

June 27, 2026

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VIA CERTIFIED MAIL, RETURN RECEIPT REQUESTED

RE: Notice of Violations and Intent to File Suit under the Clean Water Act

To Whom it May Concern,

Friends of Merrymeeting Bay ("**FOMB**") hereby gives notice of its intent to file suit pursuant to the Federal Water Pollution Control Act ("**Clean Water Act**," or "**Act**"), 33 U.S.C. § 1365(a)(2), against the Administrator of the United States Environmental Protection Agency ("**EPA**") for violations of the Act. FOMB intends to initiate such action in the United States District Court for the District of Maine seeking appropriate declaratory and injunctive relief no earlier than 60 days from the postmark date of this letter ("**Notice of Intent**"), which serves as notice pursuant to 33 U.S.C. § 1365(b) and 40 C.F.R. § 135 et seq.

The subject of this notice is the EPA's continued failure to review Maine's antidegradation implementation methods and revised antidegradation policy in violation of its mandatory duty to review all new or revised water quality standards under the Clean Water Act, 33 U.S.C. § 1313(c) and 40 C.F.R. § 131.21. The EPA has failed to review Maine's antidegradation implementation methods since the Maine Department of Environmental Protection ("**DEP**") made these methods official in 2001. The EPA, alternatively, has failed to review Maine's antidegradation policy as revised by the DEP and also the Board of Environmental Protection's ("**BEP**") "interpretation" of the policy.

FOMB's noticed action will seek to require the EPA to review Maine's antidegradation implementation methods and revised policy in accordance with its mandatory duty under the

Clean Water Act. The EPA must review these methods and revised policy to determine whether they are consistent with the minimum requirements of the Clean Water Act. The EPA's review and determination are essential to prevent Maine's continued failure to adequately protect, maintain, and restore the high quality of its waters in accordance with the Clean Water Act.

Maine's Antidegradation Implementation Methods.

The Maine Protection and Improvement of Waters Act ("**Maine Waters Act**") was amended to ensure its surface water classification system was consistent with the minimum requirements of the Clean Water Act in 1985. The Maine Legislature, in amending the Maine Waters Act, declared 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."¹ The amendment in 1985 established a classification system of four tiers and water quality standards for each tier that are still in use today.² The amendment in 1985 also established a state antidegradation policy.³ The antidegradation policy includes a reclassification provision which, largely unchanged since its enactment, requires

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 subsection 3, paragraph B, the [Board of Environmental Protection] shall recommend to the Legislature that that water be reclassified in the next higher classification.⁴

The DEP, since at least 2001, has maintained an "interpretation" of this reclassification provision of Maine's antidegradation policy. This "interpretation" is formalized in the DEP's "Waste Discharge Program Guidance" under the section entitled "Antidegradation Procedures and Considerations," attached as **Exhibit A**. The "interpretation" reads an additional requirement (emphasized) into the statutory language of the reclassification provision

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.⁵

The DEP has referred to this "interpretation" and "Waste Discharge Program Guidance" in its recommendations to the BEP to not reclassify certain waters of the state during Maine's

¹ 38 M.R.S. § 464.

² 38 M.R.S. § 465.

³ 38 M.R.S. § 464(4)(F).

⁴ 38 M.R.S. § 464(4)(F)(4).

⁵ WASTE DISCHARGE PROGRAM GUIDANCE, STATE OF MAINE DEPARTMENT OF ENVIRONMENTAL PROTECTION 5 (June 13, 2001) (emphasis added) (attached as Exhibit A).

Triennial Review process.⁶ The DEP, in these instances, has characterized the “Waste Discharge Program Guidance” as its “Antidegradation Program Guidance.”⁷

The BEP is the governing body of the DEP and under the reclassification provision also has the mandatory duty to recommend reclassifying waters of the state to the Maine Legislature when the actual water quality criteria for reclassification are met. The BEP has adopted the DEP’s reference to this “interpretation” and “Waste Discharge Program Guidance” in its recommendations to the Legislature that fail to reclassify certain waters of the state—including segments of the Androscoggin River—during Maine’s Triennial Review process.⁸ The BEP, in these instances, has adopted the DEP’s characterization of the “Waste Discharge Program Guidance” as Maine’s “Antidegradation Program Guidance.”⁹

This “Waste Discharge Program Guidance,” as referred to, characterized, and applied by the DEP and BEP, constitutes Maine’s antidegradation implementation methods that must be developed and adopted under the Clean Water Act.¹⁰ The DEP’s and BEP’s “interpretation” of the reclassification provision, alternatively, revises Maine’s antidegradation policy both literally and in effect.¹¹ This has resulted in inconsistent and conflicting reclassifications.

