



## REGION 2

NEW YORK, N.Y. 10007

September 10, 2026

Ms. Carol Lamb-Lafay, Director  
Division of Water  
New York State Department of Environmental Conservation  
625 Broadway  
Albany, NY 12233-3500

Re: EPA Transmittal of 96 Waterbody/Pollutant Combinations added to the NY 2020-2022 303(d) List and Response to Comments on its Additions

Dear Ms. Lamb-Lafay:

Thank you for your efforts and those of the New York State Department of Environmental Conservation (NYSDEC) in implementing the Clean Water Act (CWA) Section 303(d) program. I appreciate your support of having informative discussions regarding the New York 2020-2022 303(d) list, as the U.S. Environmental Protection Agency (EPA) and the NYSDEC collaboratively move forward in implementing the statutory and regulatory requirements under Section 303(d) of the CWA and 40 CFR 130.7. We look forward to continuing technical discussions with the goal of advancing the program, tackling complicated issues of emerging concern, and reaching mutually agreed upon fundamentals about the program to achieve all Clean Water Act-based programmatic requirements.

In response to your submission of the New York 2020-2022 Clean Water Act (CWA) 303(d) list (New York 2020-2022 303(d) List), the enclosed documentation describes the 96 waterbody/pollutant combinations the EPA identified on the New York 2020-2022 303(d) List. Pursuant to 40 CFR § 130.7(d)(2), the EPA opened a public comment period in order to receive comments on the addition of these 96 waterbody/pollutant combinations. The EPA's Response to Comments received during the public comment period for this action is enclosed.

On January 17, 2025, the EPA partially approved, partially disapproved, and has further action pending on the New York 2020-2022 Section 303(d) list. The EPA approved the New York 2020-2022 303(d) List with respect to the one thousand and four (1,004) waterbody/pollutant combinations New York identified on the list as requiring a total maximum daily load (TMDL).

The EPA disapproved the New York 2020-2022 303(d) List because the EPA determined that New York did not identify ninety-six (96) waterbody/pollutant combinations on the New York 2020-2022 303(d) List that meet 303(d) listing requirements. The EPA has further action pending with regard to eighty-two (82) waterbody/pollutant combinations. Pursuant to the EPA's disapproval of the New York 2020-2022 303(d) List and consistent with Section 303(d)(2) of the CWA, the EPA identified these 96 waterbody/pollutant combinations on the New York 2020-2022 303(d) List.

On January 17, 2025, the EPA published a public notice on the EPA's website, opening a public comment period on this action. Public comments were received by email. On February 18, 2025, the comment period was extended for 30 days. The comment period ended on March 18, 2025. After considering the comments received and in accordance with the CWA and the EPA's regulations and guidance, the EPA concluded that no revisions to its identification of these 96 waterbody/pollutant combinations on the New York 2020-2022 303(d) List are appropriate.

Please see the enclosed table for a complete list of the 96 waterbody/pollutant combinations, along with the EPA's Response to Comments received. For a detailed reasoning on the EPA's action, see the Support Document for Review and Partial Approval/Partial Disapproval of the New York 2020-2022 303(d) List. Pursuant to Section 303(d)(2) of the CWA and 40 C.F.R. § 130.7(d)(2), New York is required to incorporate these 96 waterbody/pollutant combinations into its water quality management plan. New York must also include these 96 waterbody/pollutant combinations, along with all waterbody/pollutant combinations the EPA identified on previous New York 303(d) lists, on all subsequent 303(d) lists, unless the State demonstrates that the water no longer meets 303(d) listing requirements.

I appreciate the opportunity to work with you and your staff on conserving, protecting, and restoring water resources. Please feel free to contact me at 212-637-4125, or your staff may contact Ryan Van Manen at [vanmanen.ryan@epa.gov](mailto:vanmanen.ryan@epa.gov) if you have any further questions on this matter.

Sincerely,

Javier Laureano, Ph.D.  
Director  
Water Division

cc: Virginia Wong, EPA R2, WD-CWRB  
Andie D'Angelo, EPA R2, ORC  
Stephanie June, NYSDEC-DOW  
Lauren Townley, NYSDEC-DOW

## Enclosures

1. 96 Waterbody/pollutant Combinations the EPA Added to the New York 2020-2022 303(d) list
2. Response to Public Comments on the EPA's Addition of 96 Waterbody/pollutant Combinations to the New York 2020-2022 303(d) List

96 Waterbody/Pollutant Combinations the EPA added to the New York 2020-2022 303(d) list

| #  | Waterbody Name (Assessment Unit ID)                         | Pollutant/Cause      |
|----|-------------------------------------------------------------|----------------------|
| 1  | Spring Creek (1701-0361)                                    | Dissolved Oxygen     |
| 2  | Paerdegat Basin (1701-0363)                                 | Dissolved Oxygen     |
| 3  | Jones Inlet/Jones Bay (1701-0373)                           | Nutrients            |
| 4  | Owasco Lake (0706-0009)                                     | Harmful Algal Blooms |
| 5  | Lake Como (0705-0029)                                       | Harmful Algal Blooms |
| 6  | Cazenovia Lake (0703-0021)                                  | Harmful Algal Blooms |
| 7  | Canandaigua Lake (0704-0001)                                | Harmful Algal Blooms |
| 8  | Roaring Brook Lake (1301-0037)                              | Harmful Algal Blooms |
| 9  | South Branch Smoke Cr, Lower, and tribs (0101-0036)         | Silt/sediment        |
| 10 | Mill Creek and minor tribs (0404-0011)                      | Silt/sediment        |
| 11 | Cayuga Lake, Southern End (0705-0040)                       | Silt/sediment        |
| 12 | Great Chazy River/Stream, Lower, Main Stem (1002-0001)      | Silt/sediment        |
| 13 | Indian Brook and tribs (1006-0002)                          | Silt/sediment        |
| 14 | Huddle/Finkle Brooks and tribs (1006-0003)                  | Silt/sediment        |
| 15 | Hague Brook and tribs (1006-0006)                           | Silt/sediment        |
| 16 | Lake George and tribs (1006-0016)                           | Silt/sediment        |
| 17 | Tribs to Lake George, East Shore (1006-0020)                | Silt/sediment        |
| 18 | Steele Creek tribs (1201-0197)                              | Silt/sediment        |
| 19 | Schoharie Reservoir (1202-0012)                             | Silt/sediment        |
| 20 | Sleepy Hollow Lake (1301-0059)                              | Silt/sediment        |
| 21 | Wappingers Lake (1305-0001)                                 | Silt/sediment        |
| 22 | Ashokan Reservoir (1307-0004)                               | Silt/sediment        |
| 23 | Esopus Creek, Upper, and minor tribs (1307-0007)            | Silt/sediment        |
| 24 | Canaan Lake (1701-0018)                                     | Silt/sediment        |
| 25 | Tribs (fresh) to East Bay (1701-0204)                       | Silt/sediment        |
| 26 | East Meadow Brook, Upper, and tribs (1701-0211)             | Silt/sediment        |
| 27 | Sheldrake River/Stream and tribs (1702-0069)                | Silt/sediment        |
| 28 | Mamaroneck River/Stream, Lower (1702-0071)                  | Silt/sediment        |
| 29 | Mamaroneck River/Stream, Upper, and minor tribs (1702-0123) | Silt/sediment        |
| 30 | Glen Cove Creek, Lower, and tribs (1702-0146)               | Silt/sediment        |
| 31 | Tribs to L. George, Village of L George (1006-0008)         | Silt/sediment        |
| 32 | Ellicott Creek, Lower, and tribs (0102-0018)                | Silt/sediment        |
| 33 | Great Brook and minor tribs (0704-0034)                     | Silt/sediment        |
| 34 | Dwaas Kill and tribs (1101-0007)                            | Silt/sediment        |

