

October 22, 2025

Maine Board of Environmental Protection
Attention: Meagan Sims,
Division of Environmental Assessment
Bureau of Water Quality
Maine Department of Environmental Protection
17 State House Station
Augusta, ME 04333-0017

SUBMITTED ELECTRONICALLY

RE: Comments by FOMB in Support of Grow L+A's Proposal Regarding the 2025 Triennial Review of Water Quality Standards, Re-classification of the Lower Androscoggin River Segment, Gulf Island Pond to Worumbo Dam from Class C to Class B.

Dear Ms. Sims,

These comments are submitted on behalf of Friends of Merrymeeting Bay ("FOMB") for inclusion into the administrative record in this matter and in response to the Board of Environmental Protection ("BEP") review of recommendations submitted by the Department of Environmental Protection's (the "Department") recommending denial of reclassification for the Lower Androscoggin River between Gulf Island Pond and Worumbo dam from Class C to Class B. FOMB's comments here are in support of the proposal submitted by Grow L+A and not intended to supplant the full, detailed data and analysis FOMB has provided in the testimony given by Ed Friedman and Scott Sells on behalf of FOMB at the recent hearing on October 16, 2025, but to supplement and update that information. Accordingly, the FOMB October 16 hearing comments, June 29 written comments to the DEP and October 16 testimony are fully incorporated into these comments by this reference.

I. "It's the law" – why the Board is required to re-classify in this case.

1. FOMB has demonstrated that the Lower Androscoggin below Great Island Pond meets Class B standards through actual field data, accordingly the Board is required to recommend to the legislature that the segment be re-classified.

The law governing the Board's mandatory actions in this matter states:

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 *shall* recommend to the Legislature that that water be reclassified in the next higher classification. (emphasis supplied)¹

At the outset it must be noted that the Department is not disputing the Lower Androscoggin is actually meeting Class B standards. It is also not disputing the integrity or sufficiency of the field data collected by FOMB under the U.S. Environmental Protection Agency or the Department's protocols in any way. The Department even concedes that the riverine segment meets Class B standards but that "In-stream data for DO show that Class B criteria were not always attained."² The same "not always attained" observation can be said for any riverine segment under any classification. An unusually hot day or unpermitted discharge can easily accomplish this. This is also a somewhat questionable observation since there is simply no existing technology in place to continuously monitor river segments throughout the segment, and the statutory and regulatory scheme, including the language cited above, does not establish an "always" standard.

Setting aside for the moment the impracticality of requiring a river segment to attain its classification twenty-four hours a day, seven days a week in order to achieve re-classification³ there is an even more egregious flaw in this "not always" observation, particularly where modeled results are being used to justify the denial of re-classification. Taken to the extreme, there would never be any re-classifications under the statute as modeling parameters could continue to be adjusted to be inconsistent with the reality of actual field data. FOMB submits that this is not what the statute requires or intends.

Further the Department asserts that: (1) exceeding the minimum standards of the next highest classification, such as for DO, must occur under critical water quality conditions to trigger the reclassification requirement; (2) modeling results which indicate that Class B DO criteria may not be attained in the segments in question during critical water quality conditions is a factor to consider in reclassification; or (3) consideration of critical flow conditions and full licensed loads or that any other condition in NPDES discharge permitting somehow can prevent mandatory reclassification.⁴ None of these pre-conditions are required under 38 M.R.S. § 464(4)(F)(4) or any other statutory requirement and if the legislature had intended to have these preconditions as a trigger to the Board's mandatory obligations it would have explicitly said so.

2. The underlying reason why re-classification to a higher class is necessary.

¹ 38 M.R.S. § 464(4)(F)(4).

² Maine DEP 2025 Triennial Review of Water Quality Standards, Department Recommendations at page 72 <https://www.maine.gov/dep/bep/2025/10-16-25/TR%20recommendations.pdf> (the "Department Triennial Review Recommendations").

³ For example, if the Department was to undertake rulemaking and require 24 hour compliance as a re-classification requirement, and it was somehow measurable, each stream segment classified in the state of Maine, regardless of its current classification, would risk being out of compliance the moment it was found not meeting its classification standards and would presumably have to be downgraded. That is an outcome FOMB suggests is in no-one's interests and is contrary to the anti-degradation intent of the Clean Water Act and Maine's Water Quality laws.

