UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MAINE

FRIENDS OF MERRYMEETING BAY, Plaintiff, v. U.S. ENVIRONMENTAL PROTECTION AGENCY, MAINE BOARD OF ENVIRONMENTAL PROTECTION, MAINE DEPARTMENT OF ENVIRONMENTAL PROTECTION, and MELANIE LOYZIM in her official capacity as Commissioner of the Maine Department of Environmental Protection, Defendants.	Case No. 2:26-cv-00316-SDN

MOTION TO DISMISS BY MAINE DEFENDANTS
WITH INCORPORATED MEMORANDUM OF LAW

Pursuant to Fed. R. Civ. P. 12(b)(1) and (6), Defendants Maine Board of Environmental Protection ("BEP" or "Board"), Maine Department of Environmental Protection ("DEP" or "Department"), and Melanie Loyzim, in her official capacity as Commissioner of the Maine Department of Environmental Protection, hereby move to dismiss the Third Cause of Action in Plaintiff Friends of Merrymeeting Bay's ("FOMB's") Complaint, which is the sole count against the Maine Defendants. For the reasons provided below, this Court does not have jurisdiction over FOMB's claims against the Maine Defendants because (1) they are entitled to sovereign immunity, and (2) FOMB has failed to demonstrate Article III standing. If this Court were to nevertheless determine it has jurisdiction, it should still dismiss the claims because they fail to state a claim upon which relief may be granted.

FACTUAL AND PROCEDURAL BACKGROUND[1]

Maine Water Quality Standards and Classifications

The federal Clean Water Act ("CWA"), 33 U.S.C. §§ 1251-1389, requires that Maine develop and adopt water quality standards to protect and maintain water quality. 33 U.S.C. § 1313; 40 C.F.R. §§ 131.10-.12. The Maine Protection and Improvement of Waters Act ("Maine Waters Act") codifies Maine's water quality standards. *See* 38 M.R.S. §§ 464-470. Maine's riverine fresh surface waters are classified as Class C (the 4th highest classification), Class B, Class A, or Class AA (outstanding natural resource waters). *Id.* § 465. The classification for each waterbody (often a defined segment of a river or stream) and associated water quality criteria "designate the minimum level of quality which the Legislature intends for the body of water." *Id.* § 464(1); *see also id.* § 464(1)(B) ("[N]o pollutants [may] 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.").

Maine's statutory antidegradation policy provides:

> 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. Pursuant to [Maine law], [BEP] shall recommend to the Legislature that that water be reclassified in the next higher classification.

[1] This factual recitation, focusing on the facts related to the Maine Defendants, incorporates the factual allegations in the Complaint, which Defendants accept as true solely for the purposes of this Motion, as well as public documents that are central to the Plaintiff's claim, referred to in the Complaint, and/or the authenticity of which cannot be reasonably disputed. *See Newman v. Lehman Brothers Holdings Inc.*, 901 F.3d 19, 25 (1st Cir. 2018) (noting the types of extrinsic documents that a court may consider without converting a motion to dismiss into a motion for summary judgment); *Barchock v. CVS Health Corp.*, 886 F.3d 43, 48 (1st Cir. 2018) ("As part of our review, we may consider implications from documents attached to or fairly incorporated into the complaint.") (quotation marks omitted)); *see also United States v. Bello*, 194 F.3d 18, 23 (1st Cir. 1999) (courts may take judicial notice of facts that are "capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned" (citing Fed. R. Evid. 201(b)).

38 M.R.S. § 464(4)(F)(4). In response to a petition or on its own motion, BEP may initiate classification studies by DEP staff and conduct a public review process to consider reclassification of a waterbody.[2] *Id.* §§ 464(2)(A), (B).

After conducting this public review process, BEP "shall submit to the [Joint Standing Committee on Environment and Natural Resources ("ENR Committee")] of the Legislature . . . a report describing the board's findings and any recommendations for changes to the water quality classification system and related standards and the . . . committee may report out legislation to implement those recommendations." 38 M.R.S. §§ 464(2)(C), (3)(B). Although BEP "may recommend changes in classification it considers necessary to the Legislature" after the public review process, "[t]he Legislature shall have sole authority to make any changes in the classification of the waters of the State." *Id.* §§ 464(2)(C), (D).

At least once every three years, BEP must review Maine's water quality standards, including the classification of individual waterbodies, consider proposals submitted by the public, and recommend revisions to the Legislature as appropriate, through a process known as the "Triennial Review." 40 C.F.R. § 131.20(a); 38 M.R.S. § 464(3)(B); *see* Board of Environmental Protection Recommendations to the Legislature for Certain Changes to Water Quality Classifications and Related Standards, 2025 Triennial Review (Dec. 18, 2025) ("2025 Triennial Review") at 5.[3] The Legislature can adopt these recommendations in whole or in part or decline to adopt them and make other changes to Maine's water quality standards and the classification of individual waterbodies. Maine then "submit[s] the results of the review" to the U.S.

[2] BEP is a seven-member citizen board charged with a variety of responsibilities, including rulemaking. *See* 38 M.R.S. § 341-D. It is a component of DEP, which acts through BEP and the DEP Commissioner. *Id.* § 341-A(2).

[3] The 2025 Triennial Review submitted by BEP to the ENR Committee is available at www.maine.gov/dep/water/wqs/2025%20Triennial%20Review%20Complete_FullSize.pdf.

Environmental Protection Agency ("EPA") for review of whether the State is in "compliance with the requirements" of the CWA and its implementing regulations. 40 C.F.R. §§ 131.20(c); 131.21(a).

Another provision of the statutory antidegradation policy provides that DEP "may only issue a discharge license . . . if the standards of classification of the water body . . . are met," or, if they are not met, if the discharge "does not cause or contribute to the failure of the water body" to meet classification. 38 M.R.S. § 464(4)(F)(3). Because DEP must ensure that waters meet their classification and that discharges do not cause or contribute to the failure of waters to meet their classification, DEP must consider critical water conditions (e.g., low water flow or high water temperature) in licensing a discharge. *See id.* § 464(4)(D) (providing that, in "computing whether a [licensed] discharge will violate the classification of any river or stream," DEP must determine "the assimilative capacity of the river or stream . . . using the minimum 7-day low flow that can be expected to occur with a frequency of once in 10 years"); 06-096 C.M.R. ch. 523.

Androscoggin River Segment Reclassification Proposal

The Androscoggin River is Maine's third largest river, flowing 177 miles from Umbagog Lake to the confluence with the Kennebec River at Merrymeeting Bay. First Amended Complaint ("Compl.") ¶ 57. The main stem of the river is divided into three segments for purposes of water quality classification: (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 Worumbo Dam in Lisbon Falls—Class C; and (3) from Worumbo Dam to the Bath-Brunswick boundary across Merrymeeting Bay—Class B. *Id.*; 38 M.R.S. § 467(1)(A).

During the 2025 Triennial Review process (covering the period from 2024 through 2026), members of the public proposed reclassifying a segment of the river from the Gulf Island Pond

Dam to Worumbo Dam, what FOMB refers to as the "Upper Lower Segment."[4] Compl. ¶ 57. FOMB conducted sampling, commissioned a macroinvertebrate aquatic life determination study, and compiled other data purportedly "showing that the actual quality of the water in the Upper Lower Segment" meets Class B standards. *Id.* ¶¶ 58-61. DEP staff analyzed the reclassification proposal based on submitted data and in the context of Maine's statutory antidegradation policy. DEP staff determined that reclassification of the Upper Lower Segment was not supported. This conclusion was based in part on DEP's "longstanding interpretation" of the antidegradation policy that the phrase "actual quality" must be read "in the full context of water quality laws" and with reference to DEP's longstanding Antidegradation Program Guidance. 2025 Triennial Review at 75. That guidance provides, in relevant part:

> 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.

