



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION I
5 POST OFFICE SQUARE SUITE 100
BOSTON, MASSACHUSETTS 02109-3912

June 13, 2012

David Mears, Commissioner
Vermont Department of Environmental Conservation
103 South Main Street
Waterbury VT 05671-0408

Re: Section 303(d) list approval

Dear Commissioner Mears:

Thank you for your final submittal of the 2012 Clean Water Act Section 303(d) list, **State of Vermont 303(d) List of Waters**, dated May 2012 and your submittal letter dated May 14, 2012. 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 Vermont's 2012 Section 303(d) list and supporting documentation. Based on this review, EPA has determined that Vermont's list of water quality limited segments still requiring Total Maximum Daily Loads (TMDLs) meets the requirements of Section 303(d) of the Clean Water Act (CWA) and EPA's implementing regulations. Therefore, by this order, EPA hereby approves Vermont's Section 303(d) list.

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 Vermont's TMDL strategy which describes a priority setting approach and identifies those waters for which TMDLs will be completed and submitted during the next two years. The statutory and regulatory requirements, and EPA's review of Vermont's compliance with each requirement, are described in detail in the enclosed approval document.

The Vermont Department of Environmental Conservation (VTDEC) has also successfully completed a public participation process during which the public was given the opportunity to review and comment on the Section 303(d) list. As a result of this effort, Vermont has considered public comments in the development of the final list. A summary of the public comments and VTDEC's response to comments was included in the submittal.

Your staff has done an excellent job of preparing a comprehensive and informative list, and providing EPA with thorough supporting documentation. My staff and I look forward to

continued cooperation with VTDEC in implementing the requirements under Section 303(d) of the CWA. Please feel free to contact me or Eric Perkins at 617-918-1602, if you have any questions or comments on our review.

Sincerely,

/s/

Stephen S. Perkins, Director
Office of Ecosystem Protection

Enclosure

cc: Tim Clear, VTDEC

VT §303(d) Approval Documentation

June 13, 2012

I. INTRODUCTION

EPA has conducted a complete review of Vermont's 2012 Section 303(d) list and supporting documentation and information and, based on this review, EPA has determined that Vermont's list of water quality limited segments (WQLSs) still requiring TMDLs meets the requirements of Section 303(d) of the Clean Water Act ("CWA" or "the Act") and EPA's implementing regulations. Therefore, by this order, EPA hereby approves Vermont's 2012 Section 303(d) list. The statutory and regulatory requirements, and EPA's review of Vermont's compliance with each requirement, are described in detail below.

II. STATUTORY AND REGULATORY BACKGROUND

Identification of WQLSs for Inclusion on 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 Section 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 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

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 an October 12, 2006 memo and attachments, a May 5, 2009 memo and attachments, and the March 21, 2011 memo and attachments. All guidance, memoranda and attachments may be found at: <http://www.epa.gov/owow/tmdl/guidance.html>. 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 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, and 2011 memoranda and attachments.

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

Waters listed by Vermont in Part A of the State's 2012 Integrated Report (which corresponds to EPA's Category 5 (as defined below)) represent the State's §303(d) list, which the State is required to submit to EPA for review and approval or disapproval. The water segments Vermont placed into one of Parts B through G of the State's 2012 Integrated Report (which correspond to EPA's Categories 3 through 4 (as defined below)) fulfill the requirements of §305(b) of the CWA and are not a part of Vermont's §303(d) list. Such integrated listing format allows states to provide the status of all assessed waters in a single multi-part list. States may list each water body or segment thereof into one or more of the following five categories, as appropriate:

- 1) All designated uses are supported, no use is threatened;
- 2) Available data and/or information indicate that some, but not all of the designated uses are supported;
- 3) There is insufficient available data and/or information to make a use support determination (VT Part C);
- 4) Available data and/or information indicate that at least one designated use is not being supported or is threatened, but a TMDL is not needed;
 - 4a) A state-developed TMDL has been approved by EPA or a TMDL has been established by EPA for any segment-pollutant combination (VT Part D);
 - 4b) Other required control measures are expected to result in the attainment of an applicable water quality standard in a reasonable period of time (VT Part B);
 - 4c) The non-attainment of any applicable water quality standard for the segment is the result of pollution and is not caused by a pollutant (VT Parts E, F, or G); and
- 5) Available data and/or information indicate that at least one designated use is not being supported or is threatened, and a TMDL is needed (VT Part A).