EPA’s Failure to Review Maine’s Antidegradation Implementation Methods.

The Clean Water Act requires states to develop and adopt water quality standards to protect and maintain the existing quality of waters.¹² These standards must include; (1) a designation of uses, (2) criteria that support these uses, and (3) an antidegradation policy and implementation methods.¹³ The states, accordingly, must “develop and adopt” an antidegradation policy that, at minimum: (1) maintains and protects “existing uses and the level of water quality necessary to protect existing uses”; (2) maintains and protects the water quality that “exceeds levels necessary to support the protection and propagation of fish, shellfish, and wildlife and recreation in and on the water;” and (3) maintains and protects the water quality of “high quality waters” that constitute an “outstanding National resource.”¹⁴ The states must also “develop methods for implementing the antidegradation policy” that are consistent with these minimum requirements.¹⁵

⁶ STATE OF MAINE DEPARTMENT OF ENVIRONMENTAL PROTECTION, MAINE DEPARTMENT OF ENVIRONMENTAL PROTECTION 2021 TRIENNIAL REVIEW OF WATER QUALITY STANDARDS DEPARTMENT RECOMMENDATIONS 57-59 (July 23, 2021) (hereafter “**DEP 2021 Recommendations**”); STATE OF MAINE DEPARTMENT OF ENVIRONMENTAL PROTECTION, MAINE DEPARTMENT OF ENVIRONMENTAL PROTECTION 2025 TRIENNIAL REVIEW OF WATER QUALITY STANDARDS DEPARTMENT RECOMMENDATIONS 72-76 (Aug. 11, 2025) (hereafter “**DEP 2025 Recommendations**”).

⁷ DEP 2021 Recommendations at p. 58; DEP 2025 Recommendations at pp. 73-73.

⁸ See, e.g., STATE OF MAINE BOARD OF ENVIRONMENTAL PROTECTION, BOARD OF ENVIRONMENTAL PROTECTION RECOMMENDATIONS TO THE LEGISLATURE FOR CERTAIN CHANGES TO WATER QUALITY CLASSIFICATIONS AND RELATED STANDARDS 2021 TRIENNIAL REVIEW 79-82 (Jan. 4, 2022) (hereafter “**BEP 2022 Final Recommendations**”); STATE OF MAINE BOARD OF ENVIRONMENTAL PROTECTION, BOARD OF ENVIRONMENTAL PROTECTION RECOMMENDATIONS TO THE LEGISLATURE FOR CERTAIN CHANGES TO WATER QUALITY CLASSIFICATIONS AND RELATED STANDARDS 2025 TRIENNIAL REVIEW 74-79, 80-84 (Dec. 18, 2025) (hereafter “**BEP 2026 Final Recommendations**”).

⁹ BEP 2022 Final Recommendations at pp. 80-81; BEP 2026 Final Recommendations at pp. 75-76, 81.

¹⁰ 40 C.F.R. § 131.12(b).

¹¹ See, e.g., *Fla. Pub. Interest Research Grp. Citizen Lobby, Inc. v. EPA*, 386 F.3d 1070, 1089 (11th Cir. 2004).

¹² 33 U.S.C. § 1313; 40 C.F.R. §§ 131.10-.12.

¹³ 33 U.S.C. § 1313; 40 C.F.R. §§ 131.10-.12.

¹⁴ 40 C.F.R. § 131.12(a).

¹⁵ 40 C.F.R. § 131.12(b).

The Clean Water Act requires the EPA to review any new or revised water quality standards to determine whether they are consistent with the minimum requirements of the Clean Water Act.¹⁶ The Clean Water Act requires this regardless of whether a state has submitted the new or revised standards to the EPA for review.¹⁷ This requirement applies to any state law, regulation, or policy that actually or effectively revises state water quality standards or the implementation of these standards.¹⁸

The Clean Water Act, additionally, requires the EPA to consider multiple factors in its review of new or revised water quality standards. These factors include “[w]hether the State has adopted an antidegradation policy that is consistent with § 131.12, and whether any State adopted antidegradation implementation methods are consistent with § 131.12.”¹⁹

The EPA has reviewed and approved Maine’s codified antidegradation policy, including the reclassification provision of 38 M.R.S. § 464(4)(F)(4), as being consistent with the minimum requirements of the Clean Water Act in 1986, 1987, and 1990. The EPA has not, however, reviewed Maine’s antidegradation policy since 1990 nor its uncodified “interpretation” of the reclassification provision.