2025 Triennial Review, Appendix B at 107.

Regarding the reclassification proposal, DEP concluded:

> Based on the review of water quality data, the [Upper Lower Segment] meets its current Class C [water quality] criteria, but it does not fully meet all Class B water quality criteria for bacteria, aquatic life (biomonitoring), and dissolved oxygen. Furthermore, the Department's analysis indicates that the river [segment] cannot meet Class B criteria at all times during critical conditions of high water temperature, low flow, and maximum licensed discharge levels.

[4] During the 2021 Triennial Review process (covering the period from 2020 to 2022), members of the public also proposed reclassifying the Upper Lower Segment. Just as in 2025, after analyzing the data submitted and in the context of the antidegradation policy, DEP did not recommend reclassifying that segment as Class B, nor did BEP; in its discretion, the Legislature did not reclassify the Upper Lower Segment. *See* Compl. ¶¶ 71-74. As recommended by BEP (but not by DEP staff), the Legislature did, however, reclassify a segment downstream from the Upper Lower Segment to Class B. Compl. ¶¶ 57, 73-74 (discussing the segment from Worumbo Dam to the Bath-Brunswick border in Merrymeeting Bay).

2025 Triennial Review at 77.

DEP included this recommendation against reclassifying the Upper Lower Segment in its Triennial Review submission to BEP. After receiving extensive public comment, including testimony at a public hearing, and engaging in deliberation over two public meetings, BEP voted unanimously to adopt DEP's recommendations.[5] BEP then sent its Triennial Review recommendations to the ENR Committee. In the cover letter to the recommendations, the BEP Chair noted that "one Board member would support upgrading" the Upper Lower Segment. 2025 Triennial Review Cover Letter at 1. The Chair further explained, however,

> [d]uring deliberation, the Board as a whole acknowledged that the Board, the Maine Legislature, and [EPA] each has a different decision-making role in the Triennial Review process, and that the Board's primary objective is to make recommendations based on the available scientific information. In the context of recommending changes to the classifications for [several waterbodies, including the Upper Lower Segment], the Board expressed that the Legislature, not the Board, is the more appropriate body to consider public policy objectives and to balance those considerations with the aspirational goals of Maine's water quality statutes and the [CWA]. The Board anticipates that the [ENR] Committee will receive focused public comment and testimony regarding the lower Androscoggin River [and other waterbodies] . . . during the legislative process and encourages the Committee to consider arguments for upgrading the classification of those waters in addition to the Department's bases [for not recommending reclassification].

Id. at 2.

The ENR Committee initially reported out a draft bill reflecting BEP's recommendations for reference back with a legislative document number. *See* L.D. 2187 (130th Me. Legis. 2026).[6] The committee then received extensive public comment and testimony, including extensive

[5] An overview of the 2025 Triennial Review process, including links to public comments and meeting transcripts, is available at www3.maine.gov/dep/water/wqs/triennial-review.html (last visited Oct. 29, 2026).

[6] Docket available at www.mainelegislature.org/LawMakerWeb/dockets.asp?ID=280101423 (last visited Oct. 29, 2026).

submissions from FOMB in support of reclassifying the Upper Lower Segment.[7] *See supra* n.5. After a work session, the committee voted down an amendment that would have included the Upper Lower Segment reclassification. *See supra* nn. 5-7. The bill was subsequently reported out of committee without the reclassification, with a minority report in favor of the reclassification amendment. *Id.* The Legislature subsequently passed the bill, *An Act to Update Certain Water Quality Standards to Reclassify Certain Waters of the State*, without the reclassification amendment, and the Governor signed it. *See* P.L. 2026, ch. 616 (eff. July 29, 2026). DEP submitted the bill to EPA for review on August 26, 2026, and EPA review remains pending.

FOMB's First Amended Complaint against DEP, BEP, and DEP Commissioner Loyzim (collectively, "Maine Defendants") asserts that they violated the law by not recommending reclassification of the Upper Lower Segment. Specifically, FOMB asserts that DEP and BEP "unlawful[ly] fail[ed] to exercise [their] nondiscretionary duty to recommend the reclassification" of the Upper Lower Segment "to reflect the *actual quality* of the water." Compl. ¶ 2. FOMB seeks a declaration that Maine's "antidegradation implementation methods . . . are inconsistent with the minimum requirements of the CWA and Maine's codified and EPA-reviewed antidegradation policy" and an order enjoining the Maine Defendants "to recommend reclassification of the Upper Lower Segment . . . to the Maine Legislature in accordance with the [Maine Waters Act] and the Maine Administrative Procedure[] Act ('MAPA'), 5 M.R.S. § 1101 et seq." *Id.* ¶¶ 5, 9. The sole count pled against the Maine Defendants (Count III) is brought under the Maine Waters Act and MAPA and asserts that the Maine Defendants "have and continue to unlawfully rely upon an

[7] A public hearing was held on February 25, 2026. *See* Me. Legis., Chamber Status L.D. 2187, *available at* https://www.mainelegislature.org/legis/bills/display_ps.asp?ld=2187&PID=1456&snum=132&sec3# (last visited Oct. 29, 2026).

agency interpretation of Maine's antidegradation policy that is in direct contradiction of the Maine Waters Act's codified antidegradation policy" and that they have violated MAPA. *Id.* ¶¶ 91, 93.

STANDARD OF REVIEW

Pursuant to Fed. R. Civ. P. 12(b)(1), an action should be dismissed "when the facts alleged in the complaint, taken as true, do not justify the exercise of subject matter jurisdiction." *Muniz-Rivera v. United States*, 326 F.3d 8, 11 (1st Cir. 2003). When a defendant challenges a court's subject matter jurisdiction pursuant to Rule 12(b)(1), "the plaintiff bears the burden of proving jurisdiction." *Lantigua-Núñez v. U.S. Coast Guard*, 174 F.4th 293, 297 (1st Cir. 2026). Sovereign immunity and Article III standing are both jurisdictional issues. *United States ex rel. Sargent v. Collins*, 165 F.4th 102, 107 (1st Cir. 2026) (sovereign immunity); *Katz v. Pershing, LLC*, 672 F.3d 64, 75 (1st Cir. 2012) (Article III standing). When considering a motion to dismiss under both 12(b)(1) and 12(b)(6), a court "should ordinarily decide the 12(b)(1) [issue] first." *Ne. Erectors Ass'n of BTEA v. Sec'y of Lab., Occupational Safety & Health Admin.*, 62 F.3d 37, 39 (1st Cir. 1995).

A motion to dismiss under Fed. R. Civ. P. 12(b)(6) requires a court to determine whether the complaint alleges "enough facts to state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). A court accepts the complaint's well-pleaded facts as true and draws all reasonable inferences in plaintiff's favor but does not credit the complaint's legal conclusions. *Ocasio-Hernández v. Fortuño-Burset*, 640 F.3d 1, 10 (1st Cir. 2011).

ARGUMENT

I. The Maine Defendants are Immune from Suit.

A. BEP and DEP

The Eleventh Amendment generally bars suits against unconsenting States and state agencies in federal court. *Cotto v. Campbell*, 126 F.4th 761, 767 (1st Cir. 2025) (citing *Hans v. Louisiana*, 134 U.S. 1, 10 (1890) and *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 100-01 (1984)); *Town of Barnstable v. O'Connor*, 786 F.3d 130, 138 (1st Cir. 2015) (noting that federal courts generally cannot entertain suits against "instrumentalities of the state"); *Kaija Fellman Lopez v. Me. Dep't of Health and Hum. Servs.*, No. 2:25-cv-00456-SDN, 2026 WL 3093463, at *3 (D. Me. Oct. 16, 2026) ("[U]nder the doctrine of sovereign immunity exemplified by the Eleventh Amendment, states and state agencies may not be sued by citizens in federal court, regardless of the form of relief requested.").