| #  | Waterbody Name (Assessment Unit ID) | Pollutant/Cause |
|----|-------------------------------------|-----------------|
| 35 | Unnamed P #3-170 (0902-0009)        | pH              |
| 36 | Ridders Pond (1701-0176)            | Chlordane       |
| 37 | Doe Pond (0801-0161)                | pH              |
| 38 | Mirror Pond (0801-0146)             | pH              |
| 39 | Poplar Pond (0801-0078)             | pH              |
| 40 | Unnamed P #4-409 (0801-0142)        | pH              |
| 41 | Unnamed P #4-437 (0801-0143)        | pH              |
| 42 | Owlshead Pond (0902-0016)           | pH              |
| 43 | Childs Pond (0902-0013)             | pH              |
| 44 | Razorback Pond (0902-0017)          | pH              |
| 45 | South Duck Pond (0902-0018)         | pH              |
| 46 | Ward Pond (0902-0020)               | pH              |
| 47 | Hidden Pond (0902-0022)             | pH              |
| 48 | Unnamed P #3-252 (0902-0023)        | pH              |
| 49 | Mikes Pond (0902-0024)              | pH              |
| 50 | Unnamed P #6-037 (0903-0034)        | pH              |
| 51 | Spring Pond (0903-0035)             | pH              |
| 52 | Unnamed P #6-055 (0903-0036)        | pH              |
| 53 | Roberts Pond (0903-0030)            | pH              |
| 54 | Preston Pond (0903-0031)            | pH              |
| 55 | Unnamed P #6-067 (0903-0026)        | pH              |
| 56 | Unnamed P #6-094(0903-0023)         | pH              |
| 57 | Unnamed P #6-107 (0903-0038)        | pH              |
| 58 | Hedgehog Pond (0903-0020)           | pH              |
| 59 | Unnamed P #6-122 (0903-0039)        | pH              |
| 60 | Unnamed P #6-125a (0903-0040)       | pH              |
| 61 | Unnamed P #6-141 (0903-0018)        | pH              |
| 62 | Hunter Pond (0903-0042)             | pH              |
| 63 | Egg Pond (0904-0003)                | pH              |
| 64 | Cartridge Hills P (0904-0004)       | pH              |
| 65 | Unnamed P #4-235 (0905-0076)        | pH              |
| 66 | Readway Pond (0905-0043)            | pH              |
| 67 | Unnamed P #4-282 (0905-0077)        | pH              |
| 68 | Unnamed P #4-297 (0905-0079)        | pH              |
| 69 | Little Dog Pond (0905- 0039)        | pH              |
| 70 | Unnamed P #4-324 (0905-0070)        | pH              |
| 71 | Dow Pond (1003-0022)                | pH              |
| 72 | Unnamed P #2-036 (1003-0023)        | pH              |
| 73 | Line Pond (1003-0025)               | pH              |
| 74 | Bass Lake (1003-0011)               | pH              |
| 75 | Unnamed P #2-067 (1003-0026)        | pH              |

| #  | Waterbody Name (Assessment Unit ID) | Pollutant/Cause |
|----|-------------------------------------|-----------------|
| 76 | Unnamed P 112-068 (1003-0017)       | pH              |
| 77 | West Polliwog Pond (1003-0016)      | pH              |
| 78 | Little Egg Pond (1003-0031)         | pH              |
| 79 | SW Amphitheatre Pond (1003-0015)    | pH              |
| 80 | East Copperas Pond (1003-0004)      | pH              |
| 81 | North Whey Pond (1003-0013)         | pH              |
| 82 | Marsh Pond (1003-0029)              | pH              |
| 83 | Unnamed P #2-166 (1003-0032)        | pH              |
| 84 | Unnamed P #2- 189 (1003-0033)       | pH              |
| 85 | McCaffery Pond (1003-0034)          | pH              |
| 86 | Unnamed P #2-196 (1003-0035)        | pH              |
| 87 | Sochia Pond (1003-0014)             | pH              |
| 88 | Unnamed P #2-223 (1004-0011)        | pH              |
| 89 | Scott Pond (1004-0008)              | pH              |
| 90 | Unnamed P #2-263 (1004-0009)        | pH              |
| 91 | Unnamed P #2-269 (1004-0010)        | pH              |
| 92 | Lost Pond (1004-0007)               | pH              |
| 93 | Bullet Pond (1004-0017)             | pH              |
| 94 | Cranberry Pond (1004-0006)          | pH              |
| 95 | Snake Pond (1005-0001)              | pH              |
| 96 | Mud Pond (1004-0016)                | pH              |

## **United States Environmental Protection Agency Region 2**

Response to Public Comments on the EPA's Addition of 96 Waterbody/Pollutant  
Combinations to the New York 2020-2022 303(d) List

September 10, 2026



**REGION 2**

NEW YORK, N.Y. 10007

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## I. Summary of EPA's Action and Response to Comments

Section 303(d)(1) of the Clean Water Act (CWA) and the EPA's implementing regulations at 40 CFR 130.7 require states to identify waters for which effluent limitations required by CWA Section 301(b)(1)(A) and (B) are not stringent enough to implement any applicable water quality standard. The means by which a State identifies these waters has been commonly referred to as the State 303(d) list or list of impaired waters. CWA Section 303(d) lists must identify water quality limited segments (WQLSs) still requiring total maximum daily loads (TMDLs). 40 CFR 130.7(b). In developing CWA 303(d) lists, states must meet several procedural, submission, and content requirements.

Pursuant to section 303(d) of the Clean Water Act, the New York State Department of Environmental Conservation (NYSDEC) submitted to the U.S. Environmental Protection Agency (EPA) the New York State 2020-2022 Clean Water Act (CWA) Section 303(d) list of impaired waters and supporting information on September 11, 2024 via email, followed by a corrected submission on December 20, 2024 transmitted via the Assessment Total Maximum Daily Load Tracking and Implementation System (ATTAINS). Together, these documents and supporting information make up New York's Integrated Report for the 2020-2022 cycle and are collectively referred to as the "submission."

The EPA conducted a complete review of the New York submission, including changes from the previous 303(d) list. Based on this review, the EPA determined that the New York 2020-2022 303(d) List of impaired waters still requiring TMDLs partially satisfied the requirements of Section 303(d) of the CWA and the EPA's implementing regulations. For detailed reasoning on the EPA's review and action, see the Support Document for Review and Partial Approval/Partial Disapproval of the New York 2020-2022 303(d) List (EPA's Support Document).<sup>1</sup>

On January 17, 2025, the EPA partially approved, partially disapproved, and has further action pending on the New York 2020-2022 Section 303(d) list. The EPA approved the New York 2020-2022 303(d) List with respect to the one thousand and four (1,004) waterbody/pollutant combinations New York identified on the list as requiring a total maximum daily load (TMDL). The EPA disapproved the New York 2020-2022 303(d) List because the EPA determined that New York did not identify ninety-six (96) waterbody/pollutant combinations on the New York 2020-2022 303(d) List that meet 303(d) listing requirements. The EPA has further action pending on eighty-two (82) waterbody/pollutant combinations.

The 96 waterbody/pollutant combinations that New York did not identify on the New York 2020-2022 303(d) List that the EPA has determined meet CWA 303(d) listing requirements comprise:

- A. **Eight (8)** waterbody/pollutant combinations the NYSDEC omitted from the New York 2020-2022 303(d) List that the EPA added to the 2018 303(d) list.
- B. **Twenty-six (26)** waterbody/pollutant combinations the NYSDEC delisted from the New York 2018 303(d) list where data and information indicate that the applicable water quality criteria for turbidity, total dissolved solids, and/or suspended, colloidal and settleable solids are not met.

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<sup>1</sup> Support Document for Review and Partial Approval/Partial Disapproval of the New York 2020-2022 303(d) List ("EPA's Support Document"); [https://www.epa.gov/system/files/documents/2025-01/ny2020-2022303d\\_epa-decision\\_support-document.pdf](https://www.epa.gov/system/files/documents/2025-01/ny2020-2022303d_epa-decision_support-document.pdf).

- C. **Sixty-two (62)** waterbody/pollutant combinations the NYSDEC delisted from the New York 2016 list that New York re-segmented where data and information indicate that applicable water quality standards are not met for these waters.