The EPA, furthermore, has never reviewed Maine’s antidegradation implementation methods, formalized in the DEP’s “Waste Discharge Program Guidance” in 2001.

The EPA, in its review and approval of Maine’s new and revised water quality standards in 2022, failed to consider whether Maine had adopted antidegradation implementation methods that are consistent with the minimum requirements of the Clean Water Act. During Maine’s 2020-2022 Triennial Review, the BEP failed to recommend to the Maine Legislature that the *entire* lower segment of the Androscoggin River from the Gulf Island Pond Dam in Lewiston to the mouth of the river in Merrymeeting Bay (“**Lower Segment**”) be reclassified from Class C to Class B despite decades of data demonstrating the actual quality of water in the segment exceeds the minimum standards for Class B.²⁰ The BEP instead recommended that a more limited section of the Lower Segment from Worumbo Dam in Lisbon Falls to the mouth of the river in Merrymeeting Bay be reclassified to Class B.²¹ But the BEP failed to recommend that an upstream section of the Lower Segment from Gulf Island Pond Dam in Lewiston and Auburn to the Worumbo Dam in Lisbon Falls (“**Upper Lower Segment**”) be reclassified to Class B.²² The BEP, in its final recommendations, cited its “long-standing interpretation” of the reclassification provision of Maine’s antidegradation policy and its “Antidegradation Program Guidance” as the

¹⁶ 33 U.S.C. § 1313(c); 40 C.F.R. § 131.21.

¹⁷ *Friends of Merrymeeting Bay v. Olsen*, 839 F. Supp. 2d 366, 375 (D. Me. 2012) (“The EPA is under an obligation to review a law that changes a water quality standard regardless of whether a state presents it for review”); *see also Miccosukee Tribe of Indians v. United States, EPA*, 105 F.3d 599, 600-601 (11th Cir. 1997); *see also Fla. Pub. Interest Research Grp. Citizen Lobby, Inc.* 386 F.3d at 1075.

¹⁸ *See Miccosukee Tribe of Indians*, 105 F.3d at 600-601 (explaining “[i]f the [Florida law] constituted a change in state water quality standards, the CWA required Florida to submit the changes to the Administrator”); *see also Fla. Pub. Interest Research Grp. Citizen Lobby Inc.*, 386 F.3d at 1089 (explaining “Florida’s decision not to describe its own regulations as new or revised water quality standards simply cannot ‘circumvent the purposes of the Clean Water Act,’ if *in effect* the [regulation] established new or revised standards”) (emphasis added).

¹⁹ 40 C.F.R. § 131.5(a)(3).

²⁰ BEP 2022 Final Recommendations at pp. 48-51, 79-82.

²¹ *Id.* at p. 48.

²² *Id.* at pp. 79-82.

reason for not recommending that the Upper Lower Segment be reclassified.²³ The BEP’s final recommendations were enacted by the Maine’s Legislature as Public Law 2021, Chapter 551. Maine then submitted only the original legislative text of the law, the text of P.L. 2021, Ch. 551 as enacted, and the Maine Attorney General Certification, to the EPA for review on October 11, 2022.²⁴ Maine did not include in this submission, among other required materials, its antidegradation policy or implementation methods in violation of the requirements of the Clean Water Act.²⁵

The EPA reviewed and approved Maine’s new and revised water quality standards by letter dated November 16, 2022.²⁶ In its approval of the reclassifying only the more limited section of the Lower Segment—but not the Upper Lower Segment—the EPA stated only that: “EPA approves this revision as it affords greater protections to the Class B section of the Androscoggin River.”²⁷ But the EPA provided no indication that, in approving this revision, it considered whether Maine had adopted antidegradation implementation methods consistent with the Clean Water Act.²⁸

The Resulting Harm to Maine’s Waters, and to FOMB and its Members.

