



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 1
1 CONGRESS STREET, SUITE 1100
BOSTON, MASSACHUSETTS 02114-2023

May 9, 2005

Dawn Gallagher, Commissioner
Maine Department of Environmental Protection
17 State House Station
Augusta, ME 04333-0017

Re: 5A Portion of Maine's 2004 §303(d) List

Dear Commissioner Gallagher:

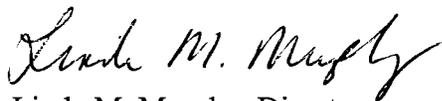
Thank you for Maine's final submittal of the Category 5A portion of Maine's 2004 §303(d) list received by EPA on April 13, 2005. In accordance with Section 303(d) of the Clean Water Act and 40 CFR §130.7, the U.S. Environmental Protection Agency (EPA) conducted a complete review of the Category 5A portion of Maine's 2004 §303(d) list and supporting documentation. Based on this review, EPA has determined that the Category 5A portion of Maine's 2004 §303(d) list of water quality limited segments still requiring Total Maximum Daily Loads (TMDLs) meets the requirements of §303(d) of the Clean Water Act (CWA) and EPA's implementing regulations. Therefore, EPA hereby approves Maine's decision to include the waters in the Category 5A on its §303(d) list. However, because EPA has not yet received Maine's final and complete 2004 §303(d) list, this approval does not constitute a final determination by EPA that Maine's Category 5A list is complete. EPA will list additional waters if EPA disapproves portions of Maine's subsequent §303(d) list submission(s), including the failure to list waters required to be listed.

The submittal includes a list of those waters for which technology based and other required controls for point and nonpoint sources are not stringent enough to attain or maintain compliance with the State's Water Quality Standards. The submittal presents Maine's TMDL strategy which describes a priority setting approach and identifies those waters in Category 5A for which TMDLs will be completed and submitted during the next two years. The statutory and regulatory requirements, and EPA's review of Maine's compliance with each requirement, are described in detail in the enclosed approval document.

The Maine Department of Environmental Protection (ME DEP) also successfully completed a public participation process during which the public was given the opportunity to review and comment on the §303(d) list. As a result of this effort, Maine has considered public comments in the development of the final list. A summary of the public comments and ME DEP's response to comments was included in the April 13, 2005 submittal.

My staff and I look forward to continued cooperation with ME DEP in implementing the requirements under Section 303(d) of the CWA. Please feel free to contact me or Jennie Bridge at 617-918-1685, if you have any questions or comments on our review.

Sincerely,



Linda M. Murphy, Director
Office of Ecosystem Protection

Enclosures

cc: Andrew Fisk, ME DEP
Dave Courtemanch, ME DEP

EPA's Partial Approval of Maine's 2004 §303(d) List

I. INTRODUCTION

On April 13, 2005, Maine submitted to EPA the 5A portion of its 303(d) list for approval with a cover letter dated April 8, 2005, and additional supporting documentation on April 15, 2005. The 5A list includes those waters characterized by the state as its "highest priority TMDL waters" listed in Appendix II (rivers and streams), Appendix III (lakes) and Appendix IV (estuarine and marine waters.) Maine expects to submit the remainder of its §303(d) list, in the near future. Maine states that its reason for submitting a partial 303(d) list at this time identifying a subset of listed waters is so that the state can move forward with planning TMDL submissions for its highest priority waters while it continues to finalize its list.

Based on this review, EPA has determined that Maine's Category 5A 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 Category 5A of Maine's §303(d) list. However, because EPA has not yet received Maine's final and complete 2004 §303(d) list, this partial approval does not constitute approval of Maine's section 303(d) list. EPA is at this time simply approving Maine's decision to include the waters in Category 5A on the section 303(d) list. EPA will list additional waters if EPA disapproves portions of Maine's subsequent §303(d) list submission(s), including the failure to list waters required to be listed. The statutory and regulatory requirements, and EPA's review of Maine's compliance with each requirement, are described in detail below.

II. 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 CFR §130.7(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.

III. REVIEW OF MAINE'S §303(d) SUBMISSION

The Maine Department of Environmental Protection (ME DEP) issued a draft 2004 §303(d) list for public review on June 23, 2004. Maine submitted a revised draft list to EPA on December 23, 2004, with changes made based on comments received during the public comment period, including comments from EPA. Maine's cover letter for the revised draft list highlighted the delisting of all previously-listed waters impaired solely by CSOs or by atmospheric deposition of pollutants. Maine forwarded copies to EPA of all public comments received, and included in the revised draft a summary of and response to public comments.