Sovereign immunity can be waived, but the party invoking federal court jurisdiction bears the burden of demonstrating waiver. *See Diaz-Fonseca v. Puerto Rico*, 451 F.3d 13, 34 (1st Cir. 2006). FOMB purports to bring suit against DEP and BEP, indisputably agencies or instrumentalities of the State. *See* Compl. ¶¶ 25 (describing BEP as "a citizen board and the governing body of [DEP], an agency of the State of Maine"), 26 (describing DEP as "the agency of the [S]tate of Maine responsible for protecting and restoring Maine's natural resources"). But FOMB does not even attempt to plead an exception to sovereign immunity. Because FOMB has not addressed, let alone carried, its burden to demonstrate a waiver of sovereign immunity, this Court should determine that it lacks subject matter jurisdiction over the claims against DEP and BEP, and dismiss those claims.

B. DEP Commissioner Loyzim

Under the so-called *Ex parte Young* exception to sovereign immunity, a state official may be sued in their official capacity in federal court to "prohibit [that official] from enforcing state law in a way that violates federal law." *Cotto*, 126 F.4th at 767 (citing *Ex parte Young*, 209 U.S. 123 (1908) and *Edelman v. Jordan*, 415 U.S. 651, 664 (1974)). However, it is well established that *Ex parte Young* "does not allow injunctive relief against state officials for violation of *state law*." *Diaz-Fonseca*, 451 F.3d at 43; *Guillemard-Ginorio v. Contreras-Gómez*, 585 F.3d 508, 529 (1st Cir. 2009) (citing *Pennhurst* for the proposition that "the Eleventh Amendment denies federal courts jurisdiction to award injunctive relief against state officials based upon violations of state law"); *Courthouse News Serv. v. Quinlan*, 32 F.4th 15, 22 (1st Cir. 2022) ("[T]he plaintiffs may obtain relief only if they establish that the [state] court officials violated the First Amendment, not merely state law . . . ."). When a plaintiff asks a federal court to compel state officers to comply with state law—even in a suit also bringing claims grounded in federal law—the only appropriate response is to dismiss the state law claims. *See Cuesnogle v. Ramos*, 835 F.2d 1486, 1497 (1st Cir. 1987) ("If the plaintiff wishes the federal court to address the federal claims, bifurcation will be the only option."); *Pennhurst*, 465 U.S. at 121 (noting, "neither pendent jurisdiction nor any other basis of jurisdiction may override the Eleventh Amendment"); *Thompson v. Keliher*, No. 1:24-cv-00001-JAW, 2024 WL 4851243, at *29 (D. Me. Nov. 21, 2024), *aff'd sub nom. Thompson v. Wilson*, 159 F.4th 91 (1st Cir. 2025), *cert. denied*, No. 25-1105, 2026 WL 2976719 (U.S. Oct. 5, 2026) ("[T]he Court therefore lacks jurisdiction to enjoin [a state agency commissioner] acting in his official capacity based on an alleged misinterpretation of *state* law.").

Commissioner Loyzim accordingly cannot be sued in this Court based on an alleged violation of Maine—as opposed to federal—law. It is evident, however, that FOMB bases its suit

against the Maine Defendants on their alleged violation of state law. The Complaint's sole count against the Maine Defendants is brought pursuant to the "Maine Waters Act, 38 M.R.S. § 464(4)(F)(4) [and] MAPA, 5 M.R.S. §§ 11001(2), 11002(3)." Compl. at 22 (PageID # 76). The Complaint furthers explains the legal basis of the count as being that the Maine Defendants (1) "have and continue to unlawfully rely upon an agency interpretation of Maine's antidegradation policy that is in direct contraction of the Maine Waters Act's codified antidegradation policy," (2) "violated the law when each failed to recommend reclassification of the Upper Lower Segment" and (3) that their "actions and inactions have been arbitrary, capricious, and otherwise not in accordance with applicable law under the MAPA; in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; and/or without observance of procedure required by law." *Id.* ¶¶ 91-93. The first two allegations concern purported violations of the Maine Waters Act, while the third is a recitation of MAPA's standard for judicial review. *See* 5 M.R.S. § 11007(4)(C); *see also* 5 M.R.S. § 11001 (providing for judicial review of final agency action or failure to act in the Maine Superior Court).

On the face of the Complaint, then, it is clear that the gravamen of the allegations against the Maine Defendants are violations of state law. To be sure, the Complaint notes that the Maine Waters Act implements the CWA. But that fact does not automatically mean that a violation of the Maine Waters Act is a violation of the federal law. Recently, this Court rejected the argument that a state regulation's connection with a federal rule or policy meant that an allegation of a violation of the state regulation automatically constituted an allegation of a violation of federal law. In *Thompson*, the Court rejected the plaintiffs' argument that a challenge to a state rule "necessarily and obviously exceeds the scope of a simple challenge to a state action under a purely state regulatory scheme because it involves the adoption of a federal policy, promulgated under a federal

rule." 2024 WL 4851243, at *29. Instead, the Court looked to the complaint itself and "[saw] it as decisive that [p]laintiffs, in their [c]omplaint, classify Count Three as a 'violation of the Maine Administrative Procedure Act.'" *Id.*

FOMB's Complaint also includes vague references to Maine's reclassification recommendation being "inconsistent with the minimum requirements of the CWA" and "in violation of [and] a complete inversion of the intent of the CWA." *See, e.g.,* Compl. ¶¶ 4-5. But these conclusory statements, devoid of any legal citation, do not transform FOMB's expressly pleaded state law claims against the Maine Defendants into cognizable claims grounded in federal law. For these reasons, this Court should conclude that it lacks jurisdiction over the claim against Commissioner Loyzim, and dismiss that claim.

II. FOMB Lacks Article III Standing.

A. Background on Article III Standing

Generally, the "irreducible constitutional minimum of standing" under Article III to bring a lawsuit in federal court "consists of three elements." *Spokeo, Inc. v. Robins*, 578 U.S. 330, 338 (2016) (quotation marks omitted). Plaintiffs must demonstrate that they "have (1) suffered an injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial decision." *Id.*; *see also Conservation L. Found., Inc. v. Acad. Express, LLC*, 129 F.4th 78, 86 (1st Cir. 2025). An "injury in fact" is "'an invasion of a legally protected interest' that is 'concrete and particularized' and 'actual or imminent, not conjectural or hypothetical.'" *Spokeo, Inc.*, 578 U.S. at 339 (quoting *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992)). The "fairly traceable" element of standing "requires 'a causal connection between the injury and the conduct complained of." *Conservation L. Found., Inc.*, 129 F.4th at 90 (quoting *Lujan*, 504 U.S. at 560). As the Supreme Court has explained, traceability and

the third element, redressability, "are often flip sides of the same coin" because "[i]f a defendant's action causes an injury, enjoining the action or awarding damages for the action will typically redress that injury." *FDA v. All. for Hippocratic Med.*, 602 U.S. 367, 380-81 (2024) (quotation marks omitted).

An organization may bring suit asserting harm to the organization itself or may establish "associational standing" to bring suit on behalf of its members in a "representational capacity." *Doe v. Trump*, 157 F.4th 36, 47 (1st Cir. 2025) (quotation marks omitted). An organization can establish standing to sue on its own behalf by demonstrating a "concrete and demonstrable injury to the organization's activities" that is more than a "setback to the organization's abstract social interests." *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 379 (1982). In other words, an organization cannot assert an injury to itself based on a defendant's action that goes against the organization's advocacy interests and merely requires it to spend resources to advocate against that action. *See All. for Hippocratic Med.*, 602 U.S. at 394 ("[A]n organization that has not suffered a concrete injury caused by a defendant's action cannot spend its way into standing simply by expending money to gather information and advocate against the defendant's action.").

