

## **EPA New England's Approval Decision on Maine's 2002 Section 303(d) List**

### **1. INTRODUCTION**

EPA has conducted a complete review of Maine's 2002 Section 303(d) list and supporting documentation and information and, based on this review, EPA has determined that Maine's list of water quality limited segments (WQLSs) still requiring TMDLs meets the requirements of §303(d) of the Clean Water Act ("CWA" or "the Act") and EPA's implementing regulations. Therefore, by this order, EPA hereby APPROVES Maine's §303(d) list. The statutory and regulatory requirements, and EPA's review of Maine's compliance with each requirement, are described in detail below.

### **2. STATUTORY and REGULATORY BACKGROUND**

#### **Identification of WQLSs for Inclusion on Section 303(d) List**

§303(d)(1) of the Act directs States to identify those waters within its jurisdiction for which effluent limitations required by §301(b)(1)(A) and (B) are not stringent enough to implement any applicable water quality standard, and to establish a priority ranking for such waters, taking into account the severity of the pollution and the uses to be made of such waters. The § 303(d) listing requirement applies to waters impaired by point and/or nonpoint sources, pursuant to EPA's long-standing interpretation of §303(d).

EPA regulations provide that States do not need to list waters where the following controls are adequate to implement applicable standards: (1) technology-based effluent limitations required by the Act, (2) more stringent effluent limitations required by State or local authority, and (3) other pollution control requirements required by State, local, or federal authority. See 40 CFR130.7(b)(1).

#### **Consideration of Existing and Readily Available Water Quality-Related Data and Information**

In developing §303(d) lists, States are required to assemble and evaluate all existing and readily available water quality-related data and information, including, at a minimum, consideration of existing and readily available data and information about the following categories of waters: (1) waters identified as partially meeting or not meeting designated uses, or as threatened, in the State's most recent §305(b) report; (2) waters for which dilution calculations or predictive modeling indicate nonattainment of applicable standards; (3) waters for which water quality problems have been reported by governmental agencies, members of the public, or academic institutions; and (4) waters identified as impaired or threatened in any §319 nonpoint assessment submitted to EPA. *See* 40 CFR 130.7(b)(5). In addition to these minimum categories, States are required to consider any other data and information that is existing and readily available. EPA's

1991 Guidance for Water Quality-Based Decisions describes categories of water quality-related data and information that may be existing and readily available. *See* Guidance for Water Quality-Based Decisions: The TMDL Process, EPA Office of Water, 1991, Appendix C ("EPA's 1991 Guidance"). While States are required to evaluate all existing and readily available water quality-related data and information, States may decide to rely or not rely on particular data or information in determining whether to list particular waters.

In addition to requiring States to assemble and evaluate all existing and readily available water quality-related data and information, EPA regulations at 40 CFR 130.7(b)(6) require States to include as part of their submissions to EPA documentation to support decisions to rely or not rely on particular data and information and decisions to list or not list waters. Such documentation needs to include, at a minimum, the following information: (1) a description of the methodology used to develop the list; (2) a description of the data and information used to identify waters; and (3) any other reasonable information requested by the Region.

### **Priority Ranking**

EPA regulations also codify and interpret the requirement in §303(d)(1)(A) of the Act that States establish a priority ranking for listed waters. The regulations at 40 CFR 130.7(b)(4) require States to prioritize waters on their §303(d) lists for TMDL development, and also to identify those WQLSs targeted for TMDL development in the next two years. In prioritizing and targeting waters, States must, at a minimum, take into account the severity of the pollution and the uses to be made of such waters. *See* §303(d)(1)(A). As long as these factors are taken into account, the Act provides that States establish priorities. States may consider other factors relevant to prioritizing waters for TMDL development, including immediate programmatic needs, vulnerability of particular waters as aquatic habitats, recreational, economic, and aesthetic importance of particular waters, degree of public interest and support, and State or national policies and priorities. *See* 57 FR 33040, 33045 (July 24, 1992), and EPA's 1991 Guidance.