⁴ Department Triennial Review Recommendations at 72-74.

The reason for re-classification here is pretty straightforward, for Androscoggin fisheries and wildlife to re-establish and thrive in the watershed, the water quality classification system under federal and state law has to work the way it is intended to work and not be subverted by pollutant dischargers, or misinformed or incorrect agency judgement. At the end of the day the objective is cleaner water – that is the basic outcome the law intends. This benefits recreational users as well and the economic benefits of clean water, including without limitation the positive economic benefits of recreational use, are well documented. As the statute clearly states it is actual reclassification to ambient conditions that is the mechanism for locking in improvements in water quality and preventing subsequent degradation.

As set forth in more detail below, under Maine law, when a riverine segment meets the water quality standards for a higher classification, re-classification is non-discretionary. Here the graphed actual field data FOMB has collected during one of the driest, drought conditions in years, showing mean averages and individual sample results, submitted to the Department for each specific site.⁵ That is actual data for specific sites throughout the riverine segment in question that can be analyzed in connection with the Grow L+A proposed upgrade.

There is therefore no preclusion that prevents individual site data from being analyzed, and while the Department might take issue with the geometric mean (“Geomean”) graphs FOMB has supplied which are based on actual field data, it must also consider that this protocol, or the averaging of data to determine compliance – is also typically used in the very NPDES program it administers and is specified in the state water quality standards. FOMB submits that here, where actual field data is demonstrating attainment, that the actual data are sufficient and uncontroverted and the Board must reclassify the Lower Androscoggin to Class B.

Accordingly, there are therefore really only two legal issues for the Board to consider – what the law says it must do, and whether there is any statutory interpretation that provides for any exceptions, circumstances or judgement on the part of the Department that would prevent it from complying with the plain language of the law.

Here, these issues must be resolved in the context of the legal standard in the Clean Water Act and Maine statutes that requires a state to revise its water quality standards and classifications to reflect uses and water quality *actually* being attained.⁶ There is also Maine statutory language that explicitly states what the Department must consider in reclassification, specifically:

1. Whether the actual data demonstrates the river segment in question meets Class B narrative and quantitative water quality criteria; and
2. Whether the actual designated uses are consistent with Class B designation, and
3. Whether re-classification is consistent with Maine’s anti-degradation statute.

⁵ See FOMB October 16, 2025 Comments at pages 3, 5-9, 15, and 20-37.

⁶ See: 40 C.F.R. § 131.10(i) designated use requirement: “Where existing water quality standards *specify designated uses* less than those which are presently being attained, *the State shall revise its standards to reflect the uses actually being attained.*” (emphasis supplied), and § 131.6(d) (anti-degradation required); and 38 M.R.S. § 464(4)(F)(4) “When the *actual* water quality of any classified water exceeds the minimum standards of the next highest classification, that higher water quality must be maintained and protected.” (emphasis supplied).

The Department's analysis and recommendation is inconsistent with this standard and ignores these specific criteria in favor of other external factors that are inappropriate and arbitrary when Class B standards are being maintained by actual data and the actual uses of the river are consistent with Class B designation.

3. The Plain language of the statute is clear - the legal standard is mandatory and not discretionary.

First, the plain language of the law itself is not ambiguous in any way. The Clean Water Act and Maine's anti-degradation policy require that "[w]hen *the actual* quality of any classified water exceeds the minimum standards of the next highest classification, that higher water quality *must* be maintained and protected. The board *shall* recommend to the Legislature that that water be reclassified in the next higher classification."⁷ The use of the terms "must" and "shall" have commonly accepted meanings and are, in any normal context, non-discretionary and obligatory. The term "actual" is similarly commonly known as referring to "real" and not "theoretical".⁸ Reclassification guidelines soliciting proposals for the Triennial Review go further noting: "Maine's Water Quality Classification System is *goal-based*. When proposing an upgrade in classification, *recommend waters that either presently attain, or with reasonable application of improved treatment or Best Management Practices (BMPs) could reasonably be expected to attain, the standards and criteria of a higher proposed class.*"⁹

a. The Department's own method of statutory interpretation results in an outcome consistent with the language of the statute – re-classification to Class B.

