



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

REGION 1

1 CONGRESS STREET, SUITE 1100
BOSTON, MASSACHUSETTS 02114-2023

February 6, 2007

Arleen O'Donnell, Commissioner
Massachusetts Department of Environmental Protection
1 Winter Street
Boston, MA 02108

Re: 2004 Clean Water Act Section 303(d) List Approval; Placement of 90 Mercury Impaired Waters from Category 4b to Category 5

Dear Commissioner O'Donnell:

Thank you for your September 15, 2006, letter regarding EPA's decision to partially approve and partially disapprove Massachusetts' 2004 303(d) list. Specifically, on June 21, 2006, EPA approved the Commonwealth's decision to list waterbody segments and associated pollutants set forth in the listing document along with the Commonwealth's priority ranking for these waters and pollutants. However, EPA disapproved the Commonwealth's decision not to list the 90 lakes and ponds impaired by atmospheric deposition of mercury. EPA opened a public comment period concerning its decision to add the 90 lakes and ponds by posting notice in the Federal Register, dated August 14, 2006 (Vol. 71, No. 156, Page 46481). Two comments were received – one from the Massachusetts Department of Environmental Protection (MassDEP) and one from a private citizen in Massachusetts (See enclosure).

After consideration of the comments received, EPA is making a final decision to add the 90 waters impaired by atmospheric mercury as identified in MassDEP's document entitled "*A TMDL Alternative Regulatory Pathway Proposal for the Management of Selected Mercury-Impaired Waters*" (Mercury Proposal) to the 2004 303(d) list for the reasons outlined in EPA's original decision document and discussed below.

EPA acknowledges and would like to underscore MassDEP's extensive efforts to address anthropogenic mercury sources and its leadership in this area. Massachusetts is a leader among states in developing a comprehensive and aggressive mercury reduction program. Massachusetts' mercury programs include strong regulatory controls on major mercury emitters, located within the Commonwealth, and pollution prevention programs for sources such as municipal waste combustors, dentists, and schools.

EPA appreciates the challenges that Massachusetts and other States are facing with regard to protecting our waters from mercury impairments, and as a result is investing significant

effort on a wide range of technical assistance, policy recommendations, and practical approaches to address this significant environmental issue. Massachusetts is distinguishing itself in a number of areas related to mercury reduction and we look forward to engaging with you on them in the future.

Regarding MassDEP's comments on the Federal Register Notice, EPA disagrees with MassDEP's assessment that the Federal Register Notice did not provide information on the basis for EPA's decision regarding the proposed 4b listing. Rather than repeat the analysis again in the Federal Register Notice, EPA provided a web link to our decision document. EPA does not believe that the format may have led the public to believe that Massachusetts "...was simply trying to shirk its responsibility to address mercury pollution." As stated above, EPA believes that Massachusetts has a robust program to dramatically reduce sources of anthropogenic mercury within the Commonwealth. EPA acknowledged Massachusetts' strong mercury reduction programs in our June 21, 2006, letter, thus providing public recognition of the state's efforts.

EPA's disapproval action relative to the 90 waterbodies is based on the State's determination, and EPA's concurrence with that determination, that one of the necessary prerequisites for not including those waterbodies on the section 303(d) list (and including them in Category 4b) is not met -- namely the demonstration that water quality standards will be attained in a reasonable period of time.

EPA agrees that mercury sources must continue to be addressed at all levels - State, Federal, and international. EPA's Clean Air Interstate Rule and the Clean Air Mercury Rule taken together will reduce electric utility mercury emissions by nearly 70 percent nationally from 1999 levels when fully implemented. EPA appreciates Massachusetts' comments on the Roadmap for Mercury and the national vehicle switch-recycling program, and we have forwarded your comments to the lead offices for these two activities. The Agency is currently developing an implementation tracking system for the Roadmap. Furthermore, EPA is providing support for tools to assist New England and other states in assessing mercury sources and developing TMDLs, such as the mercury Merganser model, air deposition modeling, and GIS-based tools to estimate mercury deposition on a watershed basis.

EPA believes that Massachusetts is an excellent candidate for placing waters impaired predominantly by atmospheric mercury in the proposed subcategory 5m. The intent of this subcategory is not to delay mercury reduction efforts by deferring TMDLs, but rather to recognize Massachusetts and other states that have taken early action to implement strong, comprehensive mercury reduction controls and programs. EPA's expectation is that, through such mercury reduction programs, States will be able to achieve environmental results earlier. States continue to have the option to develop mercury TMDLs sooner in their schedules and Massachusetts may pursue this option if it so chooses.

I would like to thank your staff for their assistance in working with my staff in finalizing the 2004 Section 303(d) list. We look forward to continued cooperation with MassDEP in implementing the requirements under Section 303(d) of the CWA. Please feel free to contact me or Mike Hill at 617-918-1398, if you have any questions or comments.

Sincerely,

/s/

Stephen S. Perkins, Director
Office of Ecosystem Protection

Enclosure

cc: Arleen O'Donnell MA DEP
Glenn Haas, MA DEP
Rick Dunn, MA DEP
Arthur Johnson, MA DEP
Anne Leiby, EPA
Ann Williams, EPA
Steve Silva, EPA
Mike Hill, EPA



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September 15, 2006

Michael Hill
U.S. Environmental Protection Agency,
EPA New England Regional Office, One Congress Street,
Suite 1100 (CWQ), Boston, MA 02114-2023,

Michael:

I am writing to comment on the June 21, 2006, EPA decision to disapprove Massachusetts' 2004 Clean Water Act section 303 proposed listing of 90 water bodies in listing category 4b.