Pursuant to the EPA's disapproval of the New York 2020-2022 303(d) list and consistent with Section 303(d)(2) of the CWA, the EPA identified these 96 waterbody/pollutant combinations for inclusion on the New York 2020-2022 303(d) list. Pursuant to 40 C.F.R. § 130.7(d)(2), the EPA sought public comment on the identification of these 96 waterbody/pollutant combinations on the New York 2020-2022 303(d) list by publishing a notice of this action on the EPA's website on January 17, 2025, and opening a public comment period for 30 days. On February 18, 2025, the comment period was extended for 30 days. The comment period ended on March 18, 2025. All comments were received by email.

The EPA received comments from eight (8) commenters and the EPA's responses to these comments are provided below. After considering the comments received and in accordance with the CWA and the EPA's regulations and guidance, the EPA concluded that no revisions to its identification of these 96 waterbody/pollutant combinations for inclusion on the New York 2020-2022 303(d) List are appropriate. Pursuant to Section 303(d)(2) of the CWA and 40 C.F.R. § 130.7(d)(2), New York is required to incorporate these 96 waterbody/pollutant combinations into its water quality management plan. New York must also include these 96 waterbody/pollutant combinations, along with all waterbody/pollutant combinations the EPA identified on previous New York 303(d) lists, on all subsequent 303(d) lists, unless the State demonstrates that an identified water no longer meets 303(d) listing requirements.

## II. Summary of Public Comments Submitted and EPA Responses

### A. The Fund for Roaring Brook Lake, Inc.

Submitted by: Sarah Bartlett, Chair

The Fund for Roaring Brook Lake, Inc.

1. **Comment #1:** The commenter expressed support for the inclusion of Roaring Brook Lake to the NY 2020-2022 303(d) list for harmful algal blooms.

**EPA Response to Comment #1:** The EPA acknowledges this comment.

### B. Tompkins County Water Resources Council

Submitted by: Cynthia Brock, Chair

Tompkins County Water Resources Council

121 E. Court St, Ithaca, NY 14850

1. **Comment #1:** The Tompkins County Water Resources Council (WRC) requested an extension to the public comment period beyond the original deadline of February 18, 2025, in order to provide sufficient opportunity for stakeholders to review materials and offer meaningful feedback.

**EPA Response to Comment #1:** The EPA extended the public comment period for 30 days, ending on March 18, 2025.

2. **Comment #2:** The WRC commented that in its comment letter to the NYSDEC on the draft New York 2020-2022 303(d) List, it requested information about the data used for the original listing of the Southern End of Cayuga Lake for silt/sediment, and that in response to this request the NYSDEC directed the WRC to the DOW Monitoring Data Portal, which did not include this data and therefore, the NYSDEC's response did not answer WRC's question about the data the NYSDEC used to make its original listing decision for the Southern End of Cayuga Lake.

**EPA Response to Comment #2:** The EPA acknowledges this comment and, while it is outside the scope of the 96 waterbody/pollutant combinations the EPA added to the New York 2020-2022 303(d) List, consistent with the EPA's Support Document, the EPA encourages the NYSDEC, when it provides public notice and an opportunity to comment on the draft 303(d) list, to make available to the public all data and information the NYSDEC used to make assessment determinations. It should also make available detailed delisting rationales, as well as detailed rationales for not using data and/or information to make assessment determinations. This will assist the public in its review of the draft 303(d) list and the preparation of comments.<sup>2</sup>

3. **Comment #3:** The WRC submitted suggestions and questions related to the NYSDEC's development of guidance values for silt/sediment and the NYSDEC's assessment determinations for silt/sediment, including that, "it would be valuable to have a clear assessment method and strategies for

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<sup>2</sup> See EPA's Support Document, page 42, for the EPA's discussion of this topic.

addressing conditions for sediment as a pollutant and where sediment is co-occurring with other pollutants like phosphorus.”<sup>3</sup> These suggestions and questions included the following:

- a. The WRC suggested that the guidance value for silt/sediment needs to be easier to apply than relating silt/sediment to multiple, existing water quality standards.
- b. The WRC inquired about how the NYSDEC will manage co-occurring pollutants, such as sediment and phosphorus,
- c. The WRC suggested that the NYSDEC adopt the method proposed during their Cayuga Lake Monitoring and Modeling Project.
  - i. The WRC suggested that the NYSDEC assess the viability of gravimetric methods versus those proposed during their Cayuga Monitoring and Modeling Project.<sup>4</sup>
- d. The WRC inquired about the timeframe and process for developing the assessment methodology.
- e. The WRC inquired about how the NYSDEC and the EPA will determine if the silt/sediment impairment is due to natural conditions or caused by a pollutant that can be addressed with a TMDL. The WRC noted that sediment loading in local waters needs to consider the watershed’s dynamics, history, impacts of glaciation, early colonial deforestation, and land use changes over time.

**EPA Response to Comment #3:** The EPA acknowledges these comments, suggestions and questions. As stated in the EPA’s Support Document, the EPA is supportive of the NYSDEC’s development of an assessment approach for identifying impairments due to sediment and restates that the lack of an assessment methodology does not obviate the requirement for the NYSDEC to use all existing and readily available data to make assessment determinations of whether the currently applicable numeric and narrative water quality criteria for total suspended solids, total dissolved solids and turbidity are met. The EPA is committed to working with the NYSDEC on its development of this assessment approach, including identifying the extent to which non-pollutant and natural features may contribute to sediment-related impairments, as well as considering other factors noted by the WRC. The timeline and process for doing this work will be determined by the NYSDEC.

4. **Comment #4:** The WRC submitted comments, suggestions, and questions related to the EPA’s addition to the New York 2020-2022 303(d) List of five (5) waterbodies as impaired due to HABs. These included the following:
  - a. The WRC agreed that the NYSDEC must provide a technical, science-based rationale for not using the HABs monitoring data, including beach closures, reports on NYHABS and data available through local monitoring groups like the Community Science Institute.
  - b. The WRC pointed out that many other waterbodies have experienced HABs resulting in beach closures and therefore the WRC asked why the EPA did not include other waterbodies on the 303(d) list as impaired due to HABs, including Cayuga Lake.
  - c. The WRC suggested that the EPA require the NYSDEC to invest resources into understanding the cause of HABs in waterbodies with low phosphorus and low chlorophyll-a.
  - d. The WRC suggested that the NYSDEC develop a numeric or narrative water quality standard for HABs and for toxins related to cyanobacteria.
  - e. The WRC indicated that the NYSDEC must invest resources to better define the causes for HABs other than from phosphorus.

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<sup>3</sup> Letter from Cynthia Brock, Tompkins County WRC to Ryan Van Manen, EPA Region 2, Water Division; February 18, 2025.

<sup>4</sup> Cayuga Monitoring and Modeling Project, [https://extapps.dec.ny.gov/docs/water\\_pdf/clmptacmtg20151022f.pdf](https://extapps.dec.ny.gov/docs/water_pdf/clmptacmtg20151022f.pdf)

- f. The WRC indicated that the NYSDEC must update its HABs action plans using site-specific data to better understand the complex causes of HABs and fund additional research.
- g. The WRC inquired about the next steps for the NYSDEC to address HABs.

**EPA Response to Comment #4.a:** The EPA acknowledges this comment and encourages the WRC to continue submitting data and information to the NYSDEC during the NYSDEC's data solicitation period. The data quantity and quality criteria set by the NYSDEC can be found in the CALM.<sup>5</sup> States must assemble and evaluate all existing and readily available water quality-related data and information to develop the CWA 303(d) list. 40 CFR 130.7(b)(5).