i. The Department's method of statutory interpretation and the language of 38 § 464

(4). In June 3 of 2021 the Board received testimony from Kevin Martin, Compliance and Procedures Specialist for the Department in another matter involving the Department's interpretation of statutory language.¹⁰ During that testimony, he specifically spoke of how the

⁷ 38 M.R.S. § 464(4)(F)(4); see also 40 C.F.R. § 131.20 (a) "If such new information indicates that the uses specified in section 101(a)(2) of the Act are attainable, the State shall revise its standards accordingly...."

⁸ The word "shall" in the context of a statute is defined in Black's Law Dictionary as "In common or ordinary parlance, and in its ordinary signification, the term 'shall' is a word of command and ... must be given a compulsory meaning." Black's Law Dictionary 1233 (5th ed.1979) and as a generally imperative or mandatory term. The term "must" is universally accepted as an obligatory term and "actual" as is specifically defined by Black's Law Dictionary to mean "real; substantial; existing presently in act having a valid objective existence *as opposed to that which is merely theoretical or possible.*" (emphasis supplied).

⁹ Maine Department of Environmental Protection, 2024 "Submission Guidelines - Proposals to Change the Water Quality Classification of Maine Waters" at 4.

¹⁰ Mr. Martin provided testimony at the June 3rd, 2021 Board of Environmental Protection meeting, all references and direct quotations from him were obtained from a recording of the meeting available from the Board of Environmental Protection.

department interpreted statutory language and the interplay of classification statutes and the legislature.

This is highly relevant here as there appear to be competing statutory arguments – the Department appears to assert or conclude that the statute is NOT mandatory, or if it is there are other laws or exceptions that must be considered; and FOMB and others assert that the circumstances warrant an exercise of the mandatory duty imposed on the Board based on the plain language of the law.

ii. The explicit language. During his testimony, Mr. Martin testified that the Department first looks to the text of the statute, the “explicit language” and the use or non-use of explicit language in frequently used phrases throughout the statute to divine legislative intent.

Here, using that approach, the Department should be looking at the terms “must,” “shall” and “actual” in the statute to determine whether there is any use or non-use that would suggest specific exemptions or differing circumstances that could be considered where the *only* condition explicitly stated uses those terms.

That choice of wording is explicit and exclusive, “actual” water quality is used by the legislature – *not* modeled or hypothetical or imagined or “full licensed waste discharge load” water quality tied to other considerations. Thus here, under Mr. Martin’s guidelines - there is no evidence of *any* legislative intent that there is any discretion on the part of the Department to use hypothetical modeling or anything else besides actual data showing actual water quality to comply with the statute. Importantly – the Department doesn’t even assert that there is any such legislative intent – only its own “guidance” somehow allows it to divine the legislative intent of 38 M.R.S.A §464 from other water quality statutes. That is not the law here.

iii. Other considerations. Mr. Martin further testified that absent specific provisions there *may* be an argument that indicates a legislative intent to consider other circumstances. Clearly since the Department itself has not asserted ambiguity, this must be what the Department is relying on with its own interpretation of the statute – they appear to ask “Is this what the legislature means when they say “*actual* water quality” and that higher water quality “*must* be maintained and protected” and that the Board “*shall recommend* to the legislature the water be re-classified”? That is, after all the plain language used by the legislature in the statute.

However, here there is no ambiguity or omission. There is no need to go elsewhere to determine what the legislature has done when it uses words like “actual,” “shall,” and “must” their plain meaning and intent are clear. The only circumstance when it is appropriate to consider other laws or divine some other legislative intent is if there is ambiguity or omission in the statute. Here there is none and there are clear words indicating a specific legislative intent.

iv. An important limitation. Nevertheless, the Department frequently, and by its own admission, not only looks at the plain language but also “the circumstances surrounding individual cases.” But it does so with an important caveat. As Mr. Martin further testified to the Board “the department is tasked with interpreting these classification statutes and identifying what the legislature intended when it wrote them. It is *important that the department not*

interpret these statutes in such a manner that creates inconsistencies or absurdities.” (emphasis supplied).

