



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

Region 1

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June 22, 2018

Clark Freise, Assistant Commissioner
New Hampshire Environmental Services
Water Division
6 Hazen Drive, Box 95
Concord, NH 03302-0095

Re: 2016 §303(d) List

Dear Mr. Freise,

Thank you for submitting New Hampshire's 2016 §303(d) list of water quality limited segments on November 30, 2017. In accordance with §303(d) of the Clean Water Act (CWA) and 40 CFR §130.7, the U.S. Environmental Protection Agency (EPA) has conducted a review of most of the State's list, including supporting documentation, with only a few waters remaining to be analyzed. Based on this review, EPA has determined that the majority of New Hampshire's list of water quality limited segments (WQLSs) still requiring total maximum daily loads (TMDLs) meets the requirements of §303(d) of the Clean Water Act ("CWA" or "the Act") and EPA implementing regulations. However, EPA is not taking action at this time to approve or to disapprove the State's decisions relating to certain assessment zones in the Great Bay Estuary and the State's decisions on pH for the Upper Portsmouth Harbor, Great Bay Prohib SZ2, and Great Bay-Cond Appr assessment units. Therefore, EPA hereby approves New Hampshire's 2016 final §303(d) list with the exception of the following: Little Bay, Bellamy River, Upper Piscataqua River, Portsmouth Harbor, Little Harbor/Back Channel and Great Bay assessment zones; and the Upper Portsmouth Harbor, Great Bay Prohib SZ2, and Great Bay-Cond Appr assessment units. EPA is deferring action on the State's list with respect to this group of assessment zones and assessment units until a later date when EPA's review is completed. EPA needs more time to complete its review of these assessment zones and units because of the complexity of the assessment issues involved.

Thank you for your hard work in developing the 2016 §303(d) list. My staff and I look forward to continuing our work with NHDES to implement the requirements under §303(d) of the CWA. If you have any questions or need additional

information please contact Ralph Abele at 617-918-1629 or Toby Stover at 617-918-1604.

Sincerely,

/s/

Ken Moraff, Director
Office of Ecosystem Protection

Enclosure

cc: NHDES: Ted Diers, Gregg Comstock, Matt Wood
EPA: Ralph Abele, Ann Williams, Greg Dain

EPA REVIEW OF NEW HAMPSHIRE'S 2016 SECTION 303(d) LIST

INTRODUCTION

EPA has conducted a review of most of New Hampshire's 2016 section 303(d) list, supporting documentation and other information, with only a few waters remaining to be analyzed. Based on this review, EPA has determined that the majority of New Hampshire's list of water quality limited segments (WQLSs) still requiring total maximum daily loads (TMDLs) meets the requirements of section 303(d) of the Clean Water Act ("CWA" or "the Act") and EPA implementing regulations; however, as noted immediately below, EPA is not taking action at this time to approve or to disapprove the State's decisions relating to certain assessment zones in the Great Bay Estuary. Therefore, by this action, EPA hereby approves New Hampshire's 2016 final section 303(d) list with the exception of the following: Little Bay, Bellamy River, Upper Piscataqua River, Portsmouth Harbor, Little Harbor/Back Channel and Great Bay assessment zones. EPA is deferring action on the State's list with respect to this group of assessment zones until a later date when EPA's review is completed. EPA needs more time to complete its review of these assessment zones and units because of the complexity of the assessment issues involved. The statutory and regulatory requirements for New Hampshire's 2016 section 303(d) list, and EPA's review of New Hampshire's compliance with each requirement, are described in detail below.

II. STATUTORY AND REGULATORY BACKGROUND

Identification of Water Quality Limited Segments for Inclusion on the Section 303(d) List

Section 303(d)(1) of the Act directs States to identify those waters within its jurisdiction for which effluent limitations required by section 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 section 303(d) listing requirement applies to waters impaired by point and/or nonpoint sources, pursuant to EPA's long-standing interpretation of section 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 section 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 section 305(b) report; (2) waters for which dilution calculations or predictive modeling indicate non-attainment 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 section 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 2006 Integrated Report Guidance describes categories of water quality-related data and information that may be existing and readily available. See EPA's March 21st, 2011 memorandum on *Information Concerning 2012 Clean Water Act Sections 303(d), 305 (b), and 314 Integrated Reporting and Listing Decisions* which recommended that the 2012 integrated water quality reports follow the *Guidance for 2006 Assessment, Listing and Reporting Requirements Pursuant to Sections 303(d), 305 (b) and 314 of the Clean Water Act* (2006 Integrated Report Guidance (IRG)) issued July 29, 2005 (available at http://www.epa.gov/owow/tmdl/2006_IRG/) as supplemented by the October 12, 2006 memo and attachments, the May 5, 2009 memo and attachments, the November 15, 2010 memo, the March 21, 2011 memo and attachments, the September 3, 2013 memo and attachments and the August 13, 2015 memo and attachments. All guidance, memoranda and attachments may be found at: <http://water.epa.gov/lawsregs/lawsguidance/cwa/tmdl/guidance.cfm>.