The EPA’s continued failure to review Maine’s antidegradation implementations methods and revised antidegradation policy has allowed Maine to maintain antidegradation implementation methods that fail to adequately restore and maintain the quality of its waters—including the quality of the Androscoggin River. These failures have been detrimental to local communities and to all who use and enjoy these waters.

These failures, specifically, have been detrimental to FOMB and its members who have dedicated time and funding to preserving, protecting, and improving the unique ecosystems of Merrymeeting Bay and its watershed—including the Androscoggin River—since 1975. FOMB, using its own financial and material resources, has collected decades of actual water quality data from the river demonstrating the Lower Segment of the Androscoggin River exceeds the minimum standards of Class B waters. FOMB submitted these data to the DEP and BEP during Maine’s 2020-2022 Triennial Review. FOMB, using its own financial and material resources, also collected data most recently in a comprehensive longitudinal profile from over 200 actual water samples demonstrating the actual quality of the Upper Lower Segment exceeds the minimum standards of Class B waters. FOMB submitted these data to the DEP and BEP during Maine’s 2024-2026 Triennial Review.

Maine, based on its unreviewed antidegradation implementation methods and unreviewed, revised antidegradation policy, fails to adequately protect the high quality of water in the Upper Lower Segment despite these data. The BEP, for example, during Maine’s 2024-2026 Triennial Review, again failed to recommend reclassifying the Upper Lower Segment to

²³ *Id.* at pp. 80-81.

²⁴ STATE OF MAINE DEPARTMENT OF ENVIRONMENTAL PROTECTION, USEPA REVIEW OF P.L. 2021, CH. 551 (Oct. 11, 2022).

²⁵ 40 C.F.R. § 131.6 (“The following elements *must be* included in each State’s water quality standards submitted to EPA for review . . . [listing required elements]”) (emphasis added).

²⁶ UNITED STATES ENVIRONMENTAL PROTECTION AGENCY REGION 1, REVIEW AND ACTION ON THE STATE OF MAINE’S SURFACE WATER QUALITY STANDARD REVISION CONTAINED IN P.L. 2021, CH. 551 (Nov. 16, 2022).

²⁷ *Id.* at pp. 9-10.

²⁸ *Id.*

Class B.²⁹ The BEP, in failing to make this mandatory recommendation, again cited its “long-standing interpretation” of the reclassification provision of Maine’s antidegradation policy and its “Antidegradation Program Guidance,”³⁰ despite acknowledging the actual quality of water in the Upper Lower Segment “largely met” the minimum dissolved oxygen criteria for Class B waters, met the E.coli criteria for Class B waters, and met nutrient criteria for Class B waters.³¹

Relief Requested

FOMB’s noticed action will seek declaratory and injunctive relief, and such other relief as permitted by law, to require the EPA to review Maine’s antidegradation implementation methods and revised antidegradation policy in accordance with the Clean Water Act, 33 U.S.C. § 1313(c)(4)(A) and 40 C.F.R. § 131.21(a). FOMB will seek an order from the court declaring the EPA has violated the Clean Water Act through its failure to review Maine’s antidegradation implementation methods and revised antidegradation policy and requiring the EPA to review the methods and policy.

FOMB will also seek recovery of costs and fees associated with this matter pursuant to the Clean Water Act, 33 U.S.C. § 1365(d).

FOMB’s Counsel

Under Clean Water Act, this Notice of Intent is required to identify legal counsel representing the person providing notice.³² FOMB is represented by the following counsel in providing this Notice of Intent:

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Conclusion

Additional information, including information regarding Maine’s failure to submit its antidegradation implementation methods and revised antidegradation policy to the EPA and the EPA’s process for reviewing Maine’s new and revised water quality standards, may reveal further details about the violations alleged above, as well as additional violations. This notice covers all such violations.

FOMB welcomes discussion of effective remedies for the noticed violations that may avoid the necessity of litigation. If you believe any of the above information is incorrect, if you believe you are currently in compliance with the Clean Water Act, or if you have any questions about this notice, please have your attorney contact Scott Sells at (207) 523-3477 or sls@sellslawfirm.com. FOMB does not intend to delay the filing of a complaint in federal court

²⁹ BEP 2026 Final Recommendations at pp. 74-79.

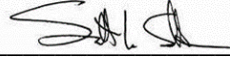
³⁰ BEP 2026 Final Recommendations at pp. 75-76.

³¹ BEP 2026 Final Recommendations at pp. 77-79.