v. The result here. Therefore, under the Department’s own stated method of statutory interpretation, the Department itself imposes an important limitation to looking beyond the plain language – no inconsistencies or absurdities. Unfortunately, here the Department has used the premise of looking elsewhere, specifically the NPDES discharge permit program and other environmental statutes, to find a basis to recommend denial. As set forth more fully below, this unfortunately has led the Board into the “inconsistent and absurd” territory it is now faced with. On one hand the plain, mandatory language of the statute, on the other, the Department’s justification, not only in some cases outside the written mandates of the law, but those that will lead to the very inconsistencies and absurdities it professes must be avoided.

b. The actual field data show the river segment meets Class B numeric criteria. For example, FOMB has supplied undisputed data that has been collected during extreme drought conditions showing that for the overwhelming majority of time the segment of the Lower Androscoggin below Gulf Island Pond meets Class B standards. This includes Class B compliance with specific numeric water quality criteria. These data show that the specific Class B dissolved oxygen (“DO”) standards¹¹ are met here.¹² Similarly E. coli requirements for Class B waters¹³ also are met here,¹⁴ aquatic life in free flowing, non-hydropower impoundments also met here.¹⁵ *These data are undisputed.*

c. The Class B designated use criteria are also met. Again, there is explicit, plain language that states what the designated uses are and what the Department (and the Board) can consider. The explicit classification criteria are as follows:

The Class C, current classification,¹⁶ and the Class B, proposed classification¹⁷ designated uses differ only in whether the habitat supported in the reach is characterized as unimpaired.

¹¹ 38 M.R.S. § 465(3)(B) states “[t]he dissolved oxygen content of Class B waters may not be less than 7 parts per million or 75% of saturation, whichever is higher, except that for the period from October 1st to May 14th, in order to ensure spawning and egg incubation of indigenous fish species, the 7-day mean dissolved oxygen concentration may not be less than 9.5 parts per million and the one-day minimum dissolved oxygen concentration may not be less than 8.0 parts per million in identified fish spawning areas.”

¹² FOMB October 16, 2025 Comments at pages 4-6.

¹³ 38 M.R.S. § 465(3)(B) states that “[b]etween April 15th and October 31st, the number of Escherichia coli bacteria in these waters may not exceed a geometric mean of 64 CFU per 100 milliliters over a 90-day interval or 236 CFU per 100 milliliters in more than 10% of the samples in any 90-day interval.

¹⁴ FOMB October 16, 2025 Comments at 5-7.

¹⁵ FOMB October 16, 2025 Comments at pages 20-37.

¹⁶ 38 M.R.S. § 465(4)(A) states “Class C waters must be of such quality that they are suitable for the designated uses of drinking water supply after treatment; fishing; agriculture; recreation in and on the water; industrial process and cooling water supply; hydroelectric power generation, except as prohibited under Title 12, section 403; navigation; and as a habitat for fish and other aquatic life.”

¹⁷ 38 M.R.S. § 465(3)(A) states “Class B waters must be of such quality that they are suitable for the designated uses of drinking water supply after treatment; fishing; agriculture; recreation in and on the water; industrial process and cooling water supply; hydroelectric power generation, except as prohibited

“Unimpaired” means “without a diminished capacity to support aquatic life.”¹⁸ The Lower Androscoggin has and does support unimpaired aquatic life and is not listed as impaired for any relevant parameter. *Again, the Department does not dispute this.*

d. The Class B aquatic life standard is also met. Extensive sampling for benthic invertebrates (BMI) was undertaken during 2021 at FOMB expense from Brunswick to Site A4 in the current proposal reach. BMI Index as modeled by DEP all show Class B attainment for Sites A2, A3 and A4 in the current proposal, the only free flowing sites. Other sites are covered under the hydropower exemption.¹⁹

e. The anti-degradation factors are also met here. Further, in determining what uses need to be protected and maintained, the Department may consider, on a case-by-case basis, certain antidegradation factors. Maine statute specifically provides that:

In making its determination of uses to be protected and maintained, the department shall consider designated uses for that water body and:

- (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 or on the water, fishing, water supply, or commercial activity that depends directly on the preservation of an existing level of water quality; [. . .] and
- (e) Any other evidence that, for divisions (a), (b) and (c), demonstrates their ecological significance because of their role or importance in the functioning of the ecosystem or their rarity and, for division (d), demonstrates its historical or social significance.²⁰

Here again, the Lower Androscoggin segment meets even these criteria *and the Department does not dispute that it does*. So even if the Department manages to avoid the reality of Class B numeric standards being met by actual field data, there is *no dispute that the designated uses are also consistent with Class B designated uses. This fact, and the department’s own statutory interpretation method completely ends any possible further analysis the Department should conduct under the law*. There is absolutely no other indication of legislative intent to indicate it should consider anything other than the actual water quality. That is what is required to conform with the goals of classification standards as explicitly stated by the legislature, nothing more.

f. The unreasonable outcomes when inappropriate considerations are used. The Department did not stop where its own analysis and method dictated it should. Instead, it layered

under Title 12, section 403; navigation; and as habitat for fish and other aquatic life. *The habitat must be characterized as unimpaired.*” (emphasis supplied).

¹⁸ 38 M.R.S. § 466(11).

¹⁹ See <https://www.mainelegislature.org/legis/statutes/38/title38sec464.html> and at FOMB October 16, 2025 Comments at pages 20-33.

²⁰ 38 M.R.S. § 465(4)(F).

hypothetical modeling results as a surrounding circumstance, even when actual data was and continues to be available. The purpose of the Clean Water Act is to prevent or eliminate water pollution, not to accommodate it by preventing reclassification towards more protective standards. This is particularly so where the basis for denial is a rare or exceptional occurrence such as modeled or imagined maximum pollutant loading. FOMB submits that it is patently unreasonable to use theoretical or hypothetical data that is inconsistent with the reality of actual facts and data to justify deviating from clear and explicit legal requirements. It also leads to an absurd and capricious result – willfully ignoring actual data and reality – and that is exactly the kind of inconsistency and absurd result that the Department itself professes it cannot do.

Legal inconsistencies notwithstanding, the practical effect of this also means that those who have to obtain a NPDES permit to degrade water quality, i.e. pollute the river, somehow override the legislative intent to maintain and protect the higher water quality. That is also patently absurd, as set forth below, the Federal Clean Water Act (under which those point source discharge permits were issued) and Maine’s anti-degradation statutes in no way intend for point source or non-point source pollution discharges to provide an exemption from water quality classification mandates.

FOMB asserts that even considering the economic impact that these waste dischargers *might* incur to come into compliance with the upgraded Class B standard, that impact has to be weighed against the positive economic benefits of cleaner water and its designated uses including the economic benefits of increased recreational use in the area.

4. The rationale given by the Department to recommend *against* re-classification is inappropriate and, in some cases, unlawful.

Simply put, the Department’s “interpretation” of the statute is that certain other additional factors must be taken into account or considered. In summary these factors include:

- Under modeled “critical” once-in-a-decade low flow, high temperature conditions, the lower Androscoggin might fail to meet Class B standard,
- Waste discharge permits might have to be altered and might not be allowed at all under Class B designation because of the requirement to consider modeled once-in-a-decade low flow, high temperature conditions, and
- Upstream and instream pollution (point and non-point source discharges) somehow can prevent lower reaches from being reclassified.

Importantly, none of these factors are appropriate when confronted with a segment of water that is actually meeting water quality standards and designated uses. Again, there is nothing – *nothing* - in the statute that allows for this and the overwhelming legal basis for both the Federal Clean Water Act and Maine’s Anti-degradation statute explicitly say so.

a. Hypothetical modeling for a once in a decade extreme event does not comply with the statute. Pollution assimilation modeling, the same modeling used for NPDES permitting, cannot be used to avoid re-classification where there is actual data available. The models used and relied upon by the Department are used to minimize harm to aquatic resources when the

department permits a pollutant discharge – *not* to determine whether a designated use is present in a particular riverine segment. This is an improper conflation of two very different statutes with two very different purposes and not unsurprisingly leads to inconsistent and absurd results.