An organization can establish associational standing only if "(a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit." *In re Fin. Oversight & Mgmt. Bd. for P.R.*, 110 F.4th 295, 308 (1st Cir. 2024) (quoting *Hunt v. Wash. State Apple Advert. Comm'n*, 432 U.S. 333, 343 (1977)). An organization asserting associational standing must therefore "at the very least, 'identify [a] member[ ] who ha[s] suffered the requisite harm.'" *Draper v. Healey*, 827 F.3d 1, 3 (1st Cir. 2016) (quoting *Summers v. Earth Island Inst.*, 555 U.S. 488, 499 (2009)). This

requirement to "name[] an injured individual" enables a court to confirm "that at least one of the group's members have standing as an individual." *Id.*; *see also Housatonic River Initiative v. EPA*, 75 F.4th 248, 265 (1st Cir. 2023) (concluding that associational standing was established where "affidavits submitted by the [plaintiffs] identify members who live near the proposed onsite disposal site, use that area for recreation and/or commerce, and fear that the disposal facility will negatively impact their use and enjoyment of the area and their property values").

B. FOMB has failed to plead associational standing.

Because FOMB does not assert any type of direct injury to its operations, it appears to be asserting associational standing.[8] In its Complaint, however, FOMB does not identify a single member who it alleges is harmed by any action by the Maine Defendants. Rather, FOMB merely asserts in the most general and conclusory fashion that "its members regularly visit, work on, or recreate in and near Merrymeeting Bay and the Androscoggin River" and that the Maine Defendants' actions allegedly implicate their members' "biological, conservation, recreational, economic, aesthetic, and spiritual interests." Compl. ¶¶ 17, 21. This is not sufficient to demonstrate associational standing. *See, e.g.*, *Draper*, 827 F.3d at 3 ("[T]he complaint did not identify any member of the group whom the regulation prevented from selling or purchasing a Glock."). Because FOMB has failed to demonstrate that it has associational standing to bring its claims against the Maine Defendants, this Court should dismiss those claims.

[8] FOMB does not allege any injury to the organization itself beyond its disagreement with the Maine Defendants' actions and the expenditure of time and resources to advocate for a different approach by the Maine Defendants. Unlike in a case such as *Havens*, for example, there are no allegations that the Maine Defendants' actions have "perceptibly impaired" FOMB's ability to conduct its activities and operations. *See Havens Realty Corp.*, 455 U.S. at 379.

C. FOMB has failed to plead an injury in fact.

Beyond FOMB's failure to identify any member who has been harmed, it has more generally failed to plead how the actions of the Maine Defendants have concretely harmed its members. FOMB challenges the Maine Defendants' recommendation not to reclassify the Upper Lower Segment, alleging that the non-reclassification unlawfully fails to "lock in" improvements to the Upper Lower Segment and instead "locks in" pollution capacity. *See* Compl. ¶¶ 3-4. But FOMB does not allege how the delta between Class C and Class B water quality in the Upper Lower Segment creates a "concrete and particularized" harm to its members beyond their general desire for what they consider to be better water quality. In other words, FOMB has not demonstrated an injury that "actually exist[s]" and that affects its members in a "personal and individual way" distinct from any injury to the general public. *Spokeo, Inc.*, 578 U.S. at 339-40 (quotation marks omitted). Because FOMB has failed to demonstrate an injury in fact, this Court should dismiss the claims against the Maine Defendants.

D. FOMB has failed to plead traceability and redressability.

As noted above, a plaintiff must demonstrate the existence of two interrelated elements: traceability (that the alleged harm was caused by the defendant's conduct) and redressability (that the harm would be redressed by enjoining the defendant's conduct). *See Dantzler, Inc. v. Empresas Berríos Inventory & Operations, Inc.*, 958 F.3d 38, 47 (1st Cir. 2020) ("[I]t cannot be merely speculative that, if a court grants the requested relief, the injury will be redressed."). FOMB, however, has not, and cannot, demonstrate either element of standing because the non-reclassification of the Upper Lower Segment depends on the actions of the Legislature, not DEP or BEP.

Plaintiffs generally cannot establish causation and redressability when an injury "depends

on the unfettered choices made by independent actors not before the courts and whose exercise of broad and legitimate discretion the courts cannot presume either to control or to predict." *ASARCO Inc. v. Kadish*, 490 U.S. 605, 615 (1989); *Murthy v. Missouri*, 603 U.S. 43, 57 (2024) ("[I]t is a bedrock principle that a federal court cannot redress injury that results from the independent action of some third party not before the court." (quotation marks omitted)). Where a plaintiff nonetheless asserts standing despite the presence of an independent actor in the causal chain, it is the plaintiff's burden to demonstrate that the third party will act in a certain way in response to the defendant's action. *See Bennett v. Spear*, 520 U.S. 154, 168-69 (1997). Courts have identified several methods of meeting that burden. Plaintiffs can demonstrate that "the defendant's action had a 'determinative or coercive effect upon the action' causing the injury,'" *Ctr. for Biological Diversity v. U.S. EPA*, 168 F.4th 1164, 1176 (9th Cir. 2026) (quoting *Bennett*, 520 U.S. at 169); that "the defendant had clear regulatory authority over the third party who more directly caused the plaintiff's injury," *id.* (quotation marks omitted); or that the third party "will likely react in predictable ways to" the challenged action, *id.* (quoting *Dep't of Com. v. New York*, 588 U.S. 752, 768 (2019)). What a plaintiff cannot do is simply ask a court to guess at the conduct of an independent decisionmaker. *Murthy*, 603 U.S. at 57 (noting the Supreme Court's "reluctan[ce] to endorse standing theories that require guesswork as to how independent decisionmakers will exercise their judgment" (quotation marks omitted)).

In this case, DEP staff made classification *recommendations* to BEP, and BEP in turn made classification *recommendations* to the Legislature, but the final decision on reclassification resided entirely with the Legislature. *See supra* at 3. BEP's recommendations, which adopted DEP staff recommendations, were transmitted to the ENR Committee, which then received extensive public input, including extensive comments supporting the reclassification of the Upper Lower Segment,

considered an amendment to reclassify the Upper Lower Segment, and eventually voted out a bill with a minority report indicating support for the Upper Lower Segment reclassification. *See supra* at 6-7. The Legislature then considered and voted on the bill, before sending it to the Governor for her consideration. *See id.* DEP's and BEP's recommendations were not determinative, and the Legislature reached a decision through its unfettered discretion and the mechanisms of the democratic process. Therefore, any injury from the non-reclassification of the Upper Lower Segment is not traceable to DEP or BEP. And a judgment ordering DEP or BEP to recommend reclassification of the Upper Lower Segment would not redress any injury because the Legislature would still be entirely free to reject the recommendation.

It would not be enough to plead that recommendations by DEP and BEP likely bear some degree of weight with the Legislature. Rather, courts ask whether agency input is "virtually determinative" of the final decision. *See Bennett*, 520 U.S. at 170; *Rouse v. Fader*, 171 F.4th 272, 282 (4th Cir. 2026) (considering whether the defendant's actions "had a determinative or coercive effect on a third party's conduct"); *cf. Simon v. E. Kentucky Welfare Rts. Org.*, 426 U.S. 26, 42-43 (1976) ("encouragement" or "discouragement" of a third party's actions is not enough to support standing). Nor would it be enough to assert that the Legislature has acted consistently with DEP and BEP classification recommendations in the past. *But see supra* n.4 (noting that the Legislature reclassified a lower segment of the Androscoggin although DEP staff did not recommend doing so). The nature of the democratic process and the regular change in legislative bodies makes reliance on past legislative action speculative, at best, rather than "predictable." *See Rouse*, 171 F.4th at 283. It is unsurprising, then, that the Maine Defendants are not aware of a case in which a court has found standing to sue an agency based on its non-binding recommendations to a legislature.