### **3. ANALYSIS OF MAINE’S SUBMISSION**

#### **A. IDENTIFICATION of WATERS and CONSIDERATION of EXISTING and READILY AVAILABLE WATER QUALITY RELATED DATA and INFORMATION**

EPA has reviewed Maine's submission, and has concluded that the State developed its §303(d) list in compliance with §303(d) of the Act and 40 CFR 130.7. EPA's review is based on its analysis of whether the State reasonably considered existing and readily available water quality-related data and information and reasonably identified waters required to be listed.

##### **1. State’s determination to list or not list waters**

###### **[Section 130.7(b)(6)(i-iv)]**

###### **a. A description of the methodology used to develop the list**

###### **[Section 130.7(b)(6)(i)]**

Maine presents its 2002 §303(d) list within the “2002 Integrated Water Quality Monitoring and Assessment Report” with the adoption of assessment units based on the hydrologic unit code (HUC – 10 digit). Category 5 waters within the integrated report constitute the 2002 §303 (d) list. A listing methodology for the 2002 §303(d) list is provided within Part I of the integrated report (pages A-9 – 14). For each of the major listing categories 1-5, Maine’s listing methodology describes the basis of attainment assessment (type of data or information used). Within the listing methodology section, Maine also provides a list of “acceptable reasons for not listing a previously listed water as provided in 40 CFR 130.7(b)” (page A-14), and addresses other aspects of Maine’s methodology, including the prioritization of waters for TMDL development, and the listing of waters affected by fish advisories. Maine provides information on monitoring and TMDL schedules (A-20-21) in another section of Part I of the integrated report.

##### **Delisting and Off-ramping:**

The following table shows a summary of the previously §303(d)-listed waterbodies that are not listed in category 5 of this integrated list (there are no waters delisted to category 1, so category 1 is not included in the table). Attached in appendix A are detailed lists and explanations / justifications for the delistings. In all cases of delisting to category 2 and 3, more recent data or information indicate compliance with water quality standards (with the exception of mercury from atmospheric deposition). However, the State has chosen to place these waters in categories 2 or 3 to reflect their intention of doing additional confirmatory monitoring.

Table 1. Summary of waterbody segments delisted or off-ramped from 1998 to 2002.

| Listing Category                 | Rivers & Streams | Lakes | Estuarine & Marine |    |
|----------------------------------|------------------|-------|--------------------|----|
| 2: partial attainment            | 12               | 0     | 1                  | 13 |
| 3: insufficient data             | 10               | 9     | 0                  | 19 |
| 4-A: TMDLs completed             | 5                | 5     | 1                  | 11 |
| 4-B: pollution controls enforced | 20               | 1     | 0                  | 21 |
| 4-C: no pollutant                | 5                | 10    | 0                  | 15 |
| Totals                           | 52               | 25    | 2                  | 79 |

In summary of the details presented in appendix A, EPA-New England recognizes that Maine's delisting or off-ramping in 2002 of these previously §303(d)-listed waterbodies has been done in accordance with Maine's 2002 listing methodology and consistent with Maine's water quality standards. As provided in 40 CFR 130.7(b)(6)(iv), EPA requested that the State demonstrate good cause for not including these waters on its §303(d) list. The State has demonstrated, to EPA's satisfaction, good cause for not including on its list waters for the various reasons included in appendix A to this approval document.

For waters removed from the 1998 §303(d) list to category 4A under 40 CFR 130.7(b)(1)(ii), TMDLs for the pollutant of concern have been completed and approved by EPA.

The State's decision to include waters in category 4-B in appendix A rather than on its 2002 Section 303(d) list is consistent with EPA regulations at 40 CFR 130.7(b)(1). These waters were identified on the State's 1998 Section 303(d) list. Under 40 CFR 130.7(b)(1), States are not required to list WQLSs still requiring TMDLs where effluent limitations required by the CWA, more stringent effluent limitations required by State or local authority, or other pollution control requirements required by State, local, or federal authority, are stringent enough to implement applicable water quality standards. The regulation does not specify the time frame in which these various requirements must implement applicable water quality standards to support a State's decision not to list particular waters. EPA guidance states that water quality standards must be attained within the near future [EPA's 2002 Integrated Water Quality Monitoring and Assessment Report Guidance, November 19, 2001].