EPA reviewed and commented on Vermont's draft 2012 Section 303(d) list, dated March 2012. The Vermont Department of Environmental Conservation (VTDEC) then revised the list based on EPA's comments and comments from other interested parties received during the public comment period. Vermont submitted its final 2012 §303(d) list to EPA-New England on May 14, 2012. VTDEC also supplemented its May 14, 2012 submission with additional information submitted in June 2012 relating to the West Branch of the Little River (discussed in detail later in this memorandum in the section entitled "Water Impairment Placed into EPA Category 4b, Vermont's Part B (impaired but no TMDL needed)"), and EPA considered that information as part of its review of VTDEC's overall submittal. The submittal package included the following components:

1. State of Vermont 2012 §303(d) List of Waters (May, 2012). This submission included "Part A," the list of impaired surface waters needing total maximum daily loads (TMDLs).
2. State of Vermont 2012 List of Priority Surface Waters Outside the Scope of Clean Water Act Section 303(d). This submission included: Part B, impaired surface waters – no TMDL required;

Part C, surface waters in need of further assessment; Part D, surface waters with completed and approved TMDLs; Part E, surface waters altered by exotic species; Part F, surface waters altered by flow regulation; and Part G, surface waters altered by channel alteration.

3. VT DEC's Response to Public Comments on Vermont's March 2012 draft §303(d) list.

VTDEC conducted a public participation process, in which it provided the public the opportunity to review and comment on the State's 2012 draft §303(d) list. A public comment period was opened on March 9, 2012 and was closed on April 11, 2012. During the comment period a public meeting was held in Winooski VT on March 27, 2012. Comments were solicited from the public both through regional newspapers and the VTDEC website. EPA concludes that Vermont's public participation process was consistent with its Continuing Planning Process (CPP), and that Vermont provided sufficient public notice and opportunities for public involvement.

Vermont's final submittal took into account suggested changes to the State's draft 2012 §303(d) list from interested parties. VTDEC prepared a "Response to Comments" document which lists each comment and the State's response. EPA reviewed VTDEC's responses and concludes that Vermont adequately responded to the comments. EPA notes that Conservation Law Foundation (CLF) submitted comments relating to the kinds of information VTDEC relies on generally to make listing decisions. In addition, CLF also specifically commented on VT DEC's decision not to rely on certain information relating to the impacts of Tropical Storm Irene for purposes of making listing decisions for the State's 2012 §303(d) list. EPA believes that CLF's comments were adequately addressed by VTDEC in its "Response to Comments" document. See also Section IV of this memorandum entitled, Identification of Waters and Consideration of Existing and Readily Available Water-Quality-Related Data and Information, for additional relevant discussion.

IV. 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 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.

Vermont used the VTDEC Water Quality Division assessment databases to develop its 2012 §303(d) list. The same databases are used to assist in the preparation of the biennial §305(b) report. These databases contain all reported water quality information. In the development of the 2012 §303(d) list, Vermont began with its existing EPA approved 2010 §303(d) list and relied on new water quality assessments (i.e., post-2010) to update the list accordingly. All data sources used to develop previous §303(d) lists were carefully reviewed. Where valid monitoring data, including recent data as well as data older than 5 years, and/or evaluative information were

collected and determined to be sufficient to make §303(d) listing judgments, waterbodies that were assessed as impaired for one or more uses due to pollutants were added to the 2012 §303(d) list. Vermont believes that information pertaining to impairment status must be well substantiated, preferably with actual monitoring data, for it to be used for §303(d) listing.