**EPA Response to Comments #4.b-c:** The EPA acknowledges that other waterbodies experience HABs. Of the 96 waterbody/pollutant combinations the EPA added to the New York 2020-2022 303(d) List, the EPA initially added five waterbody/pollutant combinations impaired due to HABs to the New York 2018 303(d) List. The NYSDEC did not include these five waterbody/pollutant combinations on the New York 2020-2022 303(d) List and did not provide new data or information that indicates that these waterbody/pollutant combinations no longer meet CWA 303(d) listing requirements, nor did the NYSDEC provide good cause for excluding them from the New York 2020-2022 303(d) List upon EPA's request. See 40 CFR 130.7(b)(6)(iv). For details on the basis for the EPA's original addition of these waterbody/pollutant combinations, see the EPA's Support Document for the New York 2018 303(d) List.<sup>6</sup> The EPA's decision was based in part, on the EPA's review of comments submitted on the NYSDEC's draft 303(d) list that included data and/or information on the occurrence of HABs in these waterbodies, and the associated waterbody-specific HABs reports that indicate the presence of cyanotoxins in these waterbodies. The EPA is working with the NYSDEC as it develops an assessment methodology to determine whether other waters experiencing HABs are impaired. Part of this effort will involve gathering resources to understand HABs in lakes, including those with low phosphorus and chlorophyll-a concentrations, as well as ensuring the use of all existing and readily available data and information related to HABs, including HABs reports, in making assessment determinations, unless the NYSDEC provides a technical, science-based rationale not to use particular data or information. This effort will also include evaluating pollutants, parameters, and factors in addition to phosphorus that may contribute to HABs.

**EPA Response to Comments #4.d-g:** The EPA acknowledges the comments regarding what the NYSDEC should consider as it develops an approach for assessing whether waters that are experiencing HABs are impaired. As discussed above, the EPA and the NYSDEC are in the process of gathering resources with the goal that the NYSDEC establish an appropriate assessment methodology for waters experiencing HABs. The timeline and process for doing this work will be determined by the NYSDEC.

5. **Comment #5:** The WRC acknowledged that Cayuga Lake, Southern End is one of the waterbodies the NYSDEC identified as impaired for algal/weed growth and placed in Category 4c, for which the EPA's action is pending further analysis. The WRC asked about the status of the additional analysis and indicated that the Cayuga Lake Monitoring and Modeling Project includes findings that are relevant to weed growth in Cayuga Lake and other similar waterbodies.

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<sup>5</sup> NYSDEC CALM, May 2023, page 12; [https://extapps.dec.ny.gov/docs/water\\_pdf/calm.pdf](https://extapps.dec.ny.gov/docs/water_pdf/calm.pdf)

<sup>6</sup> EPA Region 2 Supporting Documentation for Review and Partial Approval/Partial Disapproval of New York's 2018 303(d) List ("EPA's 2018 Support Document"); <https://www.epa.gov/system/files/documents/2022-04/epa-region-2-decision-letter-and-supporting-documentation-for-new-york-states-2018-303d-list.pdf>

**EPA Response to Comment #5:** The EPA is actively working with the NYSDEC to determine if the algal/weed growth impairment in Cayuga Lake, Southern End is due to a pollutant or not. Relatedly, the EPA is working with the NYSDEC as it develops a framework for demonstrating the appropriate placement of waters into Integrated Report Category 4c for impairments due to non-pollutant causes. See also, the EPA’s response to Comment 3.1 from PELC below.

6. **Comment #6:** The WRC commented that the spreadsheet published by the NYSDEC containing the New York 2020-2022 303(d) list does not include any Integrated Report categories other than Category 5. The WRC further commented that while the Environmental Resource Mapper can be used to search for waterbody fact sheets for individual waterbodies, this process is onerous, and the NYSDEC should be required to provide a comprehensive list of waterbodies in all Integrated Report categories.

**EPA Response to Comment #6:** The EPA acknowledges this comment and while it is outside the scope of the 96 waterbody/pollutant combinations the EPA added to the New York 2020-2022 303(d) List, consistent with the EPA’s Support Document, the EPA encourages the NYSDEC to provide the public with a comprehensive list of waterbodies in all Integrated Report categories, along with other relevant supporting information including detailed delisting rationales and detailed rationales for not using data and/or information for assessment decisions, at the time it provides public notice and an opportunity for comment on draft 303(d) lists. See 40 CFR 130.7(b)(5), (6)(i)-(iv). This will result in a more transparent assessment and listing process and help the public to track changes in water quality across Integrated Reporting cycles. In the EPA’s Support Document, the EPA notes that the WI/PWL factsheets are a valuable resource and major component of the NYSDEC’s communication of its state-wide assessment, and encouraged the NYSDEC to make these updated factsheets easily available when the NYSDEC publishes its draft 303(d) list for public comment.<sup>7</sup>

### C. Canandaigua Lake Watershed Council

Submitted by: Kevin Olvany, Watershed Program Manager  
205 Saltonstall Street, Canandaigua NY 14424

1. **Comment #1:** The Canandaigua Lake Watershed Council (CLWC) commented that it does not oppose the addition of Canandaigua Lake to the New York 2020-2022 303(d) list for HABs but would like to better understand the reasoning for listing only Canandaigua Lake and Owasco lake for HABs while the other finger lakes in the region experience HABs annually.

**EPA Response to Comment #1:** The EPA acknowledges this comment and refers the commentor to the EPA’s response to Comments 4.b-c from Tompkins County WRC above, as well as pages 21-22 of the EPA’s Support Document for its action on the New York 2018 303(d) List.

2. **Comment #2:** The CLWC commented that while nutrient loading still plays a role in the health of the lake, there are additional factors that contribute to HABs occurrences in Canandaigua Lake, and other

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<sup>7</sup> “The information in these factsheets, such as the data and information the NYSDEC used to make attainment determinations, will better inform the public in their review of and comment on draft 303(d) lists. To provide better access to these factsheets and the NYSDEC’s cyclic updates to these factsheets, the EPA also encourages the NYSDEC to include them in its Integrated Report package.” EPA’s Support Document, page 42.

finger lakes across the region, including quagga mussels and lake temperature. The CLWC has conducted 30+ years of monitoring, and its data plus data collected by the NYSDEC's Citizens Statewide Lake Assessment Program (CSLAP) do not show an increase in phosphorus and nitrogen concentration. Canandaigua Lake's average total phosphorus concentration is 5.5 ug/L and total nitrogen is 0.3-0.4 mg/L, which are below standard thresholds and suggest that nutrients are not the primary cause of HABs. The CLWC would be in favor of partnering on a research effort focused on learning the root causes of HABs in low nutrient lakes.

**EPA Response to Comment #2:** The EPA acknowledges and appreciates this comment and understands that the causes of HABs in Canandaigua Lake and lakes throughout the region are complex, requiring additional research. The EPA agrees that Canandaigua Lake would be a good candidate for a case study of this kind and would seek to support the CLWC and the NYSDEC in such an effort.

#### D. Cayuga County Health Department

Submitted by: Kathleen Cuddy, Public Health Director  
8 Dill Street, Auburn, NY 13021

1. **Comment #1:** The Cayuga County Health Department expressed support for the EPA's acknowledgment that Owasco Lake was erroneously omitted from the New York 2020-2022 303(d) List, and that it does not meet its best uses. The commenter noted that there is data showing that cyanotoxins and disinfection by-products are a concern in Owasco Lake and expressed hope that the placement of the lake on the New York 303(d) list as impaired due to HABs will lead to more assistance from New York State agencies in protecting the water quality of Owasco Lake.

**EPA Response to Comment #1:** The EPA acknowledges this comment.

#### E. Cayuga Lake Watershed Intermunicipal Organization

Submitted by: Roxy Johnston, Chair  
Ithaca, NY 14850

1. **Comment #1:** The Cayuga Lake Watershed Intermunicipal Organization (CWIO) commented that it supports the EPA's addition of waterbody/pollutant combinations to the NY 2020-2022 303(d) list as impaired due to silt/sediment and encourages the NYSDEC to develop guidance values for silt/sediment. The CWIO also agrees with the EPA that the NYSDEC provided an inadequate rationale to support the delisting of waterbodies for silt/sediment and noted that the process for the restructuring of the state's CALM either didn't involve the public or was not clearly communicated to stakeholders. The CWIO included the questions provided by the Tompkins County Water Resources Council (WRC) (see Comment #3 from the WRC above) in their comments related to waters impaired due to silt/sediment.

**EPA Response to Comment #1:** The EPA acknowledges this comment and refers the commentor to the EPA's response to Comment #3 from the WRC.

2. **Comment #2:** The CWIO commented that the omission of waters from the 303(d) list as impaired due to HABs is counter to the goals of the HABs action plans and nine element plans, and that the presence of HABs should be included in the NYSDEC's assessment of a waterbody's use attainment.