³² 40 C.F.R. § 135.3(c).

if there is no discussion, or discussion continues, at the conclusion of 60 days from the postmarked date of this letter.

Sincerely,



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Exhibit A

Maine Department of Environmental Protection Waste Discharge Program Guidance

DEPLW0267

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:

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- 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.]

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- (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:

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- (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.

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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.

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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.

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- 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:

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- 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.

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- 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.

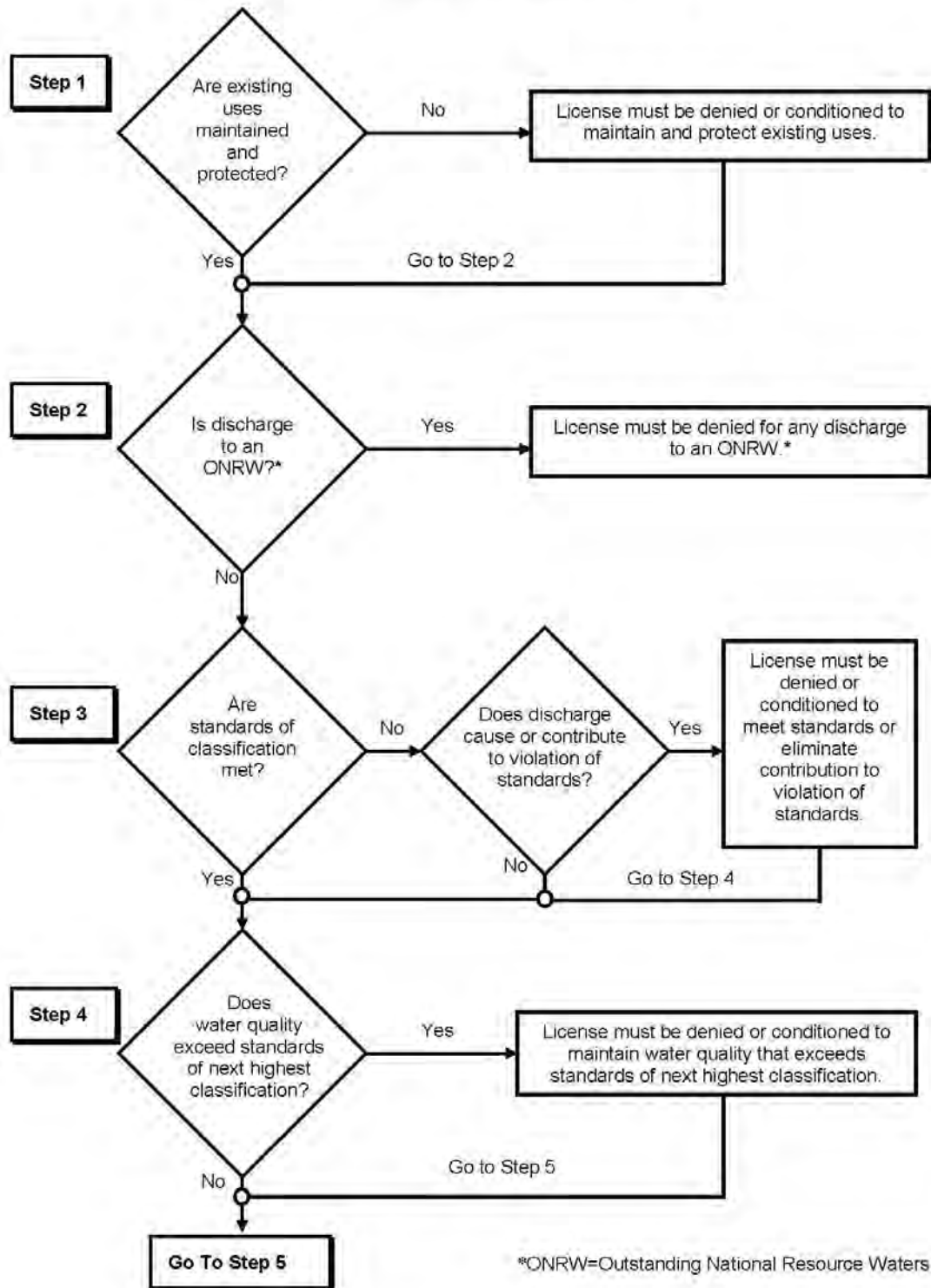
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12. LOWERING OF WATER QUALITY APPROVED. Where the DEP determines that that the lowering of water quality resulting from a new or increased discharge is necessary to achieve important economic or social benefits to the State, and where the DEP further 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 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, 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).