EPA has reviewed Vermont's description of the data and information it considered, and its methodology for identifying waters. 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).

In addition, the State provided a rationale for not relying on particular and readily available water quality-related data and information as a basis for listing waters. Beginning with the 1998 list and continuing through the 2012 listing process, Vermont chose not to list waters where the only information regarding water quality was unsubstantiated anecdotal information (e.g., citizen complaint). Vermont analyzed relevant data and information for each water body in the State in deciding whether there was sufficient, reliable data to support listing. The State's use of this listing methodology is reasonable and consistent with EPA's regulations. The regulations require states to "assemble and evaluate" all relevant water quality related data and information, and Vermont did so for each of its waterbodies. The regulations permit states to decide not to use any particular data and information as a basis for listing, provided they have a reasonable rationale in doing so. Vermont's decision not to use unsubstantiated anecdotal information is reasonable in light of the uncertainty about the reliability of such information. Moreover, it is reasonable for Vermont to decide to focus its listing and TMDL development resources on waters where water quality impairments are well-documented, rather than on waters with only unreliable water quality information. As additional waters are assessed, EPA expects Vermont would add waters to its list where such assessments show water quality standards are not being met.

Vermont did in certain cases include waters on the 2012 §303(d) list based solely on evaluative information, i.e., information the evaluation of which requires the use of judgment, in contrast to information consisting of straightforward numerical sampling results. Vermont based a listing decision on evaluative information when the State had confidence that an impairment existed. For example, most critically and chronically acidified waters, for which only limited measurements of pH and alkalinity exist, are listed based on the "evaluative" relationship between aquatic biota, pH and alkalinity, rather than on actual measurements of biological integrity.

Another example of Vermont's use of evaluative information includes waters based on data older than 5 years of age (i.e., "evaluated" waters under EPA's §305(b) guidance) where such data showed exceedences of one or more criteria of Vermont water quality standards. Although data older than 5 years is considered "evaluative" information under EPA's Section 305(b) guidance, Vermont chose to use such data as a basis for listing. The State concluded that the use of such data is reasonable because, without specific information to the contrary, there is no reason to believe that data older than 5 years are no longer representative of the water quality of the waterbody in question. EPA believes this conclusion is reasonable, and it is consistent with EPA

regulations for states to decide to list waters based on data older than 5 years. The regulations require states to consider all available data and to use it unless the state provides a reasonable rationale for not doing so.

Vermont does not add waters to the §303(d) list where the limited information available might indicate a possible impairment but the information was determined by VTDEC to be insufficient for the purpose of listing. For example, there have been instances in the past in which Vermont has not listed water segments for pathogens, where questionable volunteer monitoring data (e.g., situations with few samples and data absent a QA/QC plan) indicated potential exceedences of the bacteria criterion. Instead, Vermont included those water segments on a separate list of priority waters in need of further assessment. In those and similar cases, Vermont believes the information is too limited (for reasons discussed above), creating considerable uncertainty with respect to the assessment and whether uses are truly impaired. Another example of this kind of situation, one that occurred during the current 2012 listing cycle, consists of available observational information relating to water segments impacted by Tropical Storm Irene in 2011. As discussed in VTDEC's Response to Comments document, preliminary observational data on impacted segments were compiled by the Vermont Fish and Wildlife Department and included in Vermont's 2012 §305(b) report. However, this information was based solely on roadside observations; no data were gathered through instream habitat assessments or biological monitoring. Although VTDEC considered all of the available observational information, VTDEC concluded that such information is, by itself, insufficient to support impairment determinations. VTDEC's decision not to place water segments on the §303(d) list based on these roadside observations can be distinguished from other cases where VTDEC has made determinations based on evaluative or observational information, such as where pH and alkalinity data or observations of fish kills have been used to make aquatic life support determinations. In these other cases, the State had some type of actual water quality or biological indicator information, whereas in the case of the Tropical Storm Irene impacts, the State does not possess anything other than roadside observations (which, in addition, often only afforded a view of a *portion* of a segment). VTDEC believes that, while the available observational information is a useful start, a systematic evaluation is needed in this situation and should include at least some biological data or other water quality information. With such additional information the State will be able to determine, for example, whether a particular segment should be placed into category 4c (Part G of Vermont's list -- surface waters altered by channel alteration) or category 5 (water segments on the §303(d) list). The State intends to supplement the observational data with instream biological assessments in the near future in order to be in a position to support any necessary listing decisions in future listing cycles. EPA concurs with VTDEC's approach, and believes that VTDEC's response to CLF's comments on this issue is adequate and supportable.