MassDEP is disappointed with this decision and with the information provided to the public through the Federal Register Notice Vol. 71, No. 156 / Monday, August 14, 2006 (ENVIRONMENTAL PROTECTION AGENCY [FRL-8209-4] Clean Water Act Section 303(d): Availability of List Decisions).

Specifically, the Federal Register announcement completely ignored the fact that MassDEP did in fact list the segments in the consolidated list under category 4b. Furthermore the announcement provided no information on the basis for the proposed 4b listing nor the fact that it was contingent on the biennial demonstration that MA continue to effectively implement its Zero Mercury Strategy. By downplaying these elements of the proposal the public was not provided with the necessary information to comment on EPA's decision and may have erroneously concluded that MA was simply trying to shirk its responsibility to address mercury pollution.

Regarding the rejection decision, in a nutshell, the MA submittal listed 90 mercury-impaired water bodies that are solely impacted by atmospheric mercury deposition in Category 4b. The MA listing submission was clear that including these water bodies in the 4b category was contingent on the state demonstrating the effective implementation of mercury reduction efforts that exceed EPA requirements.

The 4b listing did not claim that all necessary controls were already in place in MA but that an adaptive management strategy was being effectively implemented by the state that would resolve the problem over time, *if* commensurate national controls were adopted. MA's adaptive management strategy for mercury is delineated in the 1998 New England Governors and Eastern Canadian Premiers Mercury Action Plan and the MA Zero Mercury Strategy, which established long-term goals of virtually eliminating anthropogenic mercury sources and interim goals of a 50% reduction by 2003 (which was substantially exceeded) and a



75% reduction by 2010. The listing submittal clearly noted that continued 4b listing was contingent upon the demonstration, every 2 years, of ongoing progress on these plans.

EPA rejected MA's proposal concluding that the Commonwealth "did not demonstrate that pollution control requirements exist that are sufficient to implement the state's water quality standards for mercury within a reasonable period of time", noting that needed reductions from out-of-state/out-of-region sources could not be assured. MA agrees that we cannot assure needed out-of-state reductions, as this is a federal responsibility. The MA listing submission was clear that mercury deposition in MA, and the New England area overall, is now attributable primarily to out-of-state/ out-of-region sources and emphasized that MA, and indeed no state, has the ability to effectively address these. MA, through our regional and state mercury plans, is taking maximal action to address our own sources with an ultimate goal of virtually eliminating anthropogenic sources. It is difficult to envision what further action MA could commit to. EPA's rejection of the 4b listing for the 90 water bodies impacted by mercury air deposition suggests that the Agency does not have confidence that its current mercury reduction policies and regulations are sufficient to resolve the problem.

Although MassDEP applauds some recent EPA actions, more remains to be done. In particular the recent release of the EPA Roadmap for Mercury is a significant step in the right direction and establishes a workable framework for future national efforts to reduce this pollutant. However, the roadmap lacks a clear implementation strategy with concrete goals, milestones and deadlines designed to ensure that the emission reductions needed to meet our water quality standards for mercury are achieved. The national vehicle switch-recycling program is another positive step which and EPA should be aggressively using as a national model to reduce other product-related sources of mercury pollution. On the other hand, many states have concluded that the Clean Air Mercury Rule does not adequately address local mercury impacts and hotspots and are opting out of the rule's emissions trading program. MA and other states have also concluded that steeper emission reductions from coal-fired electric generate units can be achieved.

In addition to the issues noted above we are also disappointed by EPA's proposal to revise listing guidance and create a new 5M category, which appears to sanction further delays on an issue that should demand immediate attention.

In conclusion, MassDEP disagrees with EPA's decision on this matter and notes that more aggressive national actions are needed "to assure that pollution control requirements exist that are sufficient to implement the state's water quality standards for mercury within a reasonable period of time". Furthermore we think the Federal Register notice fails to meet the requirement of providing the public with adequate information to comment on and, as noted, contains information that is misleading. MassDEP now plans to pursue a TMDL, not because it is an option that makes sense, but because it is the only other option that is available to us for crediting the hard work we have already done and to highlight the need for further controls on upwind sources.

Sincerely,

A handwritten signature in black ink, appearing to read 'Arleen O'Donnell', with a stylized, cursive script.

Arleen O'Donnell
Acting Commissioner



Mary Reilly
<mary_reilly@comcast.net>
09/11/2006 01:14 PM

To: Michael Hill/R1/USEPA/US@EPA
cc
bcc
Subject: Massachusetts: Comments Sought by EPA on 303 (d)
Impaired Waters List

Hello, Michael,

I would just like to voice my support of EPA's disapproval of Massachusetts 2004 303(d) list in that it did not list 90 segments impaired for mercury.

I would also like to ask a question about the Bass River in Beverly. It is apparently on the 303(d) list but has not have TMDLs defined for it. Could you tell me what the process is for getting this done?

Thank you,
Mary Reilly
14 Prospect St.
Beverly, MA 01915