The CWIO commented that the introduction of the Cayuga Lake HABs Action Plan<sup>8</sup> states that several sections of the plan will be refined by the upcoming Cayuga Lake TMDL, and that this has not yet been done since the TMDL was published in 2024. The CWIO further commented that the HABs Action Plan nor the TMDL for Cayuga Lake provide guidance on implementation and therefore the best approach for managing HABs is unclear. The CWIO included in their comments, the questions provided by the Tompkins County Water Resources Council (see Comment #4 from the WRC above) related to waters impaired due to silt/sediment.

**EPA Response to Comment #2:** The EPA acknowledges this comment and refers the commentor to the EPA's response to Comment #4 from the WRC above.

3. **Comment #3:** The CWIO is supportive of the EPA and the NYSDEC providing additional analyses of the waterbody/pollutant combinations in Category 4c for algal/weed growth to determine if they meet 303(d) listing requirements. This includes the segment, Cayuga Lake, Southern End (0705-0040). The CWIO suggests that the EPA require a progress report on this analysis and a publicly available timeline for completion.

**EPA Response to Comment #3:** Please see the EPA's response to comment #4 from the WRC above and the EPA's response to Comment 3.1 from PELC below.

4. **Comment #4:** The CWIO expressed concerns about the NYSDEC's restrictions around the eligibility of data used for making assessments, for example restrictions resulting from Quality Assurance Project Plan (QAPP) and Data Usability Analysis Report (DUAR) requirements, and how it has resulted in the exclusion of data collected by volunteers. The CWIO points out that the Clean Water Act provides citizens a role in protecting water resources.<sup>9</sup> The CWIO suggests that the EPA review the NYSDEC's criteria for data usage and create a pathway that allows for trained citizen/volunteer monitoring data to be used as an indicator of changes in water quality.

**EPA Response to Comment #4:** The EPA acknowledges this comment and while it is outside the scope of the 96 waterbody/pollutant combinations the EPA added to the New York 2020-2022 303(d) List, the EPA supports the value of reasonable and scientifically-sound data evaluation protocols, which would include typical elements of a QAPP.<sup>10</sup> The NYSDEC is required to use all existing and readily available data and information unless it has a technical, science-based rationale not to use certain data and information, and any data or information not used for making impairment determinations that is supported by a technical, science-based rationale, should be used to inform and plan future monitoring efforts. States must use existing and readily available water quality-related data and information in developing the CWA 303(d) list, 40 CFR 130.7(b)(5), unless they provide a rationale not to use data or information, 40 CFR 130.7(b)(6)(iii). The EPA evaluates whether a state provides a technical, science-based rationale for decisions not to use data or

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<sup>8</sup> [https://extapps.dec.ny.gov/docs/water\\_pdf/cayugahabplan.pdf](https://extapps.dec.ny.gov/docs/water_pdf/cayugahabplan.pdf)

<sup>9</sup> See pages 4-5 of the comments the CWIO submitted to the NYSDEC on the draft NY 2020-2022 303(d) list, February 8, 2022; <https://cwio.org/wp-content/uploads/2022/11/2022-02-CWIO-comments-re-303d.pdf>.

<sup>10</sup> For more discussion of data quality and quality assurance, see, e.g., 2006 IR Memo, pages 32-37; <https://www.epa.gov/sites/default/files/2015-10/documents/2006irg-report.pdf>.

information in developing the list.<sup>11</sup>

5. **Comment #5:** The CWIO commented that the public-facing presentation of New York's Integrated Report is lacking, that it doesn't include waterbodies in Integrated Report categories other than 5, and that it is difficult to track the progress of a water from initial listing through delisting. While CWIO acknowledges that this information is available in separate places, the lack of consolidation inhibits the ability of stakeholders to participate in the stewardship of their waters. The CWIO suggested that the EPA require the NYSDEC to make available to the public, the listing status for waters in all Integrated Reporting categories.

**EPA Response to Comment #5:** Please see the EPA's response to Comment #6 from the WRC.

## F. New York State Department of Environmental Conservation (NYSDEC)

Submitted by: Carol Lamb-Lafay, Division of Water, Director, NYSDEC  
625 Broadway, Albany, New York 12233

**Section 1:** The NYSDEC's comments regarding the EPA's determination that the NYSDEC did not include waters that meet 303(d) listing requirements resulting in its partial disapproval of the New York 2020-2022 303(d) List.

1. **Comment #1.1:** The NYSDEC contends that the NYSDEC, not the EPA, has the responsibility and authority to identify impaired waters within New York through its own chosen methodology, and that the EPA's partial disapproval of the New York 2020-2022 303(d) List and the addition of waterbody/pollutant combinations that the NYSDEC excluded, is an attempt by the EPA to replace the state's methodology with its own.

**EPA Response to Comment #1.1:** Although Section 303(d)(2) of the Clean Water Act provides states with the primary responsibility to identify waters still requiring TMDLs on the list of impaired waters, Section 303(d)(2) provides the EPA with the authority to approve or disapprove state 303(d) lists. The EPA exercises this oversight authority by determining whether a state has satisfied the statutory and regulatory requirements for CWA Section 303(d) lists. Section 303(d)(1) of the CWA requires states to identify waters for which "*any* water quality standard applicable to such waters" is not met (emphasis added). Federal executive agencies interpret federal statutes, therefore, the EPA, not states, interprets the federal CWA, and through its regulations, at 40 CFR 130.7(b)(3), the EPA defines "*any* water quality standard applicable to such waters" as "*numeric* water quality criteria, narrative water quality criteria, waterbody uses *and* antidegradation requirements" (emphasis added). Because water quality standards consist of three components - designated uses, water quality criteria (both narrative and numeric) and antidegradation requirements - *each* of which is a water quality standard, if data and/or information indicate that *any* of these water quality standards is not met, Section 303(d) of the CWA requires the water to be listed.

The EPA regulations at 40 CFR § 130.7(b)(6) require states to include a description of the methodology used to develop the 303(d) list. The EPA, however, does not approve or disapprove a state's assessment and listing methodologies. Rather, the EPA, in exercising its oversight authority

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<sup>11</sup> See 2024 IR Memo at FN 15 (citing court cases); 2006 IR Memo at 37 (The EPA evaluates whether there is a "reasonable technical rationale").

over state 303(d) lists, determines whether the state has assembled and evaluated all existing and readily available water quality-related data and information in accordance with 40 CFR 130.7(b)(5), and has provided documentation supporting its decision to list or not list waters, including a rationale for any decision to not use any existing and readily available data and information, pursuant to 40 CFR 130.7(b)(6). The EPA is not replacing the state's methodology, but rather, is determining if the state has met all statutory and regulatory requirements for its list submission. Where a state has declined to consider data and information without analysis of its quality and relevance, it has failed to "evaluate" such data as required by 40 CFR 130.7(b)(5). See *Potomac Riverkeeper v. Wheeler*, 381 F. Supp 3d 1, 16 (D.D.C. 2019); *Sierra Club v. Leavitt* 488 F.3d 904, (11<sup>th</sup> Cir. 2007). Where the EPA determines that the existing and readily available water quality-related data and information demonstrates that a water is not meeting any water quality standard applicable to that water and the state has not identified the water on the 303(d) list, Section 303(d)(2)<sup>12</sup> of the CWA provides the EPA with the authority to disapprove the state 303(d) list. The EPA approves a list only if it meets the requirements of 40 CFR 130.7(b). 40 CFR 130.7(d)(2).

When the EPA disapproves a state 303(d) list because the state failed to identify a water that meets 303(d) listing requirements, Section 303(d)(2) of the CWA requires the EPA to identify that water on the 303(d) list. When the EPA has identified a water on the 303(d) list, Section 303(d)(2) of the CWA then requires that the state "shall incorporate" the water into its water quality management plan and therefore, include it on all subsequent 303(d) lists, unless the state demonstrates that the water no longer meets CWA 303(d) listing requirements.

2. **Comment #1.2:** The NYSDEC commented that the requirement for the state's rationale to not use existing and readily available data and information to make assessment determinations to be "technical and science-based" is not in regulation and only in EPA guidance.

