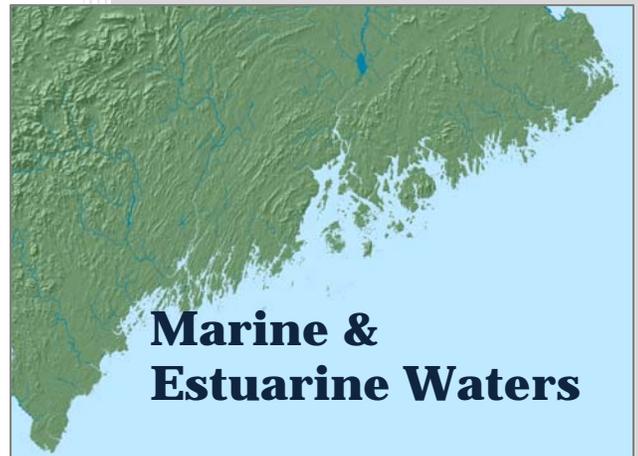
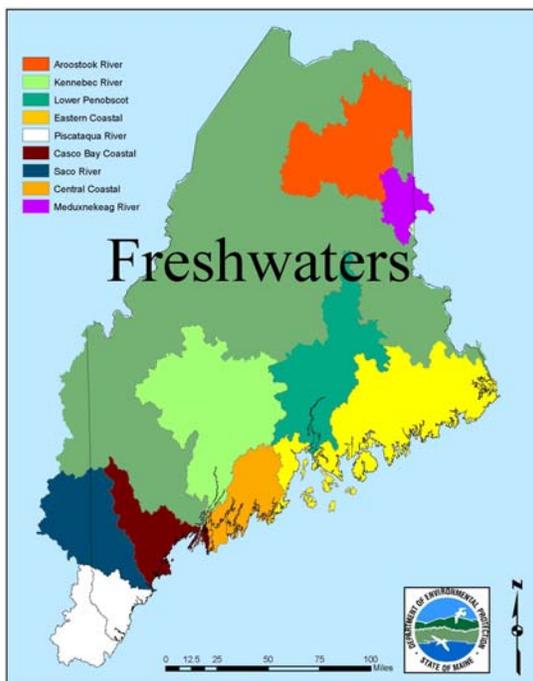
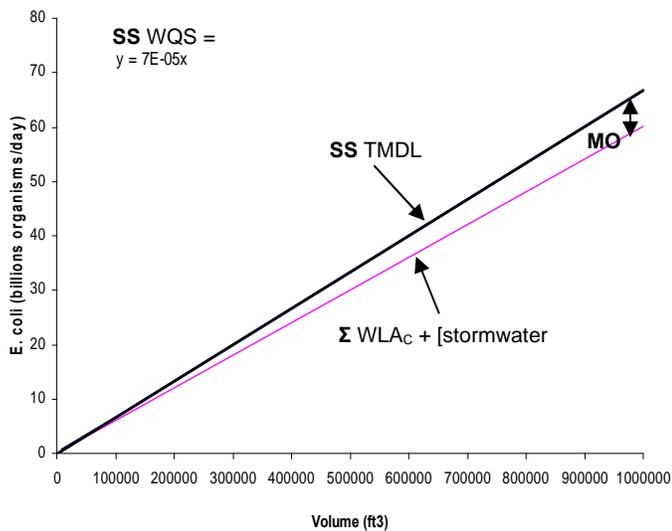


# Maine Statewide Bacteria TMDL Appendix V- Public Comments & DEP Response

**August 2009**



**Prepared by:**

Maine Department of  
Environmental Protection



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## Conservation Law Foundation Comments

Melissa Evers  
 Land and Water Bureau  
 Maine Department of Environmental Protection  
 State House Station #17  
 Augusta, ME 04333

June 30, 2009

**Re: Draft Statewide Bacteria Total Maximum Daily Load (“TMDL”)**

Dear Melissa:

The Conservation Law Foundation (“CLF”) appreciates the opportunity to comment on the Maine Department of Environmental Protection’s (“DEP”) May 2009 Draft Statewide Bacteria TMDL.

CLF is a nonprofit, member-supported organization with offices in Maine, Massachusetts, New Hampshire, Rhode Island and Vermont. CLF has advocated for New England’s environment since 1966, working to protect the region’s people, natural resources and communities. One of the primary areas of CLF’s advocacy involves water quality. This draft TMDL will affect our mission and membership through its impacts upon the regulation of point source and non-point source discharges of pathogens to Maine’s freshwater, estuarine and marine waters.