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 EPA.

Priority Ranking

EPA regulations also codify and interpret the requirement in section 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 section 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 section 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 2006 Integrated Report Guidance and the 2006, 2009, 2011 and 2013 memoranda and attachments.

III. ANALYSIS OF NEW HAMPSHIRE'S SUBMISSION

On May 8, 2017 the New Hampshire Department of Environmental Services (NH DES) released for public comment and review a draft version of its 2016 section 303(d) list as part of the State's 2016 Integrated Report (IR). Public comments on the draft version of the 2016 303(d) list were accepted until June 23, 2017. The final version of the 2016 303(d) list was issued on November 30, 2017. The State's November 30, 2017 section 303(d) list submittal included the following specific components:

1. The State of New Hampshire's 2016 section 303(d) list content introduction;
2. The State of New Hampshire's 2016 section 303(d) list;
3. A list of waters / impairments being removed or delisted from New Hampshire's section 303(d) list;
4. New Hampshire's 2016 sections 305(b) and 303(d) Consolidated Assessment and Listing Methodology (CALM) and NH DES's Response to Public Comments on the CALM;
5. New Hampshire's Response to Public Comments on the May 8, 2017 draft 303(d) list; and
6. Technical Support Document for the Great Bay Estuary Aquatic Life Use Support Assessments 2016 305(b) Report/303(d) List

New Hampshire's section 303(d) list contains water segments for which available data and/or other information indicates that a water segment is not meeting water quality standards because it is impaired or threatened by one or more pollutants for one or more designated uses, and for which a Total Maximum Daily Load (TMDL) is therefore required to be established. EPA's regulations at 40 CFR §130.7 require EPA to review and approve, or disapprove, a state's section 303(d) list.

Pursuant to EPA's Integrated Report Guidance related to assessment and listing of waters pursuant to sections 305(b) and 303(d) of the CWA, states list their waters in one or more of five categories, depending on the status of each water body's attainment of water quality standards. Category 5 corresponds to the section 303(d) list. Category 4

is comprised of waters that are not meeting water quality standards, but for which a TMDL need not be established due to one of three reasons. Category 4A contains waters for which a TMDL has already been established and approved by EPA. Category 4B includes waters, for which a “functionally equivalent” control action has been developed and is being implemented, i.e., an impairment caused by a pollutant is being addressed through other pollution control requirements. Category 4C contains waters that are not attaining water quality standards due to pollution that is not associated with a pollutant. Although waters in Category 4 are not on the section 303(d) list, EPA reviews a state’s Category 4 list to ensure that the waters are categorized appropriately and do not, in fact, belong on the section 303(d) list. NH DES included waters in Category 4 with its 2014 submission to EPA.

Public Participation

New Hampshire conducted a public participation process, in which it provided the public an opportunity to review and comment on the State’s draft 2016 section 303(d) list. A public comment period opened on May 8, 2017 and closed on June 23, 2017. NHDES posted its draft list on the Department’s website in multiple locations and notified nearly 1,500 stakeholders by direct email notification. NHDES received a total of 8 comment submissions on the May 8, 2017 version of the draft. NHDES assigned a reference or section number to individual comments to aid in identifying instances when a NH DES response applied to multiple individual comments and to ensure that all comments had been appropriately addressed. On November 30, 2017 NHDES released the final version of the 2016 303(d) list which included the responses to all comments received on the draft 303(d) list.

As noted earlier, EPA is not taking action at this time on certain assessment zones and assessment units in the Great Bay Estuary. The vast majority of the comments received during the comment period on the 2016 303(d) list pertain to the Great Bay Estuary. The evaluation of the State’s responses to comments in this document will only relate to those comments and responses that do not pertain to the Great Bay Estuary. EPA will evaluate the State’s responses to Great Bay Estuary-related comments at a later date. The State’s numbering of its responses to comments will be retained in order to reduce potential confusion.

Summary of Comments Received on the May 8, 2017 draft 303(d) list:

1. Ricardo Cantu, OspreyOwl Environmental, LLC

Summary of Comment: The commenter is concerned with the sampling procedures, laboratory procedures and QA/QC procedures that are used in the assessment and listing of waters in New Hampshire for a variety of parameters such as pH, metals, dissolved oxygen and nutrients. The commenter is also concerned with how water quality data is applied to water quality standards decisions as well. Additionally, various rivers in New Hampshire were noted as likely affected by these procedures. Several recommendations and changes to the CALM document were suggested to improve the quality of data used in assessment and listing.

