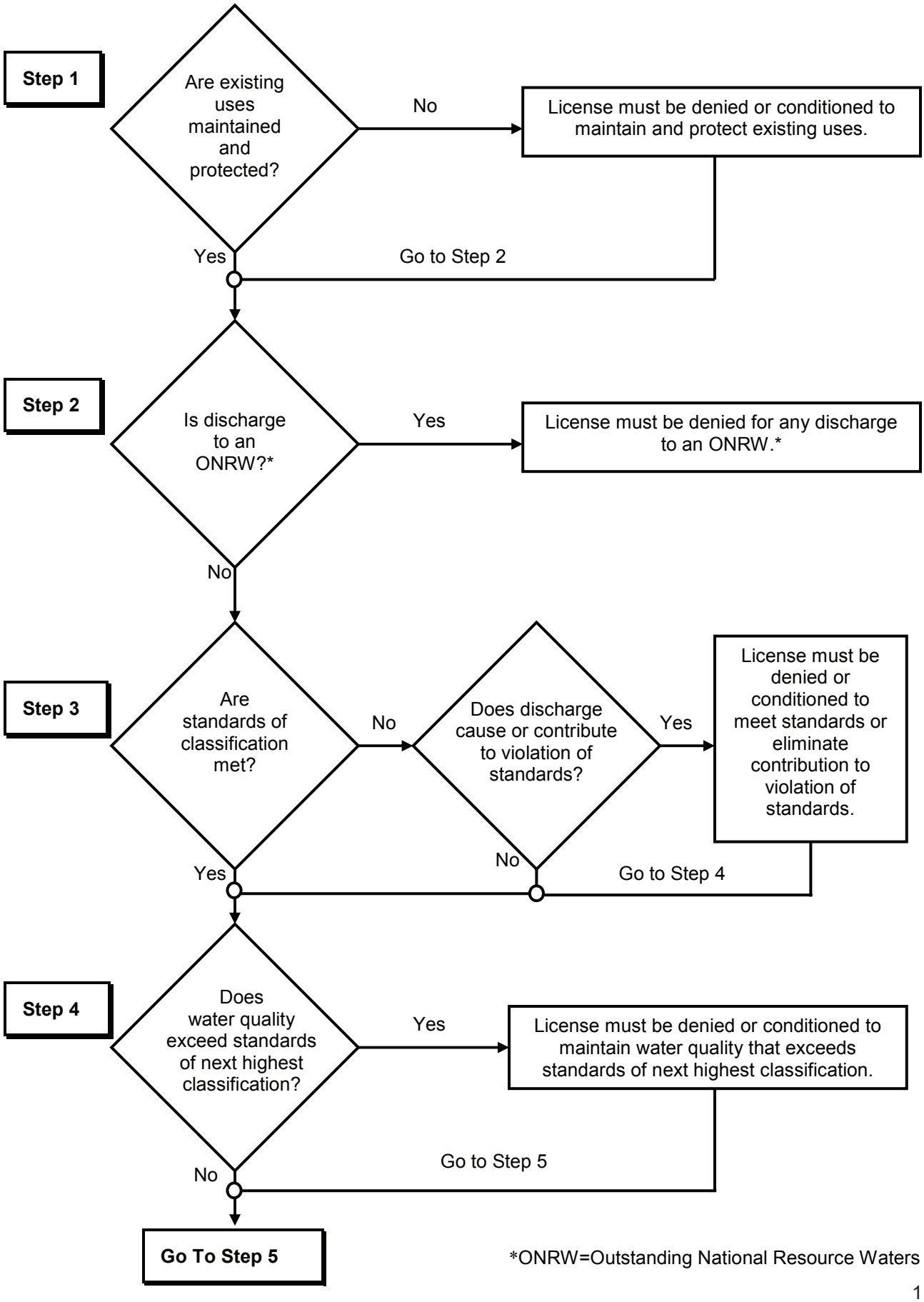
Where the DEP denies or conditions a new or increased discharge to prevent any lowering of water quality, and where the DEP determines that (1) existing in-stream water uses will be maintained and protected, and (2) the discharge is not to an outstanding national resource water, and (3) the standards of the assigned classification will be met in all receiving waters affected by the discharge or that the discharge will not cause or contribute to the failure of the receiving waters to meet standards, and (4) actual water quality is maintained and protected where any criterion of water quality exceeds the minimum standards of the next highest classification, then the requirements of the State's antidegradation policy will be deemed to be met.