It is with mixed emotions that CLF provides these comments. On the one hand, CLF is pleased to see activity on TMDLs, particularly widely-applicable ones, given that the pace of TMDL development to date has been too slow to meet its purpose of protecting water quality. See generally *Friends of the Wild Swan, Inc. v. U.S. E.P.A.*, 130 F.Supp.2d 1184 (D.Mont. 1999). CLF recognizes that the process associated with properly designing and justifying a TMDL is time and resource-consuming, and throughout that period compliance with water quality standards continues to be compromised. However, DEP has an obligation either to prepare a TMDL that meets regulatory requirements or to document that alternative measures will result in water quality standards being met at the earliest possible date, without the need to develop a TMDL. Unfortunately, DEP’s proposed approach with this Draft Bacteria TMDL is not consistent with federal Clean Water Act requirements and as such, risks the continued non-compliance of numerous waterbodies with Maine’s water quality standards. CLF urges DEP to correct the deficiencies in this TMDL proposal, in order that it meets its statutory obligations, and to take all measures within its authority to bring all impaired waters in Maine into compliance with applicable water quality standards.

### **I. The Draft Bacteria TMDL Does Not Meet Regulatory Requirements**

At a minimum, a TMDL proposal must include a description of the point and nonpoint sources of the pollutant of concern, including the magnitude and location of the sources. 40 CFR § 130.7(a) and 130.7(b)(4). In establishing TMDLs, “[s]ite-specific information should be used wherever possible.” 40 CFR § 130.7(c)(1)(i). The Draft Bacteria TMDL simply does not meet these basic requirements. The statewide “one-size-fits-all” approach to bacteria TMDLs is so generalized that the documents are

operationally meaningless. Specifically, the Draft contains watershed-specific findings as to only 22 of 61 river and stream segments (see Appendix I) and as to only a handful of the 143 estuarine and marine segments to which the TMDL applies and even those findings and data are limited.

#### **A. The Draft Fails to Document the Sources of Bacteria With Any Specificity**

As written, the Draft is devoid of any specific determinations about the sources of pathogen impairment in each of the watersheds. At the very least, the TMDL should describe the nonpoint and point sources of bacteria that contribute to exceedences of the Maine criterion for the river segments, estuaries or marine waters of a specific watershed. Locating the sources of impairment is an essential prerequisite to the creation and implementation of a TMDL. Instead, the Draft designates generic categories of discharges that may or may not occur or exist in a given watershed.

Applicable federal regulations clearly require TMDLs to allocate loads to individual point sources, not to broad categories of sources, and certainly not to broad categories of potential sources. See 30 CFR 130.2(h) (defining wasteload allocation as “[t]he portion of a receiving water’s loading capacity that is allocated to one of its existing or future point sources of pollution” (emphasis added)). Rather than identify individual sources as required by 30 CFR 130.2(h), the Draft contains a description of generic discussion of potential sources (Section 2.2). In order for it to be compliant, the Draft should describe the specifics of pathogen impairment in each of the watersheds, including an actual inventory of contributing sources.

#### **B. The Draft Lacks Specific Pathogen Abatement Requirements**

Given the Draft’s failure to identify individual sources of pathogen impairment for the effected waterbodies, it is hardly surprising that it also lacks specific abatement strategies and requirements. Instead, it contains a generic “Implementation Plan” section (section 6.0) that provides a list of general references for stormwater mitigation, illicit discharges, CSOs and other *potential* sources. The Draft should address the specific pollution controls necessary to meet water quality standards in each watershed and consider the degree to which watershed-specific conditions, such as extremely low streamflow, may affect remediation.

#### **C. The Draft Contains No Loading Calculations or Allocations**

DEP’s Bacteria TMDL proposal is unconventional in that it simply sets an end-of-pipe limit equal to the water quality standard for bacteria (e.g., an instantaneous concentration of 236 organisms per 100 ml for Class B waters), rather than actually calculating the allowable loading to a receiving water and the allocation of the allowable load to discreet point sources, nonpoint sources and background, plus a margin of safety. The Clean Water Act requires DEP to establish a total maximum daily load “at a level necessary to implement the applicable water quality standards.” 33 U.S.C. §1303(d)(1)(C). While the end-of-pipe application of water quality criteria is a useful tool for improving water quality and for *implementing* a TMDL, DEP’s proposal does not establish a load and is not itself a TMDL.