Monitoring should be scheduled for these waters to verify that the water quality standard is attained as expected in a reasonable time frame. Where standards will not be attained through implementation of the requirements listed in 40 CFR 130.7(b)(1) in a reasonable time, it is appropriate for the water to be placed on the §303(d) list to ensure that implementation of the required controls and progress towards compliance with applicable standards is tracked. If it is determined that the water is, in fact, meeting applicable standards when the next §303(d) list is developed, it would be appropriate for the State to remove the water from the list at that time.

For waters off-ramped to categories 4B, consistent with 40 CFR 130.7(b)(1)(iii), the State has

demonstrated that there are other pollution control requirements required by State, local, or federal authority that will result in attainment of applicable water quality standards for the pollutants of concern within a reasonable time.

**b. A description of the data and information used to identify waters, including a description of the data and information used by the State as required by Section 130.7(b)(5)**  
**[Section 130.7 (b)(6)(ii)]**

Maine provides information on data sources (pages A-7-8) and assessment criteria (pages A-15-19) in Part I of the “2002 Integrated Water Quality Monitoring and Assessment Report”, as well as in the listing methodology (pages A-9-14). Briefly, Maine uses the latest available information generated by ME DEP’s and other state resource agencies’ monitoring and assessment activities to update the §303(d) list. Maine uses information from a variety of federal, state, and non-government sources. Maine identifies the pollutants (when known) causing or expected to cause violations of the applicable water quality standards, including those pollutants for which there are currently no corresponding numeric criteria in the State’s standards (e.g, nutrients, total phosphorus, aquatic life criteria, and habitat). In the cases where the identity of the pollutant is unknown, ME DEP identifies the water quality standards impairment (e.g., dissolved oxygen, aquatic life).

While EPA New England is not acting to approve or disapprove Maine’s listing methodology, we have reviewed the material and we conclude that the methodology ME DEP used to develop the list is reasonable and consistent with Maine’s water quality standards, and with the Clean Water Act and EPA’s section 303(d) regulations and guidelines.

**c. A rationale for any decision to not use any existing and readily available data and information for any one of the categories of waters as described in Section 130.7(b)(5)**  
**[Section 130.7(b)(6)(iii)]**

ME DEP appropriately considers all existing and readily available information in the development of the 2002 §303(d) list, consistent with Maine’s 2002 listing methodology. There are no cases where ME DEP has made a decision to not use any readily available information, although various types of information (eg. monitored vs. evaluated) are weighted differently in the listing decision. (Personal communication with David Courtemanch, ME DEP, 10/29/02 and 6/19/03.)

**d. Any other reasonable information requested by the Regional Administrator**  
**[Section 130.7(b)(6)(iv)]**

ME DEP has been responsive to any questions or concerns raised by EPA New England. We raised a variety of questions based on our side-by-side comparison of the 1998 and 2002 §303(d) lists, and our review of other water quality related information. Documentation is provided for questions and concerns raised during our review process (See appendix A: *Documentation of*

*Waters Delisted or Off-ramped from 1998 §303(d) List to Categories other than Category 5 in Maine's 2002 Integrated List).*

## **2. Evaluation of existing and readily available data and information**

### **[Section 130.7 (b)(5)(i-iv)]**

Maine considered all data and information regarding the following 130.7(b)(5) categories:

#### **a. Waters identified by the State in its most recent Section 305(b) report as “partially meeting” or “not meeting” designated uses, or as threatened**

##### **[Section 130.7(b)(5)(i)]**

Maine's 2002 §303(d) list is part of *Maine's 2002 Integrated Water Quality Monitoring and Assessment Report* which includes the most recent §305(b) report. As ME DEP explains in the 2002 listing methodology, three criteria for listing waters in category 5 are as follows (Page A-11-12, narrative 2002 list report):

- 1. Current data (collected within five years) for a standard indicating impaired use, or a trend toward expected impairment within the listing period [threatened], and where quantitative or qualitative data/information from professional sources indicates that the cause of impaired use is from a pollutant(s), or,*
- 2. Water quality models that predict impaired use under current loading for a standard, and where quantitative or qualitative data/information from professional sources indicates that the cause of impaired use is from a pollutant(s), or,*
- 3. A water has been previously listed on the State's 303(d) list of impaired waters. Based on current or old data that indicated the involvement of a pollutant(s), and there is no change in management or conditions that would indicate attainment of use...*

No waters are listed as “threatened” in the 2002 assessment. The ME DEP's review of data for the 2002 §305(b) report resulted in category 5 listings for approximately 60 new river and stream segments.