In summary, Vermont considered the most recent §305(b) assessments, as required by EPA's regulations, and evaluated all existing and readily available water quality-related data and information, obtained primarily through monitoring, as the basis for adding water quality impairments to the 2012 §303(d) list. The State added two new impaired waters to the 2012 §303(d) list. EPA concludes that Vermont appropriately considered all relevant and appropriate information during the State's development of the 2012 §303(d) list.

Priority Ranking

As described in its methodology, Vermont established a priority ranking for listed waters by considering: 1) the presence of health issues, 2) the nature, extent, and severity of the pollutant(s) causing the impairment, 3) the use or uses that are impaired, 4) the availability of resources, and 5) the amount or degree of public interest in problem abatement. Additionally, Vermont also considered the merits of addressing – on a regional or statewide basis – waters with similar problems (e.g., pH impaired waters due to acid rain). Individual priority rankings for listed waters are reflected in the list with indications of low, medium or high priority for TMDL development. Vermont defines its priorities in the following manner: H = high, 1-3 years; M = medium, 4-8 years; L = low, 8+ years.

EPA finds that the waterbody prioritization and targeting method used by Vermont 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 other relevant factors described above. EPA acknowledges that the schedule of TMDL completion establishes a meaningful priority ranking system.

Water impairments Not Listed on Vermont's 2012 §303(d) List Because of Delisting

Vermont did not include on its 2012 §303(d) list 28 water impairments included on the State's 2010 §303(d) list, and EPA asked the State to provide rationales for its decisions to “delist” these previously listed waters. The State has demonstrated, to EPA's satisfaction, good cause for not listing these waters on its 2012 §303(d) list, consistent with 40 CFR §130.7(b)(6)(iv).

Of the 28 water impairments removed from the §303(d) list, 6 impairments were removed because new monitoring data indicate applicable water quality standards are no longer exceeded, or, in one instance, because the State concluded the original listing was in error. The specific bases for delisting the 6 water impairments are described below. The remaining 22 water impairments are no longer listed because TMDLs have been completed for them since the State's 2010 §303(d) list was prepared.

Little Otter Creek, from the mouth to river mile 7.8 (VT03-07) was impaired for aquatic life support due to “undefined” pollutants suspected to be associated with agricultural runoff. The creek was placed on the §303(d) list in 1994 as a result of a “fair” biological rating at one of the two sampling stations within this reach in 1993. Subsequent biological monitoring in 2001, 2006, and 2008 documented improved conditions at both stations (ranging from “good-fair” to “very good-good” for all years sampled) indicating compliance with the Vermont water quality standards. Based on this information, EPA approves this delisting.