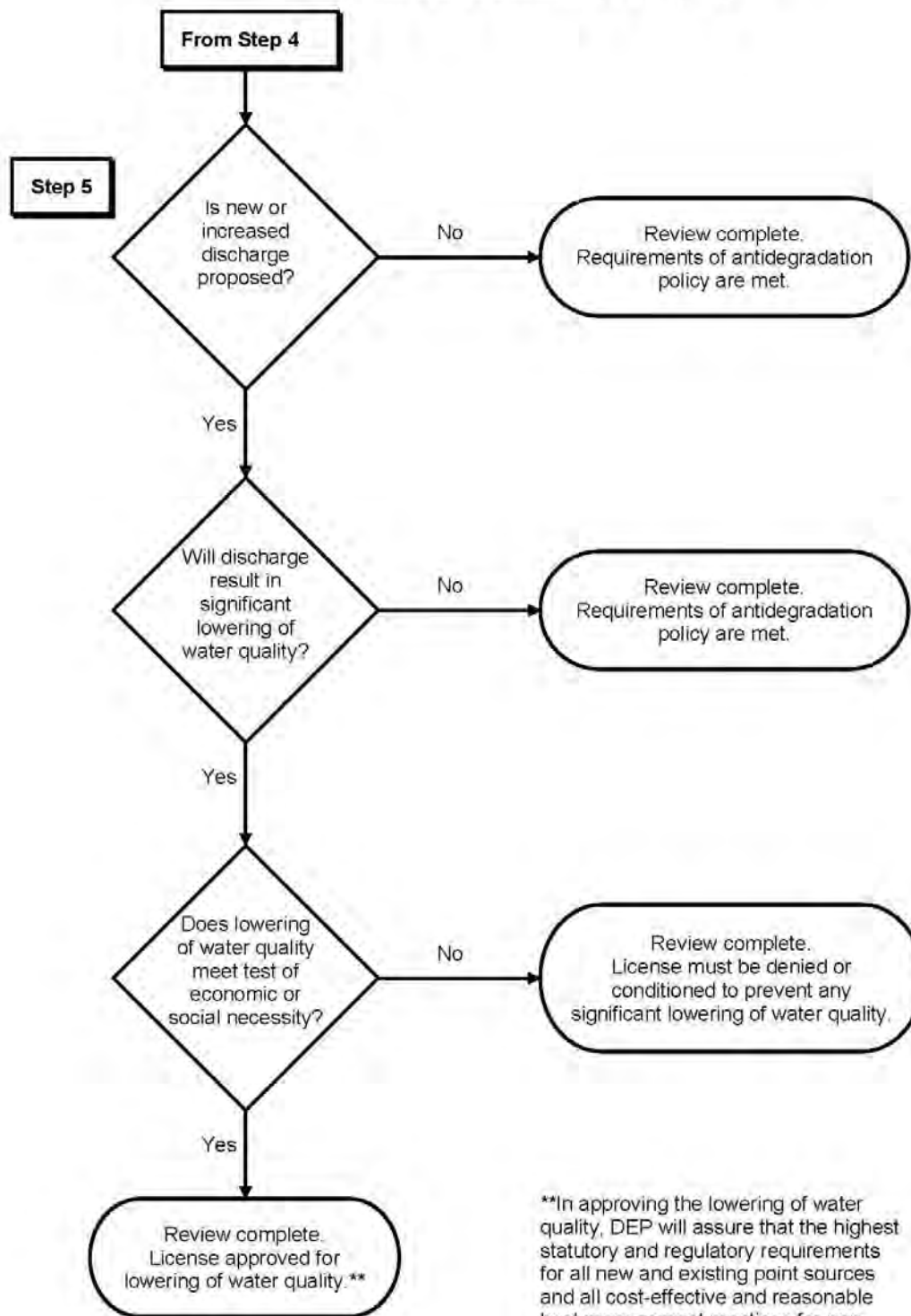
A flow chart for implementing antidegradation review in the waste discharge licensing process is attached to this guidance.

antideg guidance

Antidegradation Review Flow Chart for Waste Discharge Licensing



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.