#### **b. Waters for which dilution calculations or predictive models indicate nonattainment of applicable water quality standards**

##### **[Section 130.7(b)(5)(ii)]**

As ME DEP explains in the 2002 listing methodology, one criterion for listing waters in category 5 is as follows (page A-12, narrative 2002 list report.): “Water quality models that predict impaired use under current loading for a standard... .” For example, the predictive models for the Androscoggin and Penobscot Rivers have contributed to the listing of those waters (personal communication with Dave Courtemanch, ME DEP 10/29/02).

**c. Waters for which water quality problems have been reported by local, state, or federal agencies; members of the public; or academic institutions**

**[Section 130.7 (b)(5)(iii)]**

ME DEP solicits participation from local, state, and federal agencies, members of the public, and academic institutions for the preparation of its §303(d) list through the public review process described below. ME DEP routinely works cooperatively with various agencies, Tribes, and universities on projects yielding surface water quality data that are taken into consideration during the §303(d) list preparation. ME DEP has thoroughly reviewed water quality information from as many local, state, federal, and tribal agencies, organizations, and volunteer groups as possible, and acknowledges those assessment data sources, by waterbody type (rivers and streams, lakes, marine), in one section of the 2002 integrated list report (Pages A-7-8).

**d. Waters identified by the State as impaired or threatened in a nonpoint assessment submitted to EPA under section 319 of the CWA or in any updates of the assessment**

**[Section 130.7(b)(5)(iv)]**

Maine includes waters on its Section 303(d) list that were identified in Section 319 assessments as impaired or threatened or in updates of the assessment. Our review of Maine's 2002 §303(d) list indicates that the majority of the waters scheduled for TMDL development are impaired solely by nonpoint sources.

In summary of this section on identification of waters for listing, EPA has reviewed Maine's description of the data and information it considered, its methodology for identifying waters, and other information such as waters targeted in Maine's fish consumption advisories, other state listings for interstate waters, etc. EPA concludes that the State properly assembled and evaluated all existing and readily available data and information, including data and information relating to the categories of waters specified in 40 CFR 130.7(b)(5).

**B. PRIORITY RANKING and TARGETING**

EPA also reviewed the State's priority ranking of listed waters for TMDL development, and concludes that the State properly took into account the severity of pollution and the uses to be made of such waters, as well as other relevant factors. Specifically, as stated in Maine's narrative portion of the 2002 Integrated List (page A-21), "TMDL schedules are assigned based on the value of a water (based on size, public use, proximity to population centers, and especially by the level of public interest for water quality improvement), the nature of the impairment and the source of the problem (Maine has generally pursued point sources as a higher priority), available information to complete the TMDL, and availability of staff and contractual resources to acquire information and complete the TMDL study."

As part of the prioritization process, Maine also establishes the following subcategories of category 5 waters with varying levels of priority for TMDL development (“Impaired or threatened for one or more designated uses by a pollutant(s), TMDL required.” See page A-11-14, narrative portion of 2002 Integrated List.):