At a minimum, the TMDL must provide sufficient waterbody- and watershed-specific determinations about the nature and causes of the impairment and control measures needed to meet water quality standards. Specifically, they must (1) identify the specific point and nonpoint sources of pathogen contamination in each of the watersheds; (2) prescribe discharge-specific pollution control requirements; (3) include the most complete and current water quality data and analyses available; (4) address the relationship between bacteria concentrations and in-stream flow and the importance of protecting stream flow; and (5) demonstrate how implementation of this approach will result in attainment of water quality standards for bacteria, as required by Section 303(d)(1)(C).

## II. Conclusion

CLF urges DEP to address the serious shortcomings of its statewide “cookie-cutter” approach to establishing this Bacteria TMDL. In its current form, the Draft TMDL is vague and incomplete to the point of being of questionable enforceability. Moreover, use of this short-cut methodology in the context of this TMDL would set a poor precedent for future TMDLs to be developed by this Department. We therefore urge DEP to strengthen this Bacteria TMDL proposal and bring it into compliance with federal law.

Sincerely,

Gregory M. Cunningham  
Senior Attorney

## Maine DEP Response to CLF

Melissa Evers  
Maine Department of Environmental Protection  
Bureau of Land & Water  
State House Station # 17  
Augusta, ME 04333

August 28, 2009

Gregory M. Cunningham  
Senior Attorney  
Conservation Law Foundation  
47 Portland Street, Suite 4  
Portland, ME 04101

### ***RE: Draft Statewide Bacteria Total Maximum Daily Load (“TMDL”)***

Dear Mr. Cunningham,

Thank you for taking the time to review and consider the implications of this TMDL on bacterial contamination in Maine’s waters. While we may diverge on the optimum TMDL approach, we can both acknowledge the TMDL’s relevance in moving forward efforts to address bacterial problems. DEP regards this Bacteria TMDL as consistent with the regulatory requirements of the Clean Water Act and believes it will increase the pace with which waters attain Maine’s aquatic bacterial standards. Below is DEP’s response to the issues raised in your comments.

#### **I. The Draft Bacteria TMDL Does Not Meet Regulatory Requirements**

This discussion is different for each non-point (NPS) and point sources (defined as MEPDES licensed discharges). DEP has effectively limited bacterial contamination from point source discharges and is actively working to address any remaining CSOs. Affirming and setting water quality targets in the TMDL codifies the existing licensing program, which does not require major operational changes.

The statewide approach applied to NPS provides all the guidance and targets that DEP would typically put in single water TMDL. Individual TMDL assessment involves monitoring efforts that characterize the degree of the bacterial contamination. This information is now applied to all bacterially impaired waters and available to all interested stakeholders, rather than a single watershed. The operational advantage is wide dissemination of this information and a completed TMDL which requires MS4 municipalities to

routinely report on the status of the bacterially impairment waters. The completed TMDL elevates the status of bacteria impairments which helps counter the ambivalence many municipalities' exhibit towards cleaning up NPS or minor sources. The TMDL provides guidance on potential sources, areas of concerns and demonstrates common best management practices used to abate and control those sources.

*A. The Draft Fails to Document the Sources of Bacteria With Any Specificity*

In establishing the Maine Statewide Bacteria TMDL DEP used and incorporated site-specific information, including information on specific sources of bacteria, wherever such information was available. (See 40 CFR §130.7(c)(1)(i) (“[s]ite-specific information should be used wherever possible.”)) . DEP believes that its approach is consistent with the regulatory requirements as set forth in 30 CFR § 130.2(h) and disagrees that the regulations require that every bacterial source be specifically identified. While the TMDL does identify “potential” sources of pathogens (see Section 2.2) this does not equate to uncertainty as to the sources that are covered by the TMDL. In this TMDL, DEP clearly sets daily concentration WLA and LA targets for each one of the discharge sources by category (i.e., stormwater, CSOs, etc.). This approach is designed to give citizens and others charged with implementing the TMDL the clearest guidance possible on the precise WLA and LAs that will apply to the sources of pathogens. (Note that the TMDL also provides daily targets expressed as loadings of bacteria/day, however, DEP believes that the concentration-based approach provides the clearest and most understandable expression of water quality goals to the public and groups that conduct water quality monitoring.) Finally, as stated above, DEP has incorporated source-specific information into the development of the TMDL when such information is available.