On April 13, 2005, Maine submitted the category 5A portion of its §303(d) list (which is part of Maine's 2004 Integrated Water Quality Monitoring and Assessment Report) for EPA's approval. Maine stated in its cover letter to the submission that the Category 5A list includes the state's "highest priority TMDL waters" and that the state wanted to seek partial approval of the 5A list so that it might better plan high priority TMDL submissions. Maine indicated that it plans to submit the rest of its §303(d) list in the near future.

EPA's approval action is limited to category 5A of Maine's §303(d) list. This sub-category of the section 303(d) list includes:

- Appendix II (rivers and streams, pages 49-57 IR);
- Appendix III (lakes, page 76 IR);
- Appendix IV (estuarine and marine waters, page 89 IR).

For purposes of §303(d) review and approval of category 5A, EPA evaluated the following components of Maine's 2004 Integrated Report (IR) which were submitted in final form as supporting documentation by the State on April 13, 2005 (first two items) and April 15, 2005 (second two items):

- Maine's *Listing Methodology* (pages 60-64 of Section 4-1 *Assessment Methodology*, IR);
- Maine's *Process to Solicit Public Comments and Summary of Public Comments and Responses* (pages 12-18 of Section 2-2 *Response to Comments*, IR);
- Maine's *Data Sources and Acknowledgements* (Section 1-1, pages 7-8, IR)
- Maine's *Assessment Criteria* (Section 4-2, pages 69-72, IR)

ME DEP conducted a public participation process in which it provided the public with notice of and the opportunity to review and comment on the 2004 draft §303(d) list. A public comment period was opened upon the release of the draft list on June 23, 2004 and was closed on July 26, 2004. ME DEP posted the list on the Department's website, mailed notices directly to approximately 150 persons and entities on the DEP subscription service for rulemaking changes.

A legal notice was run in four major daily newspapers (Bangor Daily news, Kennebec Journal, Lewiston Sun, Portland Press Herald). ME DEP also issued a press release on list availability on July 8, 2004 to roughly 15-18 radio, television and print outlets around the state and to the Associated Press. EPA concludes that Maine's public participation process was consistent with its continuing planning process (CPP), and that Maine provided sufficient public notice and opportunities for public involvement and response.

ME DEP prepared a *Summary of Public Comments and Responses* (pages 15-18 Section 2-2 IR) which lists each comment and the State's response. Although no listing comments were submitted during the public comment period of June 23 – July 26, 2004 regarding the listing in category 5A of Livermore Falls (WB ID#423R, page 54, Appendix II, IR), EPA reviewed the June 2, 2004 comments from International Paper (IP) to ME DEP Dams and Hydropower Section, related to sampling data for Livermore impoundment under the review process for IP's annual water quality report for the Riley-Jay-Otis-Livermore Projects, FERC Nos. 2375 & 8277. EPA also reviewed ME DEP's June 24, 2004 response to those comments. Having reviewed all public comments and ME DEP's responses, EPA concludes that Maine adequately responded to the comments.

IV. IDENTIFICATION of WATERS and CONSIDERATION of EXISTING and READILY AVAILABLE WATER QUALITY RELATED DATA and INFORMATION

EPA has reviewed Maine's partial submission, and has concluded that the State developed the 5A portion of 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. However, because EPA has not yet received Maine's final and complete 2004 §303(d) list, this partial approval does not constitute a final approval of Maine's section 303(d) list. EPA will list additional waters if EPA disapproves Maine's failure to include in the remainder of its §303(d) list submission any waters required to be listed.

ME DEP has several departmental monitoring programs, and routinely works cooperatively with various professional and volunteer monitoring groups on projects yielding surface water quality data that are taken into consideration during the §303(d) list preparation. Sources of data include other state agencies and resources, federal and other government agencies, Tribes, volunteer watershed groups / conservation organizations that work with DEP staff and "employ approved monitoring practices" (for a specific list of sources of assessment data for rivers and streams, lakes and estuarine and marine resources, see pages 7-8, Section 1-1, *Data Sources and Acknowledgements*, IR). 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 identified the pollutants (when known) causing or expected to cause violations of the applicable water quality standards, including those pollutants for which there were 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 was unknown, ME DEP identified the water quality standards impairment (e.g., dissolved oxygen, aquatic life).