| Cat.  | Title/Description  | TMDL Development Priority   | Resources applied to:                           |
|-------|--|---|---|
| 5-A.  | Impairment caused by pollutants other than those listed in 5-B through 5-D. TMDL required, to be conducted by the State of Maine.  | Project schedule included for each listing.   | Rivers & streams<br>Lakes<br>Marine & Estuarine |
| 5-B-1 | Impairment caused solely by bacteria contamination, TMDL required.   | Low priority if other actions are already in progress to correct the problem, or if recreational use (swimming) is impractical. | Rivers & streams<br>Marine & Estuarine          |
| 5-B-2 | Waterbodies impaired by bacteria contamination solely from CSOs with current CSO Master Plans (LTCP).  | Low priority since other actions are already in progress.   | Rivers & streams<br>Marine & Estuarine          |
| 5-C.  | Impairment caused by atmospheric deposition (all Maine freshwaters); the State of Maine is participating in the development of regional scale TMDLs for the control of mercury.                                | ME is participating in development of regional scale TMDLs for mercury control.   | Rivers & streams<br>Lakes<br>Marine & Estuarine |
| 5-D.  | Impairment caused by a “legacy” pollutant (PCBs, DDT, or other substances already banned from production or use). This is a low priority for TMDL development since there is no controllable load (by permit). | Low priority since there is no controllable load.   | Rivers & streams                                |

### Targeted Waters

EPA reviewed the State's identification of WQLSs targeted for TMDL development in the next two years, and concludes that the targeted waters are appropriate for TMDL development in this time frame. Within category 5A, Maine has identified 18 rivers and streams and 12 lakes scheduled for TMDL development through 2004. The short term targeting is appropriate because the complexity of the TMDLs ranges from those requiring intensive water quality assessment and modeling of multiple discharges (Androscoggin River), and streams impaired by complex urban nonpoint sources, to more straightforward TMDLs for nonpoint source-impaired lakes.

### **C. PUBLIC REVIEW**

Maine Department of Environmental Protection (ME DEP) submitted its public review draft 2002 §303(d) list to EPA-New England electronically on September 30, 2002, and made it available to the public on October 3, 2002. The final version of Maine's 2002 list was received by EPA New England electronically on January 15, 2004. Maine's response to public comments appears on pages A-22-24 of the final submission of the integrated report.

Maine conducted a public participation process in which the public was given the opportunity to review and comment on the 2002 draft §303(d) list. The ME DEP posted the list on the website on October 3, 2002, and sent notices directly to persons on the DEP mailing list for rulemaking during the week of October 1. A press release on October 14 went out to all state papers; legal advertisements were placed in the five major papers during October 18-21 (Bangor Daily News, Kennebec Journal, Lewiston Sun, Portland Press Herald, and Waterville Sentinel). The comment period ended on November 1, 2002. (E-mail from Dave Courtemanch, ME DEP, 5/21/03.)

Maine received two comment letters from the following entities: Conservation Law Foundation (Rockland, ME), and Maine Real Estate Development Association, both dated November 1, 2002. EPA -New England reviewed the comment letters as well as ME DEP's summary of and response to comments. EPA-New England concludes that ME DEP did a thorough job of characterizing and responding to the public comments.

### **4. TRIBAL WATERS**

In submitting the 2002 303(d) list, ME DEP assumes that Maine's water quality standards apply state-wide. EPA's approval of this list does not constitute a finding of State and/or Tribal jurisdiction over particular waters. EPA's approval of Maine's §303(d) list extends to all waterbodies on the list with the exception of those waters that are within Indian territories and lands. EPA is taking no action to approve or disapprove the State's list with respect to those

waters at this time. EPA will retain responsibilities under Section 303(d) for those waters.

## **5. LONG-TERM SCHEDULE**

EPA has received Maine's long-term schedule for TMDL development for all waters on the State's 2002 Section 303(d) list. In subcategory 5-A, Maine identifies not only those waterbodies targeted for TMDL development in the next two years (by 2004), but also identifies all river and stream segments and estuaries for TMDL development in "planning increments" of four year periods out to the year 2012 [page A-21 list narrative]; Maine specifies the anticipated timing of TMDL development for all category 5A lakes by indicating "TMDL target dates". For waters in sub-categories 5-B through 5-D, Maine has indicated a narrative sense of priority for TMDL development by sub-category.

As a policy matter, EPA has requested that States provide such schedules. See Memorandum from Robert Perciasepe, Assistant Administrator for Water, to Regional Administrators and Regional Water Division Directors, "New Policies for Developing and Implementing TMDLs", August 8, 1997. EPA is not taking any action to approve or disapprove this schedule pursuant to Section 303(d).