*B. The Draft Lacks Specific Pathogen Abatement Requirements*

DEP recognizes that implementation plans are not a required element of a TMDL. Nonetheless, this TMDL provides significant resources and guidance for developing Watershed Management Plans to abate bacterial pollution. In addition to the specific and stringent TMDL targets provided by source category (see Tables 4-1, 4-2, 4-3), the TMDL specifically prioritizes segments for source abatement such as the elimination of illicit sanitary sewer connections to the stormwater sewer. The TMDL also provides more general recommendation for remediation of all of the types of bacteria sources. DEP believes that the general suggestions in this document are appropriate because of the commonality of the pathogen sources affecting the impaired segments as well as the commonality of the best management practices used to abate and control those sources. Of course, such an approach does not preclude specific remediation responses to specific source situations, where such information is available. DEP is committed to utilizing all relevant data to support TMDL development and to ensuring that the public has access to and knowledge of relevant data and resources to support TMDL implementation.

*C. The Draft Contains No Loading Calculations or Allocations*

DEP is setting daily concentration TMDLs expressed as waste load and load allocations for each one of the discharge sources by point and nonpoint source category (i.e., stormwater, CSO, etc.). Daily loads are expressed as mass per unit of time based on the type of receiving water and the ambient water quality criteria. Appendix III of the TMDL specifies the maximum daily waste load and load allocations developed as a function of volume or stream flow. Each methodology assures that the loading capacities are equal to or less than the Water Quality Standards. There is no uncertainty as to the sources covered by the TMDL or the WLA and LA targets. In addition, DEP believes that expressing a loading capacity for bacteria in terms of concentration set equal to Maine's adopted criteria provides the clearest and most understandable expression of water quality goals to the public. DEP recommends that the concentration targets be used as the primary guide for implementation and believes that these expressions of the daily targets for the TMDL are consistent with its regulatory requirements to establish total maximum daily loads. 40 CFR § 130.2(i).

## II. Conclusion

*CLF urges DEP to address the serious shortcomings of its statewide “cookie-cutter” approach to establishing this Bacteria TMDL. In its current form, the Draft TMDL is vague and incomplete to the point of being of questionable enforceability. Moreover, use of this short-cut methodology in the context of this TMDL would set a poor precedent for future TMDLs to be developed by this Department. We therefore urge DEP to strengthen this Bacteria TMDL proposal and bring it into compliance with federal law.*

The ‘enforceability’ of this TMDL is not in question because it is based on Maine’s water quality standards that DEP has solid record of enforcing. DEP views the active implementation of this TMDL as a strong step in the path towards restoration of Maine waters impaired for bacteria. This TMDL identifies impaired segments, sets water quality targets and allocates loads while increasing awareness of these impairments throughout the state. Implementation and watershed specific assessment is the next step in the path. This TMDL provides guidance and concrete examples for interested parties to begin eliminating sources of bacteria. This TMDL encourages the only path known to restore waters impaired by NPS, which is having local stakeholders to take ownership of water quality problems, seek adaptive solutions and implement BMPs. In accordance with the goals of the CWA, this TMDL will move impaired waters to attain water quality standards.

Sincerely

Melissa Evers  
Environmental Specialist

## City of Bangor Comments

### STATEWIDE BACTERIA TMDL COMMENTS – CITY OF BANGOR JULY 15, 2009

Thank you for considering our request to delay the comment period and reviewing our initial questions. Below are our official comments for your consideration.

- 1) The statewide scope of this TMDL makes some sense, as it saves DEP the considerable cost and effort of duplicating the TMDL process for every listed stream. However, the statewide scope also means it will impact many municipalities, including some which do not appear to have been informed of it. For example, there are a number of municipalities along the Kenduskeag and the Penobscot that do not appear to have been included in the distribution of the draft TMDL. Given the potential impact on these communities, they should be informed and provided a chance to provide feedback as part of the public process.
- 2) DEP has advised Bangor in the past of the importance of offering stakeholders the opportunity to comment and conducting a thoroughly transparent process. Since most communities have no idea what level of effort and costs are involved in developing an implementation plan to address the goals set forth in a TMDL, failing to hold a public hearing deprives them of any real opportunity for understanding. The Maine Municipal Association (<http://www.memun.org/>) would be a good organization to work through for stakeholder education and input. They should be notified.

Since the TMDL review does not include legislative review, numerous environmental advocates and watchdog organizations are unaware of this TMDL. They are also unaware of the associated responses that may be expected by nongovernmental organizations, citizens, and EPA in the near future as a result of this TMDL. Informational meetings are the only way to be sure that communities understand what a TMDL is and how it will affect them, to allow them to provide input into solutions, and to alleviate concerns of affected parties.