Mill River from St. Albans Bay to 1.8 miles upstream (VT05-07) was listed as impaired for E. coli based upon an assessment in 1994. The State now believes that the listing was based upon insufficient information and was therefore in error. The listing was based purely on the fact that

some agricultural uses were located within the watershed and the notion that that fact alone might be sufficient to assert that *E. coli* concentrations exceeded Vermont water quality standards in that water segment. The 1994 listing was not based on any water quality data. Although this same rationale formed the basis of many State listing decisions in the early 1990s, starting in 1998 Vermont began implementing a more rigorous listing approach, relying more heavily (although not necessarily exclusively in all cases) on water quality data. The State accordingly delisted most segments that had previously been listed due simply to land use proximity; however, a few listings inadvertently were overlooked at that time, including this Mill River segment. While the State has no data indicating compliance with *E. coli* water quality standards in the Mill River segment, there also are no data indicating an impairment or a specific *E. coli* source or threat. Consequently, the State has identified this water segment as a segment in need of further assessment. For the reasons stated above, EPA approves this delisting.

Stone Bridge Brook (VT05-08) was listed as impaired for aquatic life support due to undefined impacts associated with agricultural runoff. This segment was listed in 1998 based on biological monitoring data from 1997 that indicated a “poor” rating, which equates to noncompliance with Vermont water quality standards. Following implementation of best management practices at a number of farms within the watershed (including the establishment of winter cover crops on more than 300 acres, the development of nutrient management plans for more than 700 acres, improvements to silage leachate treatment, and use of no-till planting) the brook was rated “very good” and “very good-good” based on 2009 and 2011 biological monitoring results, respectively, indicating compliance with Vermont water quality standards. For the reasons stated above, EPA approves this delisting.

Tributary to Jewell Brook in Ludlow (VT10-14) was originally listed in 1994 as impaired for aesthetics due to iron precipitate and staining caused by leachate from the old Ludlow Landfill, which was closed in the 1970s. VTDEC completed a comprehensive assessment of the tributary in 2007, which showed that the brook was found to meet the Vermont water quality standards for aquatic life support (rated “Excellent-Very good”) and for iron. Although iron concentrations were somewhat elevated at 800 ug/l they were below the 1000 ug/l criterion. These data support and are consistent with VTDEC biologists’ aesthetic observations in 2007 that the conditions in the brook no longer rose to the level of aesthetic impairment. For the reasons stated above, EPA approves this delisting.

The Ompompanoosuc River below Ely Mine (VT14-03) was listed as impaired for aesthetics in 1994 due to metals thought to be coming from drainage from the abandoned Ely Mine site. However, during the last two bioassessment visits to this river segment in 2008 and 2011, VTDEC monitoring staff found no evidence of metals precipitate on the river bed or other evidence of aesthetic impairment. For the reasons indicated above, EPA approves this delisting.

Crystal Brook in Derby (VT17-01) was listed in 2004 as impaired for aquatic life support due to nutrients associated with agricultural runoff. Recent restoration work has resulted in reduced nutrient loading, and subsequent biological monitoring confirmed that the aquatic life impairment has been eliminated. From 2006 through 2009, a number of improvements were

made to a farm believed to be the cause of the elevated phosphorus levels in this segment. These improvements included repairs to a leak in the farm's manure storage pit, subsequent replacement of the pit with a larger sealed lagoon better sized for the volume and type of animal waste (2007), and installation of a new drainage system to capture runoff from the silage area (early 2009). Phosphorus monitoring data show that phosphorus levels in the segment declined by more than 80% between 2006 and 2009. The biological monitoring data revealed improvement as well. The macroinvertebrate sampling results for this segment improved from "poor" in 2004 and 2006 to "good-fair" in 2009 and then to "excellent-very good" in 2010. The latter two ratings indicate compliance with Vermont's water quality standards. For these reasons, EPA approves this delisting.