For these reasons, the Court should determine that FOMB has failed to demonstrate the traceability and redressability elements of standing, and should dismiss the claims against the Maine Defendants.

III. In Any Event, FOMB has Failed to State a Claim for Which Relief May Be Granted.

Assuming for argument's sake that it has sufficiently pled jurisdiction and standing (it has done neither), FOMB has nevertheless failed to state a claim against the Maine Defendants for which relief may be granted. As discussed above, FOMB has not alleged that DEP or BEP has violated federal law, and a violation of the Maine Waters Act is not automatically a violation of the CWA. *See supra* at 11-12. Under Maine law (the basis for FOMB's claims against the Maine Defendants, *see supra* at 7-8; Compl. ¶ 2) the Maine Defendants' reasonable interpretation of the statute they implement—§ 464(4)(F)(4) and the Maine Waters Act more generally—is entitled to deference. *Conservation L. Found., Inc. v. Dep't of Env't Prot.*, 823 A.2d 551, 559 (Me. 2003) ("[W]e defer to the interpretation of a[n ambiguous] statutory scheme by the agency charged with its implementation as long as the agency's construction is reasonable."); *accord E. Me. Conservation Initiative v. Bd. of Env't Prot.*, 334 A.3d 706, 714 (Me. 2025).

In the Complaint, FOMB alleges that, pursuant to an "uncodified longstanding interpretation of Maine's statutory antidegradation policy," Compl. ¶ 65, DEP and BEP impermissibly considered modeling of water quality under critical conditions, which FOMB summarily concludes "cannot by definition constitute the *actual observed water quality* of a classified water,"[9] *id.* ¶ 68. But FOMB neglects to acknowledge that this longstanding interpretation harmonizes § 464(4)(F)(4) with other, potentially conflicting, provisions of the

[9] The term "actual quality" is not defined in the statute, and the Court is not bound to credit FOMB's gloss on the statutory language. *See Guilfoile v. Shields*, 913 F.3d 178, 186 (1st Cir. 2019) (courts do not "draw unreasonable inferences or credit bald assertions [or] empty conclusions" (quotation marks omitted)); *Ocasio-Hernández*, 640 F.3d at 10 (courts do not credit a plaintiff's legal conclusions).

Maine Waters Act, as agencies and courts must do. *See Conservation L. Found., Inc.*, 823 A.2d at 559 ("A particular statute is not reviewed in isolation but in the context of the statutory and regulatory scheme."). For example, 38 M.R.S. § 464(4)(D) provides that, in "computing whether a [licensed] discharge will violate the classification of any river or stream," DEP must determine "the assimilative capacity of the river or stream . . . using the minimum 7-day low flow that can be expected to occur with a frequency of once in 10 years." *See* 06-096 C.M.R. ch. 523. And the statutory antidegradation policy provides that DEP may not issue a waste discharge license if the waters do not attain their classification. 38 M.R.S. § 464(4)(F)(3); *see supra* at 4. As explained in the final Triennial Review recommendations,

> the antidegradation provision must be read in the full context of water quality laws, including those pertaining to waste discharge licensing. . . . [E]xceeding the minimum standards of the next highest classification . . . must occur under critical water quality conditions to trigger the reclassification requirement. . . . Licenses are issued based, in part, on a determination by [DEP] that a discharge will not lower the water quality of the receiving water below its classification. That determination is in part based on statutory provisions (38 M.R.S. § 464(4)(D) and Department rule, Chapter 523, *Waste Discharge License Conditions*) that specify consideration of critical flow conditions and full licensed loads in discharge permitting. Therefore, [DEP]'s position is and has been that monitoring data showing that Class B criteria are sometimes, but not always, attained in the [Upper Lower Segment] during non-critical flow conditions does not trigger the requirements of 38 M.R.S. § 464(4)(F)(4).

2025 Triennial Review at 75-76 (incorporated into the Complaint, *see supra* n.1). Thus, even if the "qualifier 'under critical water quality conditions' does not appear in the statutory antidegradation policy" in § 464(4)(F)(4), Compl. ¶ 66, DEP's and BEP's application of this qualifier represents a reasonable interpretation of the Maine Waters Act's statutory scheme that is entitled to deference, not a violation of Maine law.

FOMB also fails to allege sufficient facts to support that the Maine Defendants had a nondiscretionary duty to recommend reclassification of the Upper Lower Segment pursuant to § 464(4)(F)(4). Although FOMB alleges facts about "actual data," those allegations show that the

Upper Lower Segment failed to attain Class B standards all of the time, even in non-critical conditions. *See* Compl. ¶¶ 58 ("one instance [of sampling] at one site" did not attain Class B); 60 (one downstream site did not attain Class B; "142 of 147 continuous monitoring profile samples" attained Class B); 61 (sampling showed the waters attained Class B "in certain locations"); *see also id.* ¶ 67 (alleging that DEP and BEP can point to no instance in which all critical conditions have co-occurred in the Upper Lower Segment). Simply alleging that data showed that the waters "largely met" Class B criteria, *id.* ¶ 62, does not trigger a nondiscretionary duty to recommend reclassification under § 464(4)(F)(4), and FOMB makes no attempt to explain why meeting standards only in certain locations and under certain conditions would be sufficient.[10] Thus, even crediting FOMB's factual allegations and accepting FOMB's conception of "actual quality," the Maine Defendants were not required to conclude that the actual quality of the Upper Lower Segment was Class B or to recommend reclassification under § 464(4)(F)(4).

CONCLUSION

For the foregoing reasons, the Maine Defendants respectfully request that the Court grant this motion and dismiss FOMB's Third Cause of Action, the sole count against the Maine Defendants.

Dated: October 30, 2026

AARON M. FREY
Attorney General

/s/ *Jack Dafoe*
JACK DAFOE
LAURA JENSEN
Assistant Attorneys General
Office of the Maine Attorney General

[10] FOMB's assertion that data showing that waters "largely met" Class B triggered a nondiscretionary duty under § 464(4)(F)(4) is a legal conclusion that the Court should not credit. *See Bruns v. Mayhew*, 750 F.3d 61, 71 (1st Cir. 2014) ("[A] court is not bound to accept as true a legal conclusion couched as a factual allegation." (quoting *Twombly*, 550 U.S. at 555)).

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Counsel for Defendants Maine Board of Environmental Protection, Maine Department of Environmental Protection, and Melanie Loyzim, in her Official Capacity as Commissioner of the Maine Department of Environmental Protection

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
Region 1
5 Post Office Square, Suite 100
Boston, MA 02109-3912

November 16, 2022

Melanie Loyzim, Commissioner
Maine Department of Environmental Protection
17 State House Station
Augusta, Maine 04333-0017

RE: Review and Action on the State of Maine's Surface Water Quality Standard Revision contained in P.L. 2021, Ch. 551

Dear Commissioner Loyzim:

By letter dated October 11, 2022, the Maine Department of Environmental Protection (DEP) submitted new and revised Water Quality Standards (WQS) to EPA for review in accordance with Section 303(c) of the Clean Water Act (CWA). The WQS revisions are a result of the States' Triennial Review pursuant to 40 C.F.R. § 131.20. The Maine Board of Environmental Protection (BEP) held a public comment period on proposed WQS revisions from August 18 through October 25, 2021, with a public hearing held on October 7, 2021. On December 16, 2021, the Maine BEP submitted final recommendations to the Maine Legislature. The Maine Legislature held a public hearing on February 28, 2022, and a working session on March 2, 2022. The revisions were certified by Scott Boak, Office of the Attorney General, Assistant Attorney General, on September 12, 2022, as having been duly adopted pursuant to state law.