**EPA Response to Comment #1.2:** As indicated above, 40 CFR 130.7(b)(6) requires states to provide in their 303(d) list submission documentation supporting their decision to list or not list waters, including a rationale for any decision to not use any existing and readily available data and information pursuant to 40 CFR 130.7(b)(6)(iii). In its oversight capacity, the EPA assesses whether any rationale for not using any existing and readily available data is reasonable. Given the technical and science-based nature of waterbody assessment determinations under Section 303(d) of the CWA, the EPA has found that a rationale is reasonable where it is technical and science-based.<sup>13</sup> The requirement for the state to provide this rationale and the EPA's role in assessing it are established in 40 CFR 130.7(b)(6)(iii).

See also, the EPA's response to Comment #1.1 from the NYSDEC.

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<sup>12</sup> See 33 U.S.C. § 1313(d)(2) "Each State shall submit to the Administrator from time to time [...] for his approval the waters identified and the loads established under paragraphs (1)(A), (1)(B), (1)(C), and (1)(D) of this subsection. The Administrator shall either approve or disapprove such identification and load not later than thirty days after the date of submission."

<sup>13</sup> This approach is informed by multiple court cases *Sierra Club v. Leavitt*, 488 F.3d 904, 913-14 (11th Cir. 2007); *Potomac Riverkeeper, Inc. v. Wheeler*, 381 F. Supp. 3d 1, 14-18 (D.D.C. 2019), *aff'd*, 815 F. App'x 551 (D.C. Cir. 2020); *Center for Biological Diversity v. EPA*, 90 F. Supp. 3d 1177, 1211-12 (W.D. Wash. 2015); *Friends of the Wild Swan, Inc. v. US EPA*, 130 F. Supp. 2d 1184, 1193-94 (D. Mont. 1999). See 2024 IR Memo at FN 15 (citing court cases); 2006 IR Memo at 37 (The EPA evaluates whether there is a "reasonable technical rationale").

3. **Comment 1.3:** The NYSDEC commented that in the EPA's Support Document, the EPA incorrectly asserts that the state did not use the NYSDOH bathing beach closure data to develop the New York 2020-2022 303(d) List. The NYSDEC asserted that it assembled and evaluated bathing beach closure data using Table 3 in its CALM.<sup>14</sup> The NYSDEC further asserted that the EPA's objection is related to how the state *used* the beach closure data in developing its list, not about the state's failure to *consider* the beach closure data.

**EPA Response to Comment 1.3:** In the EPA's Support Document, the Agency addressed the NYSDEC's assembly and evaluation of NYSDOH data, as well as the NYSDEC's use of this data. Pursuant to 40 CFR 130.7(b)(5), states are required to *assemble and evaluate* all existing and readily available water quality-related data and information to develop the CWA 303(d) list (emphasis added). The rationale requirement in 40 CFR 130.7(b)(6)(iii) for not using existing and readily available data and information does not obviate the requirement in 40 CFR §130.7(b)(5) for the state to assemble and evaluate all existing and readily available data. *See Sierra Club*, 488 F.3 at 913 (finding that Florida did not fulfill the requirement to "evaluate" data under §130.7(b)(5) where it took a hardline approach to not consider data that was over 7.5 years old). As discussed above, a state has not satisfied the requirement to "evaluate" all existing and readily available water quality-related data and information where it has categorically refused to consider data and information without analysis of its quality and relevance. *See Potomac Riverkeeper*, 381 F. Supp 3d at 16; *id.* at 913.

Regarding the assembly and evaluation of the NYSDOH beach closure data and information specifically, the NYSDEC did not assemble, evaluate or use this data nor did the NYSDEC describe anywhere in its Integrated Report submission that the NYSDEC assembled or evaluated this data. The EPA regulations, at 40 CFR 130.7(b)(6)(ii) require states to provide a description of the data and information assembled and evaluated. The EPA understands that Table 3 of the NYSDEC's CALM identifies NYSDOH beach closures, categorically, as a Supplemental Indicator, but the Integrated Report did not describe which specific NYSDOH (e.g. for which waterbodies) data and information the NYSDEC *assembled and evaluated*.<sup>15</sup> It is important for the NYSDEC to clearly describe in its Integrated Report submission the data the NYSDEC assembled and evaluated, and document how it was used or not used to develop the 303(d) list. EPA regulations at 40 CFR 130.7(b)(6)(ii) require states to provide a description of the data and information used to identify waters, including a description of the data and information used by the state as required by 40 CFR 130.7(b)(5).

As noted above, the NYSDEC cannot categorically exclude data from consideration without evaluating it in accordance with 40 CFR 130.7(b)(5). States are required to assemble and evaluate any other water quality-related data and information that is existing and readily available. 40 CFR 130.7(b)(5). Along with beach closure data/advisories, the NYSDEC's CALM identifies other categories of data as Supplemental Indicators, and because the NYSDEC's CALM dictates that the NYSDEC places waters with data it considers as Supplemental Indicators, exclusively into Integrated Report Category 3 (Insufficient Information), the NYSDEC is indeed categorically excluding data the NYSDEC considers as Supplemental Indicators, from being used to make assessment determinations. The NYSDEC is required to assemble, to evaluate, and to use all existing and readily available data and information, even the data the NYSDEC considers as supplemental indicators, unless the NYSDEC

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<sup>14</sup> Table 3 can be found on page 17 of the NYSDEC CALM, May 2023; [https://extapps.dec.ny.gov/docs/water\\_pdf/calm.pdf](https://extapps.dec.ny.gov/docs/water_pdf/calm.pdf)

<sup>15</sup> Table 3 in the 2023 CALM considers NYSDOH beach closures as supplemental indicators and will use this data to place waters in Category 3: unassessed.

can provide a technical, science-based rationale not to use the data, including identifying the specific shortcomings in the data. See, *Potomac Riverkeeper*, 381 F. Supp 3d. at 33 (D.D.C. 2019). See also, the following in the EPA's Support Document:

"The NYSDEC defines Supplemental Indicators as data and information that are 'not yet based on water quality standards adopted in 6 NYCRR.' Examples of Supplemental Indicators include NYSDOH health advisories for fish consumption and drinking water, as well as beach and shellfish area closures. It is the EPA's understanding that the NYSDEC, when making an impairment determination, uses data and information for parameters for which New York has adopted a numeric water quality criterion (Core Indicators) and does not use data and information it considers as Supplemental Indicators. Rather, the NYSDEC places waters with Supplemental Indicators into Category 3 (insufficient information to make an impairment determination) [...] Because the NYSDEC's water quality standards include narrative criteria, designated uses and antidegradation requirements, the NYSDEC's rationale (that Supplemental Indicators are not based on WQS adopted in 6 NYCRR) for not using the existing and readily available data and information it considers as 'Supplemental Indicators' is not based on technical and science-based reasoning. Supplemental Indicators assembled and evaluated by the NYSDEC are data and information that the NYSDEC must use in making impairment determinations (Category 5 or 4) as the NYSDEC has not provided a technical, science-based rationale not to use this data and information."<sup>16</sup>

Also, as noted in the excerpt above from the EPA's Support Document, the NYSDEC's decision to not use data the NYSDEC considers as a Supplemental Indicator because it is not associated with a WQS, is not based on a technical, science-based rationale not to use existing and readily available data.

See also, the EPA's response to Comment #1.1 and #1.2 from the NYSDEC.

4. **Comment #1.4:** The NYSDEC commented that in the EPA's Support Document, the EPA indicated that the NYSDEC failed to assemble and evaluate certain existing and readily available data and information and countered by stating that the NYSDEC did assemble and evaluate these data sources but decided not to use them because they did not meet New York's data quality and data quantity requirements. These data sources included data collected at other state agencies, including New York State Office of Parks, Recreation and Historic Preservation and the New York State Department of Health.

