



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

Region 1

**1 Congress Street, Suite 1100
BOSTON, MA 02114-2023**

September 28, 2006

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

RE: 5B, 5C, 5D Portions of Maine's 2004 §303(d) List

Dear Commissioner Littell:

Thank you for Maine's final re-submittal of the Category 5-B-1, 5-B-2, 5-C, and 5-D portions of Maine's 2004 §303(d) list received by EPA on June 12, 2006. In accordance with §303(d) of the Clean Water Act and 40 CFR §130.7, the U.S. Environmental Protection Agency (EPA) conducted a complete review of Maine's 2004 §303(d) list. Based on this review, EPA has determined that the 5-B-1, 5-B-2, 5-C, and 5-D portions of Maine's 2004 §303(d) list of water quality limited segments still requiring total maximum daily loads (TMDLs) meet 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 5-B-1, 5-B-2, 5-C, and 5-D on its §303(d) list. This approval constitutes a final determination by EPA that Maine's list is complete and approved, since EPA approved the 5A Portion of Maine's 2004 list on May 9, 2005.

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 5-B-1, 5-B-2, 5-C, and 5-D for which TMDLs will be completed and submitted over time. 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 in 2004 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 both the April 13, 2005 submittal and the June 12, 2006 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,

/s/

Linda M. Murphy, Director
Office of Ecosystem Protection

Enclosures

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

EPA New England's Final Approval Decision on Maine's 2004 Section 303(d) List

I. INTRODUCTION

EPA approved the 5A portion of Maine's 2004 § 303(d) list on May 9, 2005. The 5A list included those waters characterized by the state as its "highest priority TMDL waters" for TMDL development. On June 6, 2006, Maine submitted the remainder of its §303(d) list for EPA's review and approval. Those waters were listed in subcategories 5-B-1, 5-B-2, 5-C, and 5-D, in Appendix II (rivers and streams), Appendix III (lakes) and Appendix IV (estuarine and marine waters) of Maine's *2004 Integrated Water Quality Monitoring and Assessment Report*, (IR) and were characterized by the state as lower priority for TMDL development (see Table 2).

Based on this review, EPA has determined that Maine's Category 5-B-1, 5-B-2, 5-C, and 5-D portions of the list of water quality limited segments (WQLSs) still requiring TMDLs meet 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 5-B-1, 5-B-2, 5-C, and 5-D of Maine's §303(d) list. This partial approval constitutes final approval of Maine's 2004 §303(d) list. 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

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

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

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

In developing §303(d) lists, States are required to assemble and evaluate all existing and readily available water quality-related data and information, including, at a minimum, consideration of existing and readily available data and information about the following categories of waters: (1)

waters identified as partially meeting or not meeting designated uses, or as threatened, in the State's most recent §305(b) report; (2) waters for which dilution calculations or predictive modeling indicate nonattainment of applicable standards; (3) waters for which water quality problems have been reported by governmental agencies, members of the public, or academic institutions; and (4) waters identified as impaired or threatened in any §319 nonpoint assessment submitted to EPA. See 40 CFR 130.7(b)(5). In addition to these minimum categories, States are required to consider any other data and information that is existing and readily available. EPA's 1991 Guidance for Water Quality-Based Decisions describes categories of water quality-related data and information that may be existing and readily available. See EPA's *Guidance for 2004 Assessment, Listing and Reporting Requirements Pursuant to Sections 303(d) and 305(b) of the Clean Water Act* (July 21, 2003) ("EPA's 2004 Integrated Water Quality Monitoring and Assessment Report 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 *2004 Integrated Water Quality Monitoring and Assessment Report Guidance*.

III. ANALYSIS OF MAINE'S 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 proposed 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 planned to submit the rest of its §303(d) list in the near future.

On June 6, 2006, Maine submitted for EPA's approval the Category 5-B-1, 5-B-2, 5-C, and 5-D portions of its 2004 §303(d) list (in the form of a complete and revised copy of Maine's *2004 Integrated Water Quality Monitoring and Assessment Report*), received by EPA on June 12, 2006. Maine's final 2004 §303(d) list includes those waters impaired solely by CSOs or by atmospheric deposition of mercury.

This EPA approval action pertains to Category 5-B-1, 5-B-2, 5-C, and 5-D of Maine's 2004 §303(d) list. These sub-categories of the §303(d) list are included in:

- Appendix II (rivers and streams, pages 56-60 IR);
- Appendix III (lakes, page 77 IR);
- Appendix IV (estuarine and marine waters, pages 88-95 IR).