Pursuant to Section 303(c)(3) of the CWA and 40 C.F.R. Part 131, EPA hereby approves Maine's revisions to the following provisions as more specifically described and for the reasons explained in Attachment A:

- 38 MRSA § 361-A, Sub-Section 1-L – Definitions
- 38 MRSA § 464 Sub-Section 4, Paragraph F.(2) - Classification of Maine Waters
- 38 MRSA § 465 Sub-Section 1, Paragraph B and Sub-Section 2 Paragraph B. – Standards for the Classification of Fresh Surface Waters
- 38 MRSA § 465 Sub-Section 3, Paragraph B. – Standards for the Classification of Fresh Surface Waters
- 38 MRSA § 465 Sub-Section 4, Paragraph B. – Standards for the Classification of Fresh Surface Waters
- 38 MRSA § 465-A Sub-Section 1, Paragraph B. – Standards for Classification of Lakes and Ponds
- 38 MRSA § 465-B Sub-Section 1, Paragraph B. – Standards for Classification of Estuarine and Marine Waters

- 38 MRSA § 465-B Sub-Section 2, Paragraph B – Standards for the Classification of Estuarine and Marine Waters
- 38 MRSA § 465-B Sub-Section 3, Paragraph B – Standards for the Classification of Estuarine and Marine Waters
- 38 MRSA § 466 Sub-Section 2-C and 8-B – Definitions
- 38 MRSA § 467 Sub-Section 1, Paragraph A – Classification of Major River Basins – Androscoggin Rive, main stem, including all impoundments
- 38 MRSA § 467 Sub-Section 1, Paragraph B – Classification of Major River Basins – Little Androscoggin River Drainage
- 38 MRSA § 467 Sub-Section 1, Paragraph D – Classification of Major River Basins – Androscoggin River, minor tributaries
- 38 MRSA § 467 Sub-Section 4, Paragraph G – Classification of Major River Basins – Sandy River Drainage
- 38 MRSA § 467 Sub-Section 5, Paragraph B – Classification of Major River Basins – Machias River, tributaries
- 38 MRSA § 467 Sub-Section 6-A, Paragraph B – Classification of Major River Basins – Narraguagus River, tributaries
- 38 MRSA § 467 Sub-Section 7, Paragraph B – Classification of Major River Basins – East Branch of the Penobscot River, tributaries
- 38 MRSA § 467 Sub-Section 7, Paragraph C – Classification of Major River Basins – Penobscot River, West Branch Drainage
- 38 MRSA § 467 Sub-Section 7, Paragraph E – Classification of Major River Basins – Piscataquis River, tributaries
- 38 MRSA § 467 Sub-Section 7, Paragraph F – Classification of Major River Basins – Penobscot River, minor tributaries
- 38 MRSA § 467 Sub-Section 9, Paragraph A – Classification of Major River Basins – Presumpscot River, main stem
- 38 MRSA § 467 Sub-Section 15, Paragraph F – Classification of Major River Basins – St. John River, minor tributaries, those waters lying within the State
- 38 MRSA § 468 Sub-Section 1, Paragraph C – Classifications of Minor Drainages – Cumberland County - Scarborough
- 38 MRSA § 468 Sub-Section 1, Paragraph J – Classifications of Minor Drainages – Cumberland County - Westbrook
- 38 MRSA § 468 Sub-Section 1, Paragraphs O, P, Q and R - Classifications of Minor – Hancock County – Sullivan, Township 10 Southern Division, Township 9 Southern Division, Franklin

Consistent with the requirements of the Endangered Species Act (ESA), EPA evaluated the potential impacts of water body classification upgrades on federally-protected species and their critical habitat and determined that these actions would have no effect on listed species and that consultation with the U.S. Fish and Wildlife Service (USFWS) and the National Marine Fisheries Service (NMFS) was not necessary.

EPA is not taking action at this time on revisions to 38 MRSA § 464 sub-section 4, paragraph A.(5), which changes the pH range for discharges to freshwater from 6.0 – 8.5 to 6.5 – 9.0, and will initiate consultation under the ESA with USFWS and NMFS.

We look forward to continued cooperation with Maine in the development and review of WQS pursuant to our responsibilities under the CWA. If you have any questions, please contact Dan Arsenault (617-918-1562) or Mike Knapp (617-918-1053).

Sincerely,

Ken Moraff, Director
Water Divison
EPA Region 1

Cc:

Matt Hight, Environmental Specialist, Office of the Commissioner, Maine DEP
Brian Kavanah, Director, Bureau of Water Quality, Maine DEP
Wendy Garland, Director, Environmental Assessment, Bureau of Water Quality, Maine DEP
Susanne Meidel, Water Quality Standards Coordinator, Bureau of Water Quality, Maine DEP

Attachment A
Supporting Discussion of EPA's Decisions on Maine's Water Quality Standards 2022 Triennial Review Revisions Contained in P.L. 2021, Ch. 551

38 MRSA § 361-A, Sub-Section 1-L – CFU
This provision contained the definition of colony forming units, or CFU. The definition of CFU has been moved to MRSA §466, sub-section 2-C. EPA approves this revision as a non-substantive change.

EPA considers non-substantive edits to existing Water Quality Standards (WQS) to constitute new or revised WQS that it has the authority to approve or disapprove under Section 303(c)(3). While these revisions do not substantively change the meaning or intent of the existing WQS, EPA believes it is reasonable to treat such revisions in this manner to ensure public transparency as to which provisions are applicable for CWA purposes. EPA notes that the scope of its review and action on non-substantive edits or editorial changes extends only to the edits or changes themselves. EPA is not re-opening or reconsidering the underlying WQS that are the subject of the non-substantive edits or editorial changes.

38 MRSA § 363-D – Waiver or Modification of Protection and Improvement Laws
This section states:

> "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."

In a letter dated June 5, 2015, EPA disapproved this provision because, "Waivers or modifications of WQS that would have the effect of removing a designated use or creating a subcategory of use, including waiving or modifying criteria necessary to support the use, may occur under the Clean Water Act but only in accordance with 40 C.F.R. § 131.10(g) (which, among other things, requires a use attainability analysis). Before taking such action, states must provide public notice and an opportunity for a public hearing, and revised WQS are subject to EPA review and approval. Because 38 M.R.S. § 363-D does not contain any of these requirements, it is not consistent with minimum federal requirements." The letter further explained that Maine could remedy this provision by specifying that the provision does not apply to WQS.

Maine has added the following language to this provision:

> "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."

EPA finds that the revisions listed above are not WQS requiring EPA review and approval pursuant to Section 303(c)(3) of the Clean Water Act and 40 C.F.R. Part 131 because the revisions do not affect criteria, designated uses, or antidegradation requirements. EPA notes its prior, 2015, disapproval is no longer applicable as the provision has been amended to address the basis for EPA's disapproval.

38 MRSA § 464 Sub-Section 2, Paragraph C – Classification of Maine Waters
This provision has been revised to read as follows:

> "C. ~~The~~ Pursuant to subsection 3, paragraph B, the board may recommend changes in classifications it ~~deems~~ considers necessary to the legislature."

EPA finds that the revision listed above is not a WQS requiring EPA review and approval pursuant to Section 303(c)(3) of the Clean Water Act and 40 C.F.R. Part 131 because the revision does not affect criteria, designated uses, or antidegradation requirements.

38 MRSA § 464 Sub-Section 2-A, Paragraph E – Classification of Maine Waters
This provision has been revised to read as follows:

> "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."

EPA finds that the revision listed above is not a WQS requiring EPA review and approval pursuant to Section 303(c)(3) of the Clean Water Act and 40 C.F.R. Part 131 because the revision does not affect criteria, designated uses or antidegradation requirements. If any legislation to implement the recommendation amounts to a WQS change, the Clean Water Act requires it to be submitted to EPA and requires EPA to act on it before it is effective for Clean Water Act purposes.