- Discharge permit standards emphasize worst case scenarios to protect and build in a margin of safety for discharge permit purposes. Unlike re-classification statutes, their purpose is to limit the discharge of pollutants, not to deny reclassification of a riverine segment.
- There is no indication they are or were ever intended to thwart federal and state anti-degradation or reclassification laws.

Anti-degradation policy is clear under federal and state law – the intentional movement towards improved water quality ensures that water quality is continually improved and that the improvements are maintained, not degraded or held hostage by imagined modeling scenarios.

The Department has also stated that proponents of re-classification must provide water quality data and modeling showing the likelihood of attainment of Class B water quality criteria at maximum NPDES licensed loads since the Department does not foresee the ability to ensure attainment of Class B standards under critical conditions.²¹ This is also an absurd requirement – there is no evidence that any waste discharger operates at maximum licensed loads; rather a large, discretionary buffer is generally built into all NPDES discharge permits²² to avoid violations that may occur under theoretical and extreme conditions. This is a permit requirement to prevent pollutant discharge, *not* a re-classification requirement involving the collection of actual field data. *Unless all maximum licensed loads are actually discharged simultaneously under critical flow conditions*²³ (defined as “7Q10”), *there is no way to collect actual data to demonstrate compliance under these conditions*. Thus, DEP is requesting an impossible and unnecessary showing, *exactly the kind of absurd result it purports to find as unacceptable*.

FOMB further suggests that the data collected in 2025 was under extreme drought conditions, suggested by some to be the third or fifth driest year in at least the last twenty years strongly suggesting that that the *actual* field data showing Class B attainment was collected under “7Q10” conditions. USGS actual Auburn flow levels vs 96 year median as documented in the FOMB

²¹ See the Department’s Triennial Review Recommendations at 73.

²² See FOMB 2020 proposal for Reclassification of the Lower Androscoggin River, Exhibit 40 <http://cybrary.fomb.org/pages/20210502%20Exhibit%2040%20Andro%20Dischargers%20Actual%20vs.%20Licensed%202012-2013.pdf>.

²³ To determine if a discharge to waters of the State of Maine could cause or contribute to non-attainment of water quality standards, the Department, relies on its existing statutory authority derived from 38 M.R.S. § 464(4)(D) which states: “Except as otherwise provided in this paragraph, for the purpose of computing whether a discharge will violate the classification of any river or stream, the assimilative capacity of the river or stream must be computed using the minimum 7-day low flow that can be expected to occur with a frequency of once in 10 years.” Thus in writing a permit the Department typically uses in its reasonable potential analysis a “7Q10” standard, which is the lowest 7-day average that occurs (on average) once every 10 years as the maximum flow of the discharge allowed by permit. There is however, discretion built into the statute for certain toxic substances and nutrients discussed *infra* at note 26.

October 16 testimony are quite clear. The failure to model compliance under such conditions is not relevant when there is actual field data to suggest Class B compliance.

b. The existence of waste discharge permits that may need to be altered or not allowed under Class B designation due to modeled results is not a requirement for re-classification. This is a critical flaw in the Department's reclassification denial. The Department's analysis must be based on *existing* water quality-not hypothetical modeling with point sources operating at maximum NPDES licensed discharge. Further, the Department expressly must *not* take into account industrial discharge capacity needs in determining uses for a water segment reclassification. Indeed, the Board is specifically prohibited from considering maximum licensed loads because both state and federal regulations prohibit consideration of waste discharge or transport as a designated use.

For example, under Maine law the “[u]se of water body to receive or transport waste discharges is not considered for an existing use for the purposes of this anti-degradation policy.”²⁴ Similarly, under federal law: “[i]n no case shall a state adopt waste transport or waste assimilation as a designated use for any waters of the United States.”²⁵

Here, the Department improperly used consideration of the waste assimilative capacity of the river, specifically waste NPDES permitting limits as expressed in point source discharge permits, as part of its re-classification review. *This is expressly prohibited under federal and state statute and regulation.*

c. Finally, upstream or instream pollution, such as nutrient loading, has no bearing whatsoever on denying reclassification of a specific segment under the Clean Water Act – it would result in exactly the opposite outcome intended.