- 3) We would like to know why the Kenduskeag is labeled as “Bangor.” Bangor may have been the sampling site, but the stream has many towns and potential bacteria sources upstream that may contribute to the impairment. Since bacterial loads build in a water system, these other towns and areas should be held accountable as well.
- 4) As required by EPA, TMDLs are enforced through the NPDES permits, so we can assume that if this TMDL is approved, then bacteria will be a target of concern in the next MS4 permit cycle and beyond. To address this is likely to cost the City considerable time and effort, potentially upwards of \$200 million dollars.
- 5) The EPA has established guidelines for TMDLs so that TMDLs are useful and helpful to the organizations that will be held responsible for implementing them. Since the Maine DEP is not adequately completing the TMDL to EPA guidelines, the remaining work is being transferred to municipalities or organizations to complete before they even begin developing a plan for addressing the goals within the TMDL. Our understanding is that the EPA approves of the approach taken in this new TMDL, but that does not change the fact that this approach provides us with considerably less to work with.

For example:

- a) The EPA guidelines and 40 C.F.R. Part 130 requires a TMDL to include Loading capacity and Waste Load Allocations. This has not been addressed in the draft TMDL. Estimating pollutant loading from all sources to the waterbody, analysing current pollutant load, and determining needed reductions to meet assimilative capacity would require much more information than has been gathered for this TMDL. Municipalities may not have the financial capacity or the technical understanding to fill in the blanks that the State will leave unanswered by not developing a thorough and comprehensive TMDL.
  - b) As required by EPA TMDL guidelines, the Draft Statewide Bacteria TMDL should identify specific bacteria pollution sources. Instead, this Draft lists 12 broad categories of potential sources. This transfers to municipalities the burden of conducting sampling in order to establish what the sources are and what the priorities should be. This could be construed as an unfunded mandate being transferred to municipalities without their knowledge.
  - c) As required by EPA TMDL guidelines, the Draft TMDL should include a monitoring plan to track TMDL effectiveness. Even though the TMDL states that it is the responsibility of the MEDEP to assess water quality and attainment of water quality standards, this Draft TMDL relies on the Dept. of Marine Resources (DMR) for monitoring shellfish beds and on volunteer organizations for monitoring other areas. It can be assumed that it will be up to local municipalities to organize and financially support these volunteer organizations, thereby indirectly transferring the burden and the cost of conducting the necessary monitoring to local municipalities or other responsible organizations.
- 6) We are concerned that this report sets a precedent for future TMDLs such that any parameter that affects aquatic life in itself can be used to create a statewide TMDL affecting hundreds of waterbodies in the state. Even parameters such as temperature or turbidity or conductivity could be the focus of a TMDL without consideration of the ability of the receiving body to assimilate the stressor, leaving the burden of discovery for the municipalities to absorb.
  - 7) We appreciate DEP’s offer to conduct additional sampling in the Kenduskeag to better isolate areas of the stream in order to determine outside contributions (upstream of the City) and tidal influences. We will share sampling data that we have with the DEP as well. We feel that this

information provided in report form as an addendum to this TMDL would be very useful. This does not alleviate our concerns however, for all other communities who may experience surprise at what sampling they also may need to gather.

- 8) DEP has stated that they believe that this TMDL will not change the MS4 permit, nor affect our operations. If there are no ramifications, then who will it affect, and why is it being done if it is not expected to have any effect? We understand that the TMDL is prompted by EPA requirements, but are concerned about the eventual consequences, such as its effect on the next MS4 cycle.
- 9) DEP believes this TMDL will not affect the City with regard to violations or compliance concerns. While this may represent the intention of current staff, other organizations, including the EPA, the Conservation Law Foundation, and individual citizens, can bring suit when a report such as a TMDL and its goals have not been addressed adequately.
- 10) The Stormwater Law, Chapter 500 requires that developers (of 20,000 sq. ft. or more or 5 acres or more) must meet additional standards when they are located in the direct watershed of an urban impaired stream. One of those requirements is to pay a compensation fee. Will developers of projects in the Kenduskeag and Penobscot Watersheds be held to these same standards?
- 11) We have found through examination of Penjajawoc sampling and analysis that it would be very helpful if the report would include a comparison of background bacteria counts for similarly sized streams in Maine that are considered class B in order to get an idea of what the background should be. It is highly likely that this type of information is available within DEP databases, or records, and could be made available to municipalities at little or no cost.