12. LOWERING OF WATER QUALITY APPROVED. Where the DEP determines that that the lowering of water quality resulting from a new or increased discharge is necessary to achieve important economic or social benefits to the State, and where the DEP further determines that (1) existing in-stream water uses will be maintained and protected, and (2) the discharge is not to an outstanding national resource water, and (3) the standards of the assigned classification will be met in all receiving waters affected by the discharge or that the discharge will not cause or contribute to the failure of the receiving waters to met standards, and (4) actual water quality is maintained and protected where any criterion of water quality exceeds the minimum standards of the next highest classification, then the requirements of the State's antidegradation policy will be deemed to be met, and the lowering of water quality will be approved. In approving the lowering of water quality, the DEP will assure that there shall be achieved the highest statutory and regulatory requirements for all new and existing point sources and all cost-effective and reasonable best management practices for non-point source control, as stipulated in 40 CFR 131.12(a)(2).

A flow chart for implementing antidegradation review in the waste discharge licensing process is attached to this guidance.

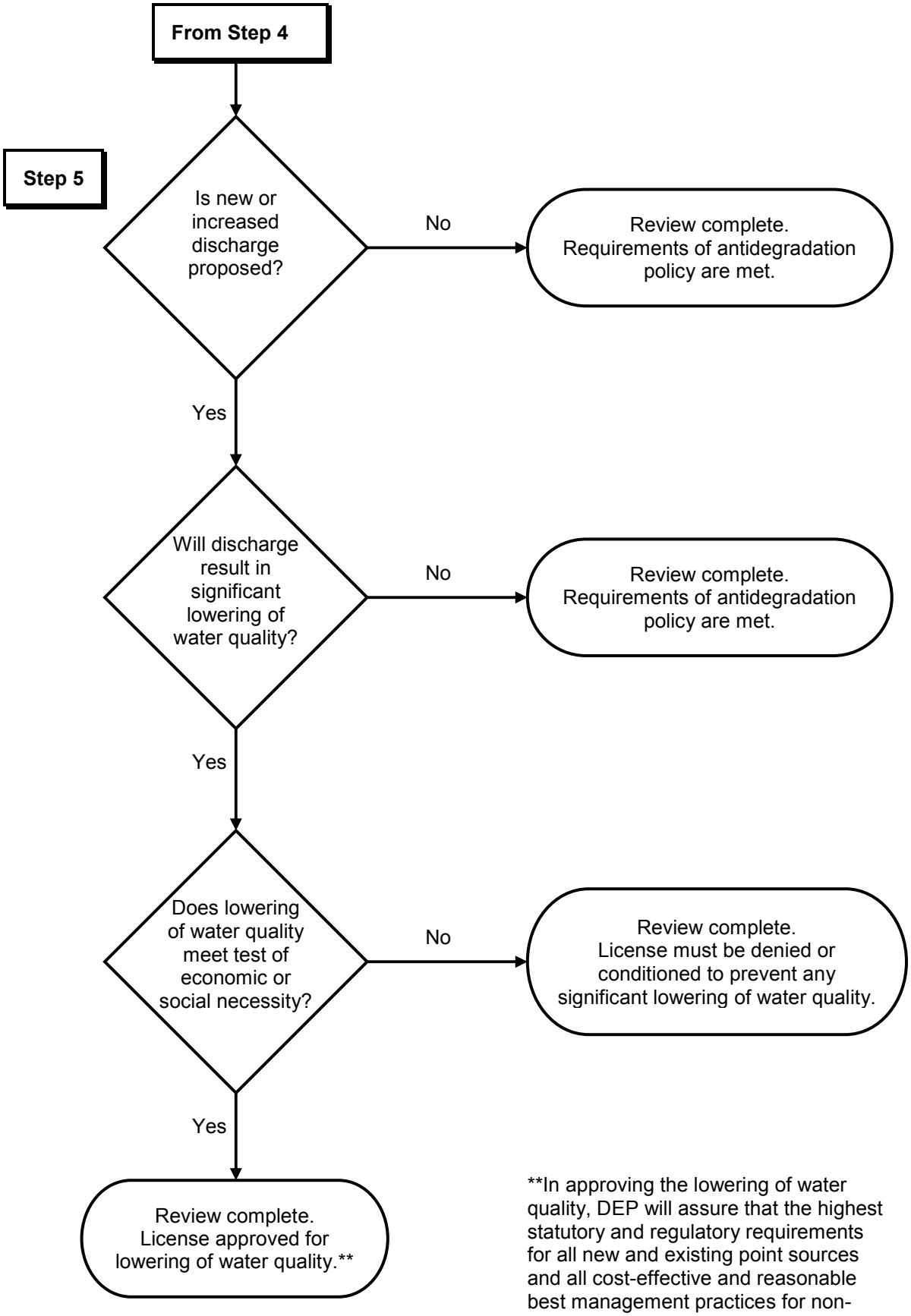
\antideg guidance

Antidegradation Review Flow Chart for Waste Discharge Licensing



*ONRW=Outstanding National Resource Waters

Antidegradation Review Flow Chart for Waste Discharge Licensing



**In approving the lowering of water quality, DEP will assure that the highest statutory and regulatory requirements for all new and existing point sources and all cost-effective and reasonable best management practices for non-point source control are achieved.