The State of Maine administers its water quality program under the federal Clean Water Act, and as such the provisions and guidance under the CWA must also be adhered to. Under federal Law the state's responsibilities are explicit: “*The state's designation of those upstream sources should not negatively impact downstream waters.*”²⁶ (emphasis supplied). Therefore, the Department cannot, under any circumstance, use negative impacts of upstream designations as justification for denying re-classification when the standards are met. That would be exactly the kind of “negative impact” the CWA explicitly forbids.

This is further confirmed in EPA Agency Guidance which states: “[n]o waste load allocation can be developed or NPDES permit issued that would result in standards being violated. With respect to antidegradation, that means existing uses must be protected, water quality may not be lowered in [Outstanding Natural Resource Waters], and *in the case of waters whose quality exceeds that necessary for the section 101(a)(2) goals of the Act, an activity cannot result in a lowering of water quality unless the applicable public participation, intergovernmental review, and baseline control requirements of the antidegradation policy have been met.*” (emphasis supplied).

²⁴ 38 § M.R.S. § 465(4)(F)(1)(d).

²⁵ 40 CFR § 131.1 (a).

²⁶ 40 C.F.R Sec. 131 (b).

FOMB is unaware that the Department has undertaken any such intergovernmental review, or reviewed whether baseline control requirements of Maine's anti-degradation policy have been met here. It appears that the Department has done just the opposite – used the NPDES discharge requirements and upstream water quality as the basis to deny re-classification to a higher, improved water quality classification downstream. It's clear from both the federal statute and guidance that the intent of the NPDES permit program is not intended to prevent water quality standards from being met or prevent improvement to water quality - here not to allow upstream or instream pollutants to negatively impact the improvement of downstream waters and by extension their potential reclassification to a higher class. Put simply, if the Department, as part of *its* guidance is going to consider other laws in re-classification under a mandatory statute, it must comply with the language and guidance of those other laws to make sure it does not result in an inconsistent or absurd outcome.

d. Accordingly, using the Department's own method of statutory interpretation, and the explicit language of federal and state statute, regulation and guidance – there is no reasonable legal interpretation that would justify denial. There is no dispute over whether the Class B standards or the designated uses are being met here. However, the external considerations used by the Department in denying reclassification are not in accordance with the federal and state statute, regulation and guidance or the express purposes underlying those laws. Further, there is no assertion by the Department that the legislature intended to provide an exception for the rationale it has provided. It appears, on closer scrutiny to have done just the opposite. Here the Department's and the Board's inquiry is limited to only limited specific circumstances that must be examined – (1) whether the river segment meets the higher classification and (2) whether the designated uses are consistent with Class B designation and antidegradation laws. That's it. The Department has made no showing that the actual data is disputed or that the designated uses are inconsistent with Class B designation. Instead, it offers justification for denial that is inconsistent with the plain language and purpose of the very statutes and programs it itself administers.

5. There is a better, more practical alternative than exposing the Board to statutory liability.

a. The Department has more discretion under the NPDES point source discharge program to ease the transition to a higher classification standard. As stated above,²⁷ rather than conflate the NPDES program with a non-discretionary statute, FOMB suggests the data, here the information reported by the permittees themselves,²⁸ confirm that there is room to adjust those permits so as to ease any economic impact reclassification might have over time. This is because (1) these permits typically have a 5 year time frame; (2) the NPDES permits requirements are based on a worse case discharge scenario; and (3) the Department has the

²⁷ See Paragraph 4 (a) above – NPDES discharge permit standards emphasize worst case scenarios to protect and build in a margin of safety for discharge permit purposes, this margin of safety will need to be adjusted so that dischargers can comply with new Class B water quality standards.