For purposes of §303(d) review and approval of Category 5-B-1, 5-B-2, 5-C, and 5-D, EPA evaluated the following components of Maine's 2004 Integrated Report (IR):

- Maine's *Listing Methodology* (pages 60-64, Section 4-1 *Assessment Methodology*, IR);
- Maine's *Process to Solicit Public Comments and Summary of Public Comments and Responses* (pages 12-19, Section 2-2 *Response to Comments*, IR);
- Maine's *Data Sources and Acknowledgements* (pages 7-8, Section 1-1, IR)
- Maine's *Assessment Criteria* (pages 64-67, Section 4-2, IR)

Public Review

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 15-19, Section 2-2, IR) which lists each comment and the State's response. 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 Category B-1, 5-B-2, 5-C, and 5-D portions 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.

Listing Methodology

Maine provided a listing methodology for the 2004 §303(d) list which describes the basis of attainment assessment (type of data or information used) (pages 60-64, IR). Maine's 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.*

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).

The methodology also provides a list of “acceptable reasons for not listing a previously listed water as provided in 40 CFR 1307.7(b)”, and addresses other aspects including the prioritization of waters for TMDL development, and the listing of waters affected by fish advisories. Maine also provides information on monitoring and TMDL schedules (pages 62-64, IR).

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

Consideration of Water Quality-Related Data and Information

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 and other state resource agencies’ monitoring and assessment activities (including dilution calculations and predictive models) to update the §303(d) list.

In summary, Maine considered the most recent §305(b) water quality 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. As long as assessment data were collected using “approved monitoring practices” and quality assurance, there were no cases where ME DEP made a decision to not use any readily available information (page 8, 2004 IR; personal communication with David Courtemanch, ME DEP, 3/17/05). 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).

Delistings

A total of seventeen of the waters that were on the §2002 303(d) list have been removed from the 2004 §303(d) list. The Table 1 shows a summary of those delistings. Attached in Appendix A are copies of Maine's detailed lists and explanations / justifications for the delistings.

Table 1. Summary of waterbody segments delisted from 2002 to 2004.

Listing Category	Rivers & Streams	Lakes	Estuarine & Marine	Totals
1: full attainment	0	0	0	0
2: attainment/insufficient data*	4	0	1	5
3: insufficient data**	1	0	0	1
4-A: TMDLs completed	2	7	0	9
4-B: pollution controls enforced	1	0	1	2
4-C: no pollutant	0	0	0	0
Totals	8	7	2	17

* Category 2: "Attains some of the designated uses; no use is threatened; and insufficient data or no data and information is available to determine if the remaining uses are attained or threatened (with presumption that all uses are attained)." [page 61 2004 IR]

** Category 3: "Insufficient data and information to determine if designated uses are attained (with presumption that one or more uses may be impaired)." [page 61 2004 IR]

EPA recognizes that Maine's delisting in 2004 of these previously §303(d)-listed waterbodies has been done in accordance with Maine's 2004 listing methodology and consistent with Maine's water quality standards. The State has demonstrated, to EPA's satisfaction, good cause for not including on its list waters for the various reasons included in Appendix A to this approval document. In all six cases of delisting to category 2 and 3, more recent data or information indicate attainment of water quality standards (with the exception of mercury from atmospheric deposition). For the nine waters removed from the 2002 §303(d) list to category 4A under 40 CFR 130.7(b)(1)(ii), TMDLs for the pollutant of concern have been completed and approved by EPA.

The State's decision to include two waters in category 4-B rather than on its 2004 Section 303(d) list is consistent with EPA regulations at 40 CFR 130.7(b)(1). In both cases, land treatment systems for municipal wastewater treatment facilities were completed, and the wastewater discharges causing the dissolved oxygen and nutrient impairments were eliminated. With the Mapleton discharge removed from Presque Isle Stream, and the municipal discharge to the Medomak River estuary removed, both waterbodies are expected to meet water quality standards within a reasonable amount of time (consistent with 40 CFR §130.7(6)(1)(iii)). The "other pollution controls" now in effect are State of Maine waste discharge licenses issued by the DEP

(under 38 MRSA §413) which require land application for the wastewater treatment plant effluent, and do not authorize the continued discharge from the treatment facilities to the waterbodies.

Monitoring should be scheduled for these waters to verify that the water quality standards are attained as expected in a reasonable time frame, and the results of this monitoring should be submitted with the next §303(d) list. If water quality standards are not attained through the selected controls within a reasonable time, the waters should be placed back onto the §303(d) list for TMDL development. If the data submitted by the state in its next listing cycle supports a determination that water quality standards are being met for dissolved oxygen, it will be appropriate for the State to remove the water from the list at that time.

Priority ranking

Maine established a priority ranking for listed waters which includes assigning varying levels of priority for TMDL development to five subcategories of category 5 waters. Category 5A waters are Maine's highest priority for TMDL development and each waterbody is assigned a schedule for TMDL development. Category B-1, 5-B-2, 5-C, and 5-D are lower priority for TMDL development for various reasons, as explained in Table 2.