**EPA Response to Comment #1.4:** In Section II.C.i: Assemble and evaluate data and information of the EPA's Support Document, the EPA assessed whether or not the NYSDEC assembled and evaluated all existing and readily available water quality-related data and information to develop the 303(d) list. In this section, the EPA describes these data sources in the following way:

"Existing and readily available data and information includes data collected from the NYSDEC's monitoring programs, data collected by other New York State agencies (e.g, the New York State Office of Parks, Recreation and Historic Preservation and the New York State Department of Health), as well as data collected by the United States Geological Survey (USGS). These agencies, among others, collect data that is analyzed by an ELAP-certified lab, much of which meets the data criteria set in the NYSDEC's CALM. The New York State Department of Health collects

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<sup>16</sup> 2020-2022 Support Document, page 12-13.

valuable data and information on the conditions of public beaches, including beach closures based on beach-specific bacteria and cyanotoxin sample data. Because these data are existing and readily available, the NYSDEC should assemble and evaluate data from these data sources, as well as other sources, on its own initiative, rather than only if it is submitted to them by a third party during a public data solicitation period.”<sup>17</sup>

Again, the EPA regulations, at 40 CFR 130.7(b)(6)(ii), require states to provide a description of the data and information the state assembled and evaluated. The NYSDEC did not identify these data sources in the New York 2020-2022 303(d) List and supporting materials of its Integrated Report, as data and information the NYSDEC assembled and evaluated. As discussed further in Section II.C.i of the EPA’s Support Document, the NYSDEC identified the data and information that was assembled and evaluated in a few places of its Integrated Report submission, including: in its 2020-2022 Water Quality Report, its waterbody-specific WI/PWL fact sheets stored on the NYSDEC’s InfoLocator, and its CALM.<sup>18</sup> The NYSDEC also provided to the EPA a summary of the data submitted to the NYSDEC during the public data solicitation periods. However, the NYSDEC, in its submission, did not describe the categories of data sources discussed above, including USGS and NYSDOH data, as categories of data the NYSDEC assembled and evaluated, nor did the NYSDEC include or describe the specific data in these categories that the NYSDEC assembled and evaluated. If the NYSDEC did assemble and evaluate these data sources but decided not to use them because they did not meet certain data quality and quantity requirements, the NYSDEC would need to document this in its submission, along with a rationale for not using the data that provides adequate support by identifying the specific shortcomings of the data. Relatedly, as noted in Section II.C.i of the EPA’s Support Document, the EPA recommends that the NYSDEC “include in its Integrated Report, a detailed summary of all the data, both internal (e.g. data produced by the NYSDEC’s monitoring programs) and external (data received during data solicitation), the NYSDEC assembled and evaluated for its development of its 303(d) lists.”<sup>19</sup>

See Section II.C.ii of the EPA’s Support Document for its discussion of the NYSDEC’s data quality and data quantity requirements from the NYSDEC CALM.

**Section 2:** The NYSDEC’s comments regarding the eight (8) waterbody/pollutant combinations that the EPA added to previous New York 303(d) lists that the NYSDEC excluded from the New York 2020-2022 303(d) list.

1. **Comment #2.1:** The NYSDEC commented that the NYSDEC evaluated NYHABS program data but excluded such data because it determined that the data was unreliable due to inconsistencies in content or quality of the data submitted by the public. In addition, the NYSDEC indicated that the data is not covered by a Quality Assurance Project Plan (QAPP) and does not meet the data quantity requirements of the CALM.

**EPA Response to Comment #2.1:** States must use existing and readily available water quality-related data and information in developing the CWA 303(d) list, 40 CFR 130.7(b)(5), unless they provide a rationale not to use them, 40 CFR 130.7(b)(6)(iii). The EPA evaluates whether a state provides a

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<sup>17</sup> 2020-2022 Support Document, pages 10-11.

<sup>18</sup> 2020-2022 Support Document, page 10.

<sup>19</sup> 2020-2022 Support Document, page 10.

technical, science-based rationale for decisions not to use data or information in developing the list.<sup>20</sup> The NYSDEC, in its submission, did not identify that it assembled and evaluated these HABS-related datasets, nor did the NYSDEC include a description of the specific HABS-related datasets the NYSDEC assembled and evaluated. Likewise, the NYSDEC, in its submission, did not provide a technical, science-based rationale for not using these HABS-related datasets, including the specific shortcomings of the HABS-related datasets the NYSDEC assembled and evaluated.

2. **Comment #2.2:** The NYSDEC commented that the EPA continues to overlist these eight (8) waterbody/pollutant combinations without a methodology and data to support the impairment determination, and until the EPA establishes a mandatory methodology in regulation, the EPA is ignoring the respective statutory and regulatory responsibilities of the EPA and the states.

**EPA Response to Comment #2.2:** As stated in the EPA's Support Document, "[i]n the 2018 listing cycle, the EPA determined that 8 waterbody/pollutant combinations that the NYSDEC did not include on the New York 2018 303(d) list met 303(d) listing requirements and identified these waterbody/pollutant combinations on the New York 2018 303(d) list. The support for this determination is described in the EPA's Support Document for its action on the New York 2018 303(d) list."<sup>21</sup> The EPA's action was based on waterbody-specific determinations using existing and readily available data. A description of these determinations and the data that was used as the bases for them is included in the EPA's Support Document for the EPA's 2018 partial approval/partial disapproval of the New York 2018 303(d) list.<sup>22</sup>

Pursuant to Section 303(d)(2) of the CWA, when the EPA disapproves a State 303(d) list and identifies waters on the list, "the State shall incorporate them into its current plan under subsection (e) of this section." Likewise, pursuant to 40 CFR §130.7(d)(2), after the EPA identifies waters on the list, the Regional Administrator is required to "transmit the listing[s]....to the State," and the State is required to "incorporate them into its current WQM plan." "Segments included on previous 303(d) lists or previously placed in Category 5 should be accounted for in subsequent submissions."<sup>23</sup> The NYSDEC continues to omit waterbody/pollutant combinations from the 303(d) list where the NYSDEC disagrees with the EPA's determinations that the waterbody/pollutant combinations meet 303(d) listing requirements, and fails to provide good cause for excluding them from the list.

See also, EPA's response to Comment 1.1 from the NYSDEC.

3. **Comment #2.3:** The NYSDEC commented that Spring Creek (1701-0361) is no longer impaired for Dissolved Oxygen and therefore does not meet 303(d) listing requirements. The NYSDEC stated that there is data showing that between 2015-2017, the dissolved oxygen criterion was met 98% of the time. Similarly, the NYSDEC commented that Paerdegat Basin (1701-0363) is meeting its water quality criterion for dissolved oxygen because there is data showing the criterion was met 99% of the time.

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<sup>20</sup> 2024 IR Memo at FN 15 (citing court cases); 2006 IR Memo at 37 (EPA evaluates whether there is a "reasonable technical rationale")

<sup>21</sup> 2020-2022 Support Document, page 22.

<sup>22</sup> See 2018 Support Document, pages 11-23; <https://www.epa.gov/system/files/documents/2022-04/epa-region-2-decision-letter-and-supportingdocumentation-for-new-york-states-2018-303d-list-.pdf>.

<sup>23</sup> 2006 IR Memo, page 57.

**EPA Response to Comment #2.3:** New York’s applicable water quality criterion for dissolved oxygen in these waters is that dissolved oxygen “shall not be less than 4.0 mg/L at any time.”<sup>24</sup> Because New York’s applicable water quality criterion for dissolved oxygen is expressed as “*shall* not be less than 4.0 mg/L *at any time*” (emphasis added), the criterion is only attained where it is met 100% of the time.<sup>25</sup> Any other interpretation would not be consistent with the expression of this criterion. This percent attainment assessment rule is not consistent with the water quality criterion in New York’s regulation at 6 CRR-NY 703.3.