Summary of Response: NHDES explained how they conduct lab and field sampling procedures to reduce the concerns that the commenter had regarding sampling and laboratory analyses. NHDES also explained how data are used in making impairment and listing decisions. Several of the comments did not specifically pertain to either the Consolidated Assessment and Listing Methodology (CALM) document or to 303(d) listing procedures, but NHDES addressed these comments as well.

EPA concludes that NH DES adequately responded to the comments.

2. Dawn Tuomala, Town of Merrimack

Summary of Comment: The commenter has concerns about the age of data that is used to make assessment decisions on waterbodies within the Town of Merrimack. The town has numerous catch basins to manage stormwater and is concerned about the sampling effort that will be required to monitor stormwater discharges to impaired waterbodies as result of the MS4 permit requirements. The Town would also like the improvements that have been made in recent years to be captured in the assessment and listing process.

Summary of Response: NHDES explained how data is used in the assessment and listing process and how recent data is used to make decisions, but is compared to historical data to provide context and look at trends in the data. NHDES also provided some guidance for the town on how best to look at the 303(d) list and how to best assess the listings and how to interpret the categories that accompany the listings.

EPA concludes that NH DES adequately responded to the comments.

Identification of Waters and Consideration of Existing and Readily Available Water Quality Related Data and Information

EPA has reviewed the State's submission, and has concluded that the State developed the majority of its section 303(d) list in compliance with section 303(d) of the Act and 40 CFR § 130.7, although as noted earlier EPA is not taking action to approve or to disapprove the State's decisions relating to certain assessment zones in the Great Bay Estuary and three other assessment units. 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.

New Hampshire used the NHDES assessment database to develop its 2014 section 303(d) list. The same database was used to assist in the preparation of the biennial section 305(b) report. NHDES provides ongoing notice on its website to request data from outside sources. Information received from outside sources was assessed in accordance with the State's assessment methodology. In the development of the 2014 section 303(d) list, New Hampshire began with its existing EPA-approved 2012 section 303(d) list and relied on new water quality assessments to update the list accordingly. New Hampshire believes that information pertaining to impairment status must be well substantiated, preferably with actual monitoring data, for it to be

used in section 303(d) listing.

Priority Ranking

As described in its methodology, New Hampshire established a priority ranking for listed waters by considering: 1) the presence of public health issues, 2) natural/outstanding resource waters, 3) threat to federally threatened or endangered species, 4) public interest, 5) available resources, 6) administrative or legal factors (i.e., NPDES program support or court order), and 7) the likelihood of implementation after the TMDL has been completed.

Individual priority rankings for listed waters are presented as the date shown on the section 303(d) list which indicates when the TMDL is expected to be completed. EPA finds that the water body prioritization and targeting method used by New Hampshire is reasonable and sufficient for purposes of section 303(d). The State properly took into account the severity of pollution and the uses to be made of listed waters, as well as relevant factors described above.

Waters which are not listed on New Hampshire's 2014 section 303(d) List

The following section provides a summary of NHDES' rationale supporting decisions not to include certain newly identified waters and certain previously listed waters on the State's 2016 303(d) list. As discussed below, the State has demonstrated, to EPA's satisfaction, good cause for not listing the following waters, as provided in 40 CFR §130.7(b)(6)(iv). Note that the section below does not include the following waters, described earlier, for which EPA is deferring action: Little Bay, Bellamy River, Upper Piscataqua River, Portsmouth Harbor, Little Harbor/Back Channel and Great Bay assessment zones, and the Upper Portsmouth Harbor, Great Bay Prohib SZ2, and Great Bay-Cond Appr assessment units.

EPA approves the State's section 303(d) list without the following water body-pollutant combinations because the removal of these listings is consistent with EPA's regulations and EPA's Guidance for Assessment, Listing and Reporting Requirements.

Waters impaired by nonpoint sources of pollution

The State properly listed waters with nonpoint sources causing or expected to cause impairment, consistent with section 303(d) and EPA guidance. Section 303(d) lists are to include all WQLSs 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

section 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 section 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. Nastri, 291 F.3d 1123 (9th Cir. 2002). See also *EPA's Guidance for 2006 Assessment, Listing and Reporting Requirements Pursuant to Sections 303(d), 305(b) and 314 of the Clean Water Act*, EPA Office of Water, July 29, 2005.