Consistent with EPA's regulations and EPA's Guidance for Assessment, Listing and Reporting Requirements, Vermont did not include on the §303(d) list, 22 water impairments for which TMDLs have been approved by EPA. These 22 are all E. coli TMDLs, and address the following waters: Flower Brook (Paulet), Otter Creek (Middlebury, Salisbury, Cornwall), Little Otter Creek (Ferrisburg), Little Otter Creek (New Haven), Lewis Creek (Charlotte, Hinesburg, Starksboro, Monkton), Pond Brook (Hinesburg, Monkton), Middlebury River (Middlebury), Direct drainages to Inner Malletts Bay (Colchester), Englesby Brook (Burlington), LaPlatte River (Hinesburg, Charlotte, Shelburne), Mud Hollow Brook (Charlotte), Potash Brook (South Burlington), Berry Brook (Richford), Godin Brook (Berkshire), Samsonville Brook (Berkshire, Enosburg), Allen Brook (Williston), Huntington River (Huntington), Mad River (Moretown), West River (Londonderry), No. Branch Deerfield River (Wilmington, Dover), Whetstone Brook (Brattleboro), Ompompanoosuc River (Thetford, West Fairlee). EPA approves these delistings for the specified impairment cause (E. coli). Some of these segments are still listed for other impairments.

Water Impairment Placed into EPA Category 4b, Vermont's Part B (impaired but no TMDL needed).

During this listing cycle, VTDEC determined that the West Branch of the Little River (VT08-12) is impaired for aquatic life support. (This water was not identified on the State's 2010 Section 303(d) list because it was determined to be impaired after the 2010 list was completed.) Vermont has proposed that this water segment not be listed on the State's Section 303(d) list during this listing cycle, but, rather, that it be placed instead on the State's "Part B list" (impaired surface waters – no TMDL required) consistent with EPA regulations at 40 CFR §130.7(b)(1) and EPA's Guidance for Assessment, Listing and Reporting Requirements.

Under 40 CFR §130.7(b)(1), States are not required to list water quality limited segments still requiring TMDLs where effluent limitations required by the CWA, more stringent effluent limitations required by state or local authority, or other pollution control requirements required by state, local, or federal authority, are stringent enough to implement applicable water quality standards. The regulation does not specify the time frame in which these various requirements must implement applicable water quality standards to support a State's decision not to list particular waters.

In its submission to EPA, Vermont has demonstrated that there are other pollution control requirements required by state, local or federal authority that will result in attainment of water quality standards for aquatic life support in the West Branch of the Little River (VT08-12) within a reasonable time. VTDEC's submission demonstrates that the best available information supports a conclusion that storm water runoff and sediment are causes of the aquatic life support impairment in the water segment, and that those causes are associated with property owned by Stowe Mountain Resort (SMR) and activities occurring on that property. On May 3, 2012, VTDEC issued an enforcement order to SMR requiring development of a remediation plan to address storm water runoff and sediment loading from SMR's property and activities. The May 3, 2012 order also requires that SMR submit the remediation plan to VTDEC for review. Following VTDEC approval of the plan, the order requires SMR to implement the corrective actions identified in the plan by September 30, 2012. SMR submitted a plan to VT DEC in mid-May 2012, and VTDEC approved the plan on May 24, 2012.

Based on a May 23, 2012 site visit by VTDEC and VTDEC's review of SMR's plan, VTDEC has concluded that the actions specified in the plan will eliminate the water quality impairment. The plan calls for upgrades to existing, and installation of new, storm water management systems; protection and/or maintenance of riparian buffers; and modifications to snowplowing, snow piling, and sand operations. The plan also requires follow-up monitoring in order to determine the effectiveness of the measures implemented. By virtue of implementation of the measures identified in SMR's plan, VTDEC believes Vermont's water quality standards will be met within a reasonable period of time. If monitoring does not confirm an improving trend, this water may be placed on the State's Section 303(d) list in future listing cycles.

The State's decision not to include the West Branch of the Little River on its 2012 Section 303(d) list is consistent with EPA regulations at 40 CFR §130.7(b)(1) and EPA's Guidance for Assessment, Listing and Reporting Requirements. For the reasons stated above, EPA concurs with VTDEC's decision.

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. Natri, 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.