38 MRSA § 464 Sub-Section 3 – Classification of Maine Waters
This provision has been revised to read as follows:

> "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.

EPA finds that the revisions listed above are not WQS requiring EPA review and approval pursuant to Section 303(c)(3) of the Clean Water Act and 40 C.F.R. Part 131 because the revisions do not affect criteria, designated uses or antidegradation requirements. Regarding Part B, if any legislation to implement the recommendation amounts to a WQS change, the Clean Water Act requires it to be submitted to EPA and requires EPA to act on it before it is effective for Clean Water Act purposes.

38 MRSA § 464 Sub-Section 4, Paragraph F.(2) – Classification of Maine Waters
The designation of outstanding national resource waters (ONRWs) at 464 Sub-Section 4, Paragraph F.(2) was expanded to include waters in the Katahdin Woods and Waters National monument in addition to those water bodies in public reserve lands. EPA approves this revision as it provides greater protections to the water bodies in these areas and provides greater specificity about which waters within the State are considered ONRWs.

38 MRSA § 464 Sub-Section 4, Paragraph F.(4) – Classification of Maine Waters
This provision has been revised to read as follows:

(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.

EPA finds that the revision listed above is not a WQS requiring EPA review and approval pursuant to Section 303(c)(3) of the Clean Water Act and 40 C.F.R. Part 131 because the revision does not affect criteria, designated uses or antidegradation requirements.

38 MRSA § 465 Sub-Section 1, Paragraph B and Sub-Section 2 Paragraph B. – Standards for the Classification of Fresh Surface Waters

Section 465 Sub-Section 1, Paragraph B and Sub-Section 2 Paragraph B contain *Escherichia coli* (*E. Coli*) criteria for Class AA and A waters. The units for the *E. coli* criteria were previously listed only as colony forming units (CFU). This criterion has been amended to include the units of most probably number (MPN), in addition to the existing CFU units.

EPA approved methods for *E. coli* testing may be found at 40 C.F.R § 136.3. Depending on the approved method utilized, the results may be expressed as MPN or CFU. Therefore, EPA approves the addition of MPN to the *E. coli* criteria for Class AA and A waters, as it is consistent with EPA's approved methods. Although EPA is acting on the addition of the unit of MPN, EPA is not taking a new action on the *E. coli* criteria values.

38 MRSA § 465 Sub-Section 3, Paragraph B. – Standards for the Classification of Fresh Surface Waters

Two revisions were made to this section. First the following provision was added:

> "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"

"Without detrimental changes in the resident biological community" is already defined at 38 MRSA § 466 as:

> "'Without detrimental changes in the resident biological community' means no significant loss of species or excessive dominance by any species or group of species attributable to human activity."

EPA approves this revision as it adds greater specificity to the protections afforded to Class B waters. EPA notes that this language is already present in 38 MRSA § 465 sub-section 3, paragraph C as it pertains to discharges to Class B waters.

Secondly, the units for *E. coli* criteria were previously listed only as CFU. The unit of MPN was added to the *E. coli* criteria. Since EPA approved methods for *E. coli* testing found at 40 C.F.R § 136.3 may be expressed as CFU or MPN, EPA approves this revision.

38 MRSA § 465 Sub-Section 4, Paragraph B. – Standards for the Classification of Fresh Surface Waters

Two revisions were made to this section. First the following provision was added:

> "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."

This provision is already contained in 38 MRSA § 465 sub-section 4, paragraph C as it pertains to discharges to Class C waters. EPA approves this revision as it adds greater specificity to the protections afforded to Class C waters.

Secondly, the units for *E. coli* criteria were previously listed only as CFU. The unit of MPN was added to the *E. coli* criteria. Since EPA approved methods for *E. coli* testing found at 40 C.F.R § 136.3 may be expressed as CFU or MPN, EPA approves this revision.

38 MRSA § 465-A Sub-Section 1, Paragraph B. – Standards for Classification of Lakes and Ponds

The units for *E. coli* criteria were previously listed only as CFU. The unit of MPN was added to the *E. coli* criteria. Since EPA approved methods for *E. coli* testing found at 40 C.F.R § 136.3 may be expressed as CFU or MPN, EPA approves this revision.

38 MRSA § 465-B Sub-Section 1, Paragraph B. – Standards for Classification of Estuarine and Marine Waters

The units for *enterococcus* bacteria criteria applicable to Class SA were previously only specified as CFU. The unit of MPN was added to the *enterococcus* bacteria criteria. Since EPA approved methods for *enterococcus* bacteria testing found at 40 C.F.R § 136.3 may be expressed as CFU or MPN, EPA approves this revision.

To ensure that shellfishing is protected, this section was also revised to contain United States Food and Drug Administration (FDA) total bacteria or other specific indicator organisms as established under the National Shellfish Sanitation Program (NSSP) and contained in its publication "Guide for the Control of Molluscan Shellfish", 2019 revision or any successor publication. EPA approves this revision since it protects the designated use of shellfishing contained in MRSA § 465-B sub-section 1, paragraph B.

38 MRSA § 465-B Sub-Section 2, Paragraph B – Standards for the Classification of Estuarine and Marine Waters

Three revisions were made to this section. First the following provision was added:

> "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."

This provision provides greater specificity about the protections afforded to Class SB waters. Also, this provision is already contained in MRSA § 465-B sub-section 2, paragraph C as it pertains to discharges to Class SB waters. EPA approves this provision.

Secondly, the units for *enterococcus* bacteria criteria applicable to Class SB were previously only specified as CFU. The unit of MPN was added to the *enterococcus* bacteria criteria. Since EPA approved methods for *enterococcus* bacteria testing found at 40 C.F.R § 136.3 may be expressed as CFU or MPN, EPA approves this revision.

Finally, while this section does contain the reference to FDA's total bacteria or other specific indicator organisms established under the NSSP for the protection of shellfishing, it does not specifically reference the NSSP publication "Guide for the Control of Molluscan Shellfish"

(2019 revision) or any successor publication. EPA approves this revision as it provides greater specificity concerning the FDA NSSP publication to be used for the protection of shellfishing.

38 MRSA § 465-B Sub-Section 3, Paragraph B – Standards for the Classification of Estuarine and Marine Waters

Three revisions were made to this section. First the following provision was added:

> "Class SC water 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"

This provision provides greater specificity about the protections afforded to Class SC waters. Also, this provision is already contained in MRSA § 465-B sub-section 2, paragraph C as it pertains to discharges to Class SC waters. EPA approves this provision.

Secondly, the units for *enterococcus* bacteria criteria applicable to Class SC were previously only specified as CFU. The unit of MPN was added to the *enterococcus* bacteria criteria. Since EPA approved methods for *enterococcus* bacteria testing found at 40 C.F.R § 136.3 may be expressed as CFU or MPN, EPA approves this revision.

Finally, while this section does contain the reference to FDA's total bacteria or other specific indicator organisms established under the NSSP for the protection of shellfishing, it does not specifically reference the NSSP publication "Guide for the Control of Molluscan Shellfish" (2019 revision) or any successor publication. EPA approves this revision as it provides greater specificity concerning the FDA NSSP publication to be used for the protection of shellfishing.

38 MRSA § 466 Sub-Section 2-C and 8-B – Definitions

The following definitions have been added to this section:

> 2-C. CFU. "CFU" means colony-forming units.
>
> 8-B. MPN. "MPN" means most probable number.

EPA approves the addition of these definitions. These definitions provide the necessary information to apply and implement Maine's WQS. EPA approves these definitions because they are consistent with § 303(c) of the CWA and the implementation regulations at 40 C.F.R. Part 131.