## Maine DEP Response to the City of Bangor

Melissa Evers  
Maine Department of Environmental Protection  
Bureau of Land & Water  
State House Station # 17  
Augusta, ME 04333

August 28, 2009

Engineering & Environmental Management  
City of Bangor  
73 Harlow Street  
Bangor, ME 04401

### ***RE: Draft Statewide Bacteria Total Maximum Daily Load (“TMDL”)***

Thank you for taking the time to review and consider the implications of this TMDL for the City of Bangor. Below is DEP’s response to the issues raised in your comments, with each number corresponding to the items listed in the comments.

1. The City’s concern regarding limited distribution of the TMDL is noted and DEP will expand the stakeholder distribution list in the future. DEP took the approach of advertising the TMDL’s public review period in the local newspaper and aggressively forwarded the announcement to municipalities, wastewater treatments plants, stormwater and watershed organizations. I received confirmation that the announcement was widely forwarded and the newspaper ads also

serve to broaden distribution of the announcement. Additionally, the TMDL was readily accessible on DEP's Public Comment Web page. The effectiveness of this approach could always be improved given greater time and resources, but this effort was commensurate or beyond the level of 'Public Participation' approved by EPA in past TMDLs.

2. Involving the Maine Municipal Association for stakeholder education and input is a good idea and DEP will contact them regarding future TMDL 'Public Participation' efforts. Again, the suggestion that DEP conduct informational meetings on TMDLs is good and we may make a greater effort on this issue in the future, depending on staff resources. Education regarding TMDLs is not limited to the Comment period and DEP is open to providing presentations on the implications of this TMDL to any interested organizations. DEP has offered to talk to Bangor Area Stormwater Group, but no date has been set.
3. The segment of the Kenduskeag that runs through Bangor has been identified as impaired through sampling and the presence of an old CSO. The City is correct that upstream sources may contribute to the impairments observed in Bangor, but DEP has not placed upstream sites on the 303d list, so they are not identified in the TMDL. All sources of bacteria that contribute to an impairment will be held 'accountable' once they are identified.
4. The City is correct that this TMDL should elevate the status of bacteria as a pollutant of concern to be considered during the development of any watershed management plans. Implementation of these plans in conjunction with the regulated small MS4's priority watershed(s) selection will continue into the next five year MS4 permit cycle. Regulated MS4 municipalities are required to prioritize watersheds based on several factors including but not limited to public knowledge, acceptance and participation within the watershed, knowledge of impairments (bacteria TMDL should be considered while setting priorities), and the ability to implement structural and non-structural BMPs to benefit water quality and public health and safety issues. The DEP intends to build upon these elements during the next five year MS4 permit cycle.

All regulated MS4 municipalities have developed an illicit discharge detection and elimination plan to better manage their separate storm sewer system. Municipalities are required to develop a comprehensive storm sewer map that will aid in detecting illicit discharges and connections. Each regulated municipality has adopted and is currently implementing its own illicit discharge ordinance. Some regulated municipalities are also implementing pet waste ordinances to remove this waste from the storm sewer system. Aggressive administration, compliance and enforcement with this plan and any ordinances developed may directly reduce bacterial discharges into receiving waters. An effectively administered MS4 stormwater program will complement the efforts of reducing bacteria per the TMDL.

5. The TMDL does address loading capacity and wasteload allocations, and other elements, as required by EPA regulations and guidance (see ME DEP responses to CLF comments). The TMDL sets bacterial water quality targets and presents a method for estimating needed reductions to attain those targets. Essentially, the TMDL presents a framework for municipalities or interested stakeholders to further identify bacterial problems and sources, then to take steps to address those sources. The TMDL pulls together the many existing resources that are available within the state to address bacterial problems and include: WWTP NPDES permits, DEP enforcement of discharges from discreet sources (pipes, residential or agriculture), investigating clam flat contamination, assist with marine Sanitary Surveys, and licensing Overboard Discharges. All municipalities also have their own illicit discharge ordinances they should enforce and the TMDL provides guidance on how to approach that issue. These resources, and more, are available for to use to help diagnose bacterial problems, and it is true that the municipality will need to expend effort to address these impairments. Every bacteria problem is unique and the standard approach to address nonpoint source problems requires local involvement, which is at the core of this TMDL. This TMDL is a departure from a rigid prescriptive approach and should allow for innovative, adaptive solutions to local bacteria problems.