As mentioned, while the EPA does not approve or disapprove of the state’s assessment methodology, the EPA evaluates whether the state’s application of its methodology results in the state identifying on the 303(d) list, all waters that meet 303(d) listing requirements. In other words, the EPA evaluates whether all waters that are not meeting any WQS applicable to such waters and requires a TMDL, are identified on the 303(d) list. The EPA encourages the NYSDEC to update New York’s Dissolved Oxygen criterion to incorporate an averaging period instead of an absolute instantaneous minimum concentration, such as to account for naturally occurring variations. This is necessary in order to be consistent with the duration and frequency methodology for assessing Dissolved Oxygen in Table 5 of the NYSDEC’s 2021 and 2023 CALM.<sup>26</sup>

4. **Comment #2.4:** The NYSDEC commented that Jones Inlet/Jones Bay (1701-0373) does not meet 303(d) listing requirements because there is no valid water quality data demonstrating a violation of an applicable WQS. The NYSDEC notes that the data submitted by the EPA indicate that impacts of macroalgae (ulva) in Jones Inlet/Jones Bay, are due to excessive growth in adjacent waters, Reynolds Channel east and west, and contends that the impairment is caused by external pollution, and therefore Jones Inlet/Jones Bay should be placed in Category 4c for algal/weed growth.

**EPA Response to Comment #2.4:** Impaired segments must be listed [i.e., in Category 5] unless NYSDEC can demonstrate that no pollutant(s) causes or contribute[s] to the impairment.<sup>27</sup> The NYSDEC has determined that Jones Inlet/Jones Bay is impaired, however, the NYSDEC has not adequately demonstrated that the cause of impairment is not caused by a pollutant. Exclusion from Category 5, therefore, is not appropriate for Jones Inlet/Jones Bay, regardless of the inclusion in Category 4c.<sup>28</sup> Regarding the macroalgae originating in Reynold Channel, the EPA addressed this in its Support Document for its action on the New York 2018 303(d) list by relaying that where the source of impairment is from outside of the waterbody, this does not obviate the state’s requirement to list the impaired water:

“By email, dated February 19, 2014, EPA sent NYSDEC data and/or information indicating nutrient impairment in Jones Inlet/Jones Bay. This e-mail included links to several articles about excess amounts of algae washing up on the shores of Point Lookout Beach; photographs of the

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<sup>24</sup> Spring Creek (1701-0361) and Paerdegat Basin (1701-0363) are both Class I waters.

<sup>25</sup> See Dissolved oxygen criterion for Class I waters at 6 CRR-NY 703.3;  
<https://govt.westlaw.com/nycrr/Document/I4ed90412cd1711dda432a117e6e0f345>.

<sup>26</sup> NYSDEC CALM, May 2023, page 19 (Table 5)

<sup>27</sup> See 2006 IR Memo, page 60, and 2024 IR Memo, pages 18-19. From FN 49: “This is based on, among other things, Sections 303(d)(1)(A) (states must identify waters not meeting applicable WQS) and 303(d)(1)(C) (for listed waters, TMDLs must be written for ‘pollutants’) and 40 CFR § 130.7(b)(4) (the list ‘shall identify the pollutants causing or expected to cause violations of the applicable water quality standards’).”

<sup>28</sup> See 2024 IR Memo, page 17.

algae; and blogs where boaters, fishers and visitors of Jones Inlet/Jones Bay complained about the algae problem. The presence of algal growth is often an indicator of excess nutrients. Based on the photographs, articles and citizen complaints, EPA determined that the narrative criterion for nutrients is not met in Jones Inlet/Jones Bay. Though the algal growth in Jones Inlet/Jones Bay may be caused by nitrogen originating from sources in the adjacent waters of the Western Bays, the narrative water quality criterion for nutrients is nevertheless not met in Jones Inlet/Jones Bay.”<sup>29</sup>

The EPA notes that where the source of the impairment in Jones Inlet/Jones Bay is in fact, entirely contained within Reynolds Channel segment, the TMDL for Reynolds Channel should address the impairment in Reynolds Channel, as well as the impairment in Jones Inlet/Jones Bay.<sup>30</sup>

The EPA further reiterates that a segment must be included on the 303(d) list even when the cause of the impairment is not known and that segments are to be placed only in Category 4c (and not also Category 5) when the state demonstrates that the failure to meet an applicable WQS is not caused by a pollutant.

5. **Comment #2.5:** The NYSDEC commented that “[i]n low nutrient systems, such as Owasco Lake, HABs are likely due to non- pollutant physical and biological conditions such as water temperature, invasive species (e.g. dreissenid mussels), lake size/orientation, and fetch length (Owasco Lake HABs Action Plan, 2018).” The NYSDEC further commented that Owasco Lake, Lake Como, Canandaigua Lake, Cazenovia Lake, Roaring Brook Lake, and Jones Inlet all should be placed in Category 4c for algal/weed growth.

**EPA Response to Comment #2.5:** It is important to note that the NYSDEC, not the EPA, determined that these waters are impaired. Again, an impairment (even if there is a non-pollutant cause warranting inclusion in Category 4c) must be included in Category 5 unless a state demonstrates that the impairment is not caused by a pollutant.<sup>31</sup> The EPA acknowledges that several factors may contribute to the occurrence of HABs in these waterbodies, and also notes that only accounting for phosphorus may be an overly simplistic model for managing algal blooms. In addition to developing an assessment methodology for HABs impairments, the EPA encourages the NYSDEC to develop a framework for demonstrating that no pollutant is causing an impairment for the placement of any water into Integrated Report Category 4c, for impairments due to non-pollutant causes. The EPA notes that further action by the EPA is pending for 72 waterbody/pollutant combinations the NYSDEC has included only in Integrated Report Category 4c for algal/weed growth. The EPA continues to work with the NYSDEC as it determines whether these waterbody/pollutant combinations meet 303(d) listing requirements. This determination will include whether placement in Integrated Report Category 4c (only) is appropriate for waterbodies impaired by algal/weed growth due to macrophytes, and whether there are non-pollutant causes.

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<sup>29</sup> 2018 Support Document, page 19; <https://www.epa.gov/system/files/documents/2022-04/epa-region-2-decision-letter-and-supporting-documentation-for-new-york-states-2018-303d-list-.pdf>.

<sup>30</sup> EPA notes that New York appropriately includes Reynolds Channel East (1701-0215) and West (1701-0216) on the 2018 303(d) list. New York, in footnote 12 of its 2018 303(d) list, states, “the impact of the transported macroalgae [from adjacent waters] into the Channel and deposits along the shore result in the impairment of uses.....[N]itrogen levels in the Channel will be addressed through the Western Bays Nitrogen TMDL and other efforts to restore water quality and coastal habitat in Hempstead Bay and other adjacent waters.”

<sup>31</sup> See FN 27 above.

6. **Comment #2.6:** The NYSDEC explains that the following waterbodies are impaired for algal/weed growth and that it reports them in Category 4c: Owasco Lake (0706-0009), Lake Como (0705-0029), Canandaigua Lake (0704-0001), Cazenovia Lake (0703-0021), Roaring Brook Lake (1301-0037). The NYSDEC states that these waterbodies do not meet listing requirements for HABs because New York does not have an applicable WQS for HABs, and a TMDL would not mitigate HABs.

**EPA Response to Comment #2.6:** The EPA added these waterbody/pollutant combinations to the New York 2018 303(d) list as impaired for not meeting the primary contact designated use. As stated in the EPA's responses to Comments 2.4 and 2.5 above, the NYSDEC did not demonstrate that no pollutant is causing the impairments in these waters. In addition to developing an assessment methodology for HABs impairments, the EPA encourages the NYSDEC to develop a framework for placement of impaired waters into Category 4c for impairments due to non-pollutant causes and excluding such impairments from Category 5. This demonstration, for example, can include the degree to which HABs impairments are due to non-pollutant causes. The EPA reiterates that the existence of HABs is data and information indicating that recreational and/or drinking water uses, as well as certain narrative criteria, are not met in these waters.

**Section 3:** The NYSDEC's comments regarding the twenty-six (26) waterbody/pollutant combinations the NYSDEC delisted from the New York 2018 303(d) list as impaired for "silt/sediment" that the EPA added to the New York 2020-2022 303(d) List.

1. **Comment #3.1:** The NYSDEC commented that it submitted delisting rationales, other than those the EPA referred to in its Support Document, for the 26 waterbody/pollutant combinations the EPA added to the New York 2020-2022 303(d) list as impaired by silt/sediment. These are summarized in groups as follows, with the EPA's response for each below:
- a. **Comment #3.1.a:** The NYSDEC provided information indicating that three (3) of these waterbodies were exceeding the water quality criterion for total