Maine's 2004 §303(d) list is part of *Maine's 2004 Integrated Water Quality Monitoring and Assessment Report* which includes the most recent §305(b) report. As ME DEP explains in the 2004 listing methodology, three criteria for listing waters in category 5 are as follows (page 63, Section 4-1, IR):

- 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),*
- 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. Those waters have 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 has been no change in management or conditions that would indicate attainment of use.*

ME DEP appropriately considered all existing and readily available information in the development of the 2004 §303(d) list, consistent with Maine's 2004 listing methodology. As long as assessment data were collected using "approved monitoring practices" required in Maine's listing methodology, there were no cases where ME DEP made a decision to not use any readily available information, although various types of information (e.g. monitored vs. evaluated) are weighted differently in the listing decision (page 69, Section 4-2 *Assessment Criteria*, IR). One water was listed as "threatened" (expected to be in non-attainment of aquatic life criteria by the next listing cycle) in the 2004 assessment: Meadow Brook in Bangor, ME (page 50, WB ID# 226R03, Category 5A, Appendix II, IR). The ME DEP's review of data for the §303(d) list resulted in new category 5A listings for 18 river & stream segments, and 1 lake.

Further, waters that were on the §2002 303(d) list but have been removed from the 2004 §303(d) list include waters impaired solely by CSOs (category 5-B-1 in 2002) and waters impaired solely by atmospheric deposition of mercury (category 5-C in 2002). EPA will evaluate the delisting of these and other waters when Maine completes its §303(d) submission. As part of this approval, EPA is making no determination about whether the absence of such waters from any Category 5 list is appropriate.

In summary, Maine considered the most recent §305(b) assessments, as required by EPA's regulations, and used information obtained primarily through monitoring as the basis for adding water quality impairments to the 2004 §303(d) list. 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).

Priority ranking

As described in its listing methodology, and as summarized as follows, in its final 5A submittal letter, Maine established a priority ranking for listed waters: *"TMDL schedules are assigned based on the value of a water (considering size, public use, proximity to population centers, and level of public interest for water quality improvement), the nature of the impairment and the source(s) of the problem, 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 continues to use several subcategories of category 5 waters with varying levels of priority for TMDL development. Category 5 waters are defined as *"Impaired or threatened for one or more designated uses by a pollutant(s), TMDL required,"* and the subcategories are described in the 2004 integrated report (pages 63-64 Section 4-1, IR). Category 5A lists waters of all resource types whose *"impairment [is] caused by pollutants (other than those listed in 5-B through 5-D), TMDL required and will be conducted by the State of Maine"*. Category 5A waters are Maine's highest priority for TMDL development.

Within subcategory 5A of Maine's §303(d) list, Maine identified 34 rivers and streams, 16 lakes, and 2 estuaries scheduled for TMDL development through 2006. In subcategory 5A, Maine also identified schedules for TMDL development in "planning increments" of four-year periods out to the year 2012 for all river and stream segments, and all estuaries. For all subcategory 5A lakes, Maine specified the anticipated timing of TMDL development by indicating "TMDL target dates" through 2007.

EPA finds that the waterbody prioritization and targeting method used by Maine is reasonable and sufficient for purposes of §303(d). Maine properly took into account the severity of pollution and the uses to be made of listed waters, as well as other relevant factors described above. EPA acknowledges that the schedule of TMDL completion establishes a meaningful priority ranking system.

Maine properly listed waters with nonpoint sources causing or expected to cause impairment, consistent with §303(d) and EPA guidance. Section 303(d) lists are to include all water quality limited segments still needing TMDLs, regardless of whether the source of the impairment is a point and/or nonpoint source. EPA's long-standing interpretation is that §303(d) applies to waters impacted by point and/or nonpoint sources. In *Pronsolino v. Marcus*, the District Court

for Northern District of California held that §303(d) of the Clean Water Act authorizes EPA to identify and establish total maximum daily loads for waters impaired by nonpoint sources. Pronsolino v. Marcus, 91 F. Supp. 2d 1337, 1347 (N.D.Ca 2000). This decision was affirmed by the 9th Circuit court of appeals in Pronsolino v. Nasti, 291 F. 3d 1123 (9th Cir. 2002). See also EPA's 1991 Guidance and National Clarifying Guidance for 1998 §303(d) Lists, August 27, 1997.

V. TRIBAL WATERS

In submitting the 2004 §303(d) list, ME DEP assumes that Maine's water quality standards apply statewide. EPA's approval of category 5A of Maine's §303(d) list extends to all waterbodies in category 5A of the list with the exception of those waters, if any, 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 responsibility under §303(c) and §303(d) of the Clean Water Act for those waters.

APPENDIX A.

Copies of the following references relating to the Livermore Falls Impoundment are attached:

- June 2, 2004 comments from International Paper (IP) to ME DEP Dams and Hydropower Section;
- ME DEP's June 24, 2004 response to those comments.