A few key points-

- DEP offers technical and financial assistance to municipalities and organizations interested in addressing water quality impairments, including bacteria.
  - No 'burdens' are being transferred to municipalities outside of existing programs (such as MS4). The TMDL provides further information on previously identified impairments and enhances the municipality's ability to make responsible decisions regarding water quality management.
  - There is no expectation that municipalities will fund volunteer organizations beyond their ongoing water quality commitments.
6. TMDLs currently set targets and limits for pollutants of concerns in waterbodies that don't meet water quality standards. (This is true for any impaired water, whether it is one or many.) The pollutant of concern in the case of this TMDL report is bacteria, and mixing zones are not allowed for bacteria discharges because of the risk of exposure in the immediate vicinity of the discharge (this risk could be to humans engaged in recreational water uses, or to shellfish in harvesting areas). For this reason, there is no need for complex calculations of the receiving water's assimilative capacity, and there is no expectation that municipalities would conduct this sort of analysis. There are expectations that the municipality will look for the usual sources of bacterial contamination associated with stormwater, such as illicit discharges to the storm sewer system, leaking sewers, and failing septic systems. The municipality's MS4 permit already requires attention (within the MS4's stormwater program management plan and priority-setting) to identifying and fixing these illicit discharges, which is why DEP considers no additional permit measures will be necessary in order to be consistent with the bacteria TMDL.
  7. DEP is pleased that the City is interested in further defining the limits of bacterial problems in the Kenduskeag. All water quality sampling has the potential to find more problems than were previously known, but this is part of the path towards water quality restoration.
  8. This TMDL has been prepared to aid all parties interested in going to the next step to address bacterial pollution that affects high priority resources. Clam flats and beaches are obviously high priority resources. This TMDL also educates on the continuing need to look at bacteria problems within the stakeholder's purview. (See response to item 6 above.) As mentioned above, illicit discharges, leaking sewers and failing septics continue to impact water quality and municipalities need to address these problems when they are identified, much as they have done in the past.
  9. (See responses to item 6 above).
  10. Most of the streams covered by the Bacteria TMDL are not defined as 'urban impaired' under Chapter 500, this includes the Kenduskeag and the Penobscot. Therefore the simple answer is 'no', developers in the Kenduskeag and Penobscot will not be required to pay a compensation fee, as a result of this TMDL. It should be noted that no development should be allowed with the potential to increase bacterial pollution in a waterbody already identified as impaired for bacteria.
  11. DEP will try to accommodate this request in the future reporting of Penjajawoc data. It is a good idea to mention this concern directly to Mark Whiting, who manages the Penjajawoc Stream Team. The City should feel free to give this type of feedback to DEP at anytime.

Sincerely

Melissa Evers  
Environmental Specialist

## Houlton Band of the Maliseet Indians Comments

Ms. Melissa Evers  
Maine DEP  
State House Station #17,  
Augusta, ME 04333

July 15, 2009

Dear Ms. Evers,

This letter constitutes our formal comments regarding draft Maine Statewide Bacteria TMDL, May 2009, Report # DEPLW-1002. Our comments focus on two areas of concern; (1) the lack of participation afforded to us as a federally recognized Indian tribe pursuant to 25 USC 1721 et seq. in the §303(d) listing and TMDL development processes and, (2) the subsequent error that resulted in the Meduxnekeag Watershed being omitted from the list of impaired watersheds addressed by this draft TMDL.

### ***Lack of consultation***

We saw the draft TMDL for the first time when Maine Department of Environmental Protection (MDEP) forwarded a public notice at the beginning of the thirty-day public comment period. After reviewing the TMDL, we were disturbed to find that the Meduxnekeag River was not included in Maine's 2008 §303(d) list of impaired waters needing TMDL development given the eight (8) years of bacteria data we have shared with MDEP indicating significant impairment in the Meduxnekeag. We later learned that this omission was an oversight rather than a deliberate exclusion. Human errors are unavoidable and we do not condemn the actions of any individual. However, if MDEP had consulted with us during the §303(d) listing and TMDL development processes, this error would have been caught and could have been addressed prior to the public comment period.

Remedy: Consult with the Band regarding listing and other actions that involve water quality data collected and shared with MDEP by HBMI's water quality monitoring program prior to decision-making and public notice.

### ***Omission of Meduxnekeag Watershed from draft TMDL***

We have been aware, and very concerned, about bacterial contamination in the Meduxnekeag River for many years. In the early 1990's we applied for and received EPA funding to support a cattle exclusion demonstration project with a local farmer in a subwatershed where MDEP had identified bacterial contamination of agricultural origin. In 2003, in partnership with MDEP and others, we were awarded EPA funding that we used in part to address illicit sewer connections on a storm drain in the Town of Houlton identified by our water quality monitoring program. We are currently engaged in a soon-to-be-finalized bacteria source tracking study with USGS. Over the years we have discussed our concerns regarding bacterial contamination with many local stakeholders and continue to do so. We fear that the draft TMDL as it stands will undermine these longstanding efforts at outreach and mitigation.

Remedy: We appreciate your offer to include a section on our bacteria data in Appendix I of the TMDL along with a reference to the data in the comment section of the TMDL report. We agree that Appendix I could then be used as a way to demonstrate the existence of bacterial contamination in the Meduxnekeag and DEP's recognition of the impairment. We think the language in this section must be very clear that the absence of the Meduxnekeag River on the list of impaired watersheds is an *oversight only*.

To this end we also suggest additional language in the first paragraph of **Section 2.4 Waterbody Descriptions and Priority Ranking** that states "*Monitoring data identifying bacteria-impaired segments in the Meduxnekeag Watershed (see Appendix I section...) were inadvertently overlooked during Maine's 2008 §303(d) listing process. This bacteria TMDL will be applied to those waters and made available for*

public comment through Maine's publicly reviewed §303(d) listing process in 2010' or other words to that effect. This language could be added as a footnote.

Our first indication that the Meduxnekeag Watershed was not included in the TMDL (although this turned out to be erroneous) was the map of watersheds provided on the cover of the document. The Meduxnekeag was conspicuously absent on this map. To us the map makes an immediate and powerful statement of the extent of bacterial contamination in Maine's waters. Please include the Meduxnekeag Watershed on this map.

We appreciate this opportunity to comment on MDEP's draft statewide bacteria TMDL. We hope and expect more timely inclusion in the process in the future.

Sincerely,

Brenda Commander  
Tribal Chief

cc: David Littell, Commissioner, DEP  
Ira Leighton, EPA  
Stephen Perkins, EPA  
Stephen Silva, EPA  
Jennie Bridge, EPA  
George Frantz, EPA

## Maine DEP Response to Houlton Band of the Maliseet Indians

Melissa Evers  
Maine Department of Environmental Protection  
Bureau of Land & Water  
State House Station # 17  
Augusta, ME 04333

August 28, 2009

Brenda Commander  
Tribal Chief  
Houlton Band of the Maliseet Indians  
88 Bell Rd.  
Littleton, ME 04730

### **RE: Draft Maine Statewide Bacteria Total Maximum Daily Load (TMDL)**

Dear Ms. Commander,

This is a response to the comments you provided on Maine DEP's draft Maine Statewide Bacteria TMDL, May 2009, Report # DEPLW-1002. First, to address 'Lack of Consultation', DEP regrets the administrative oversight that led to not considering the HBMI's extensive Meduxnekeag data set while revising Maine 303 (d) list of impaired waters in 2008. This problem came to light during the public review of the Bacteria TMDL and DEP will rectify this omission during the next update of the 303 (d) list in 2010. DEP concurs with your proposed remedy and believes the discussions that ensued as a result of this

process makes a recurrence of this oversight unlikely in the future. To foster communication, DEP is discussing current data submissions with the Band's Water Quality Specialist, Cara O'Donnell.

To address the 'Omission of Meduxnekeag Watershed from draft TMDL', DEP suggested and has complied with the stated remedy, to include a section in Appendix I on HBMI's Meduxnekeag Watershed bacteria monitoring results. Data provided by HBMI was analyzed according to the protocols used in the other sections of the Appendix to produce a concise report that points out bacterial impairments in the watershed. HBMI's 2008 'Water Quality Monitoring Report' is referenced in this section and your paragraph describing past remediation efforts was also included. Language was also included to acknowledge the administrative oversight and to indicate the observed impairments require remediation, regardless or whether they are listed on the 2008 303(d) list. This section can also be used as a standalone document to educate stakeholders on the occurrence of local bacterial contamination.

Additionally, DEP will include a statement in Section 2.4 of the TMDL report, similar to the suggested language. The maps of freshwaters on the cover of the TMDL and Appendix I have been updated to include the Meduxnekeag Watershed. DEP customarily attaches all written comments and the response in an appendix to the final document.

DEP appreciates the Band's willingness to find reasonable solutions to the problems uncovered during the public review of the Bacteria TMDL. DEP also looks forward to working with the Band in the future to protect and restore our vulnerable waters.

Sincerely

Melissa Evers  
Environmental Specialist