²⁸ See: NPDES permit data compiled as Exhibit 40 to FOMB 2020 Upgrade Proposal (which the Board recommended). The data are reported discharges for one year and typical of annual NPDES discharges.

discretion under the statute to adjust the discharge requirements over the permit duration to reflect the actual pollutant discharge, with a smaller, more realistic buffers based on actual discharges. While basing permits on a 7Q10 standard is required, there is no apparent reason why licensed discharge loads should not better reflect actual discharges with a smaller buffer.²⁹ For example, basing discharge permits on a rolling average or maximum actual discharge plus a reasonable buffer would more realistically reflect actual water quality impairment. Simply put, as long as there is a smaller buffer built in there is always room for expansion, but overall within any given permit period discharge permits would be closer aligned with reality. In this way an abrupt permit impact due to re-classification to a higher Class B (or any other class where there is significant impact on NPDES dischargers) could be avoided and the transition phased in over time.

Stated another way, the Department has more discretion under the NPDES permit program it administers than it does where a mandatory statute requires re-classification under its plain language. FOMB asserts that when a segment is deemed to meet a higher water quality classification, the better approach is to re-classify the segment and take the 5 year NPDES permit window to transition upstream dischargers into compliance, revising the margin or buffer dischargers that are permitted under over time, thereby easing the economic impact. FOMB also notes that the upstream and instream NPDES discharge permits in question, are still operating on expired permits – making this an ideal time to transition to a higher classification. Eventually dischargers will need to meet Class B standards, the data show that, in most cases, there is ample room under existing discharge requirements to phase this in over the life of the permits.

II. Conclusion.

FOMB has submitted actual field data and continues to collect data confirming the Lower Androscoggin below Gulf Island Pond meets Class B criteria virtually all, if not all of the time. This is probably the fifth Triennial process it has participated in, in addition to numerous other formal and informal presentations to the Department and the legislature. By any reasonable standard, the actual field data FOMB has submitted in support of Grow L+A's upgrade proposal is no different, and in fact more compelling due to the conditions under which it was obtained than the data supplied to justify the upgrade from Worumbo Dam to Merrymeeting bay.

As with that last Lower Androscoggin upgrade, the Board is again face to face with a mandatory statute it must either adhere to or risk legal exposure in connection with its final agency action. Unfortunately, the law does not permit the kind of justification the Department is attempting, presumably to accommodate upstream or instream pollutant dischargers who are resisting re-classification on the basis of its potential economic impact. Environmental regulatory

²⁹ Unlike the mandatory language discussed at length in these comments, 38 §464(4)(D) contains the following *discretionary* language: "The department *may* use a different flow rate only for those toxic substances regulated under section 420 and for those nutrients specified in department rules. To use a different flow rate, the department must find that the flow rate is consistent with the risk being addressed." (emphasis supplied). Thus, unlike reclassification standards, the department has wide latitude to address nutrient discharges and toxic substances addressed under 38 §420 under different discharge parameters over the term of the permit.

compliance is a cost of doing business – that has been the case since the Clean Water Act and Maine’s anti-degradation water quality laws were enacted. Importantly the positive economic impacts of cleaner water must also be considered.

Here, however, the Department has (and has had) other options rather than putting the parties and the Board in this position. It can recommend reclassification of the segment to Class B and use the Department’s discretion under the NPDES program, which it administers, to ease the transition for upstream dischargers to come into compliance with Class B standards. This is not to say FOMB is suggesting the Department abandon the requirements of that program either and allow non-compliance under those permits. Instead, it appears the actual data, reported by the very permittees opposed to re-classification, show there is room to adjust and gradually phase their permits into compliance with the higher classification. Particularly now, where these permits have not yet been renewed.

The river currently attains the higher bacteria, aquatic life and dissolved oxygen standards set forth in the Class B designation. As noted by the Department, it has no reason to question the data; and it has even relied upon data supplied by FOMB in prior reclassifications. There is also no dispute as to whether the designated uses of the segment of the river are somehow inconsistent with Class B designated uses or any antidegradation provisions. There is also no assertion that the legislature intended anything other than this result and it is confirmed using the statutory analysis of the Department’s own expert. Further, the Department has not legally justified its deviation from that statutory language with the reasons it has given.

Therefore, under the circumstances presented here, the actual data obtained and the plain language and purpose of the re-classification statutes, the Board must recommend to the legislature the re-classification of the Lower Androscoggin from Gulf Island Pond to Worumbo Dam from Class C to Class B.

Respectfully submitted this 22th day of October, 2025.



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