Table 2. Maine's 2004 TMDL Development Priority

Category	Title/Description	TMDL development Priority	Applicable to:
5-A	Impairment caused by pollutants (other than those listed in 5-B through 5-D). A TMDL is required and will be conducted by the State of Maine.	A projected schedule is included for each listing.	Rivers & streams Lakes Marine & Estuarine
5-B-1	Impairment is caused solely by bacteria contamination. A TMDL is required.	Low priority if other actions are already in progress to correct the problem, or if recreational use (swimming) is impractical. A projected schedule is included where applicable.	Rivers & streams Marine & Estuarine
5-B-2	Waterbodies impaired only by CSOs when CSO Master Plans (LTCP) are in place.	Low priority since other actions are already in progress. Provisions are in place for both funding and compliance timetables.	Rivers & streams Marine & Estuarine
5-C	Impairment caused by atmospheric deposition of mercury.	ME is participating in development of regional scale TMDLs for mercury control.	Rivers & streams Lakes
5-D	Impairment caused by a "legacy" pollutant (PCBs, DDT, or other substance already banned from production or use).	Low priority since there is no controllable load.	Rivers & streams Marine & Estuarine

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 2004 Integrated Water Quality Monitoring and Assessment Report Guidance*.

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: 2002 Maine waters no longer listed on the 2004 §303(d) List.

(Source: Maine 2004 IR, pages 232-233)

Table 8-1. 2002 Category 5/TMDL Rivers & Streams not on the 2004 Category 5 / TMDL List

Segment	Assessment Unit (Waterbody) ID	Has EPA Approved TMDL (In 4a)	Has Other Control Measures (Proposed for 4b)	Insufficient Information to Determine If Water Is Impaired (Category 3)	Assessment Unit is Attaining At Least One WQ Standard, With Other Standards Not Assessed (Category 2)	Assessment Unit is Attaining All WQ Standards (Category 1)
Outlet Stream (China Lake)	ME01030000 309 328R01			Recent (2002) biomonitoring indicates attainment, sources may still exist.		
Kennedy Brook	ME01030000 312 333R03				Recent (2003) monitoring in attainment. See case study discussion in Sect 4-4, Small Streams.	
Togus Stream	ME01030000 312 335R02				Draft TMDL completed with findings that water quality impairments are attributable to natural (wetland) sources rather than any identifiable point or nonpoint source	
Bog Stream	ME01050000 308 511R01				Hatchery point source eliminated. Recent (2003) monitoring in attainment.	
Goosefare Brook	ME01060000 106 612R01	TMDL approved 2003				
Deep Brook	ME01060000 211 616R01				Recent (2002) in attainment. No sources found for previous cause	
Presque Isle Stream	ME01010000 412 140R01		Mapleton land treatment system complete. Probable attainment.			
Cobbossee Stream	ME01030000 311 334R05	TMDL approved 2004				
Total Number of Segments Moved From 2002 TMDL List		2	1	1	4	

Table 8-1 2002 Category 5/TMDL Lakes not on the 2004 Category 5 / TMDL List

Lake	Assessment Unit (Lake) ID	Year EPA Approved TMDL (In 4a)	Has Other Control Measures (Proposed for 4b)	Insufficient Information to Determine If Water Is Impaired (Category 3)	Assessment Unit is Attaining At Least One WQ Standard, With Other Standards Not Assessed (Category 2)	Assessment Unit is Attaining All WQ Standards (Category 1)
Webber Pond	5408	2003				
Threemile Pond	5416	2003				
Three-cornered Pond	5424	2003				
Highland (Duck) Lake	3734	2003				
Mousam Lake	3838	2003				
Annabessacook Lake	9961	2004				
Pleasant (Mud) Pond	5254	2004				
Total Number of Lakes Moved From 2002 TMDL List		7 Lakes				

Table 8-2 2002 Category 5/TMDL Estuarine/Marine Waters not on 2004 Category 5/TMDL List

Segment	Assessment Unit (Waterbody) ID	Year EPA Approved TMDL (In 4a)	Has Other Control Measures (Proposed for 4b)	Insufficient Information to Determine If Water Is Impaired (Category 3)	Assessment Unit is Attaining At Least One WQ Standard, With Other Standards Not Assessed (Category 2)	Assessment Unit is Attaining All WQ Standards (Category 1)
Medomak River Estuary	726-11		4-B-1 Municipal Point Source removed – changed to spray irrigation			
Burnt Cove, Stonington	722-36				OBDs Removed. Monitoring indicates attainment.	
Total Number of Segments Moved From 2002 TMDL List			1		1	