38 MRSA § 467 Sub-Section 1, Paragraph A – Classification of Major River Basins

The segment of the Androscoggin 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 was previously a Class C in its entirety. The segment has been broken into two segments with the upper segment retaining Class C status and the lower section being upgraded to Class B. The segments are as follows:

(2) From its confluence with the Ellis River to 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

EPA approves this revision as it affords greater protections to the Class B section of the Androscoggin River.

38 MRSA § 467 Sub-Section 1, Paragraph B – Classification of Major River Basins
This section contains water classifications for the Little Androscoggin River Drainage. Two waters have been removed from this section because they were previously incorrectly listed in the Little Androscoggin River but actually flow into the Androscoggin River. These include:

(d) Cushman Stream in Woodstock – Class A

(e) Meadow Brook in Woodstock – Class A

EPA notes that Black Brook in Woodstock no longer appears as a stand-alone Class A segment. It is contained in "Tributaries upstream of the confluence with Twichell Brook in Greenwood" which are listed as Class A waters.

Two new additions have been made to this section, which constitute classification upgrades from Class B to Class A, including:

(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

EPA approves these revisions since they increase protections to certain waters and list waters in the correct watershed.

38 MRSA § 467 Sub-Section 1, Paragraph D – Classification of Major River Basins
The Nezinscot River east and west branches above their confluence in Buckfield were previously designated Class A waters. This section has been revised to include the tributaries to the east and west branches of the Nezinscot River above their confluence in Buckfield as Class A waters. Their class remains unchanged.

The following two segments were previously incorrectly listed in the Little Androscoggin River Drainage and have been added to minor tributaries of the Androscoggin River, their class remains unchanged:

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

(11) Meadow Brook in Woodstock – Class A

EPA approves these revisions as they add further protections to the tributaries of the Nezinscot River and now correctly list Cushman Stream and Meadow Brook in the correct watershed.

38 MRSA § 467 Sub-Section 4, Paragraph G – Classification of Major River Basins
Several classification upgrades were made to the Sandy River Tributaries which are Class B unless otherwise specified. First, the language "unless otherwise specified" was added to item (2)(a) so the provision now reads:

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

Next, the following classification upgrades were added:

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

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

(c) Mount Blue Stream and its tributaries – Class A

(d) Oberton Stream above Toothaker Pond Road and its tributaries – Class AA

EPA approves these revisions as they add further protections to these waterbodies.

38 MRSA § 467 Sub-Section 5, Paragraph B – Classification of Major River Basins
Three revisions were made to water body segments that are tributaries to the Machias River. These waters are Class A unless otherwise specified.

First, for item (7) Fletcher Brook and its tributaries are Class AA. The previous classification only contained Fletcher Brook in Township 36 Middle division.

Secondly, all of Magazine Brook in item (8) is Class AA. The previous classification only listed Magazine Brook as Class AA in Township 43 Middle Division.

Finally, for item (10), Chain Lakes Stream, also known as Chain Lake Stream, is Class AA. The previous AA classification was only for Chain Lakes Stream in Day Block Township. "Also known as Chain Lake Stream" was added to the segment description as well.

EPA approves these revisions as they add further protections to these waterbodies.

38 MRSA § 467 Sub-Section 6-A, Paragraph B – Classification of Major River Basins
Item 12 within this section, Narraguagus River Basin, was revised to include Township 28 and Middle Division. This item now reads:

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

EPA approves this revision as it adds further protection to the Little Narraguagus River.

38 MRSA § 467 Sub-Section 7, Paragraph B – Classification of Major River Basins
Three Class AA segments were added to the East Branch of the Penobscot tributaries. Waters within this drainage are Class A unless otherwise specified. The three Class AA waters include:

> (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.
>
> (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.
>
> (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.

EPA approves these revisions as they add further protections and classification upgrades from Class A to Class AA to these waterbodies.

38 MRSA § 467 Sub-Section 7, Paragraph C – Classification of Major River Basins
Five water classification upgrades were made to this Section, Penobscot River, West Branch Drainage. Item (d) was amended to classify waters 1,000 feet below Mckay powerhouse as Class A and item (d-1) was added to designate waters 1,000 downstream of Mckay powerhouse to the confluence of Ambajejus Lake as Class AA. These items now read as follows:

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

Items (a), (b) and (e) pertain to the West Branch of the Penobscot River tributaries that are Class A unless otherwise specified. Item (a) was amended to include tributaries that are located within the Katahdin Woods and Waters National Monument and item (b) was revised to include tributaries entering between Ripogenus Dam and the confluence of Ambajejus Lake. Item (e) is a new provision and specifies that Nahmakanta Stream and its tributaries including tributaries to Nahmakanta Land and upstream lakes as Class AA. These provisions now read as follows:

> (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.

(b) Those tributaries entering between Ripogenus Dam and the confluence with Ambajejus Lake - Class AA.

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

EPA approves these revisions as they add further protections to these waterbodies.

38 MRSA § 467 Sub-Section 7, Paragraph E – Classification of Major River Basins
Four revisions were made to this section which address Piscataquis River tributaries. Item (e) was revised to include "unless otherwise specified" for the Pleasant River, West Branch tributaries which are Class A. Item (e-1) was added to designate Houston Brook and its tributaries as Class AA, this is a classification upgrade from Class A to Class AA. Items (k) and (l) were revised to include tributaries of Schoodic Stream and Scutaze Stream as Class A waters. These provisions now read:

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

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

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

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

EPA approves these revisions as they add further protections to these waterbodies.

38 MRSA § 467 Sub-Section 7, Paragraph F – Classification of Major River Basins
Two revisions were made to this section which includes the Penobscot River minor tributaries. These waters are Class B unless other with provided. Item (a) was repealed. The provision classified Cambolasse Stream (Lincoln) below the Route 2 bridge as Class C. This water is now a Class B water. Additionally, item (12) was amended to include the tributaries of Medunkeunk Stream as Class A waters. EPA approves these revisions as they add further protections to these waterbodies.

38 MRSA § 467 Sub-Section 9, Paragraph A – Classification of Major River Basins
The section concerns waters of the Presumpscot River, main stem. Items (3) and (4) were revised to clarify that "Saccarappa Falls" is also known as "Sacarappa Falls." EPA approves these clarifications as non-substantive changes that improve clarity and the identification of the waters.

38 MRSA § 467 Sub-Section 15, Paragraph F – Classification of Major River Basins
This section concerns water of the minor tributaries of the St. John River lying within the State. These waters are Class A unless otherwise specified. Item (6) was revised to specify that the Southwest Branch from a point located five miles downstream of the international boundary to its confluence with the Northwest Branch, as opposed to the Baker Branch, is a Class AA water. The Baker Branch and Baker Stream are contained in item (2) and are Class AA waters from the

headwaters at the Upper First St. John Pond to the confluence with the Southwest Branch. EPA approves this revision as it adds further protection to this waterbody.

38 MRSA § 468 Sub-Section 1, Paragraph C – Classifications of Minor Drainages
"Finnard" Brook in item (2) was corrected to read "Finnerd" Brook. EPA approves this clarification as a non-substantive change that improves clarity and the identification of this water.

38 MRSA § 468 Sub-Section 1, Paragraph J – Classifications of Minor Drainages
This item was repealed. Long Creek, main stem, in Westbrook was previously listed as a Class C water. Since this provision is repealed, Long Creek, main stem, in Westbrook is now a Class B water pursuant to 38 MRSA § 468 Sub-Section 1. EPA approves this revision as it adds further protection to this waterbody.

38 MRSA § 468 Sub-Section 1, Paragraphs O, P, Q and R - Classifications of Minor Drainages
This section addresses minor drainages in Hancock County. Tributaries to Bonnell Pond have been upgraded to Class A in the Town of Sullivan (item 2), Township 10 Southern Division (item 2), Township 9 Southern Division (item 1) and the Town of Franklin (item 1). EPA approves these revisions as they add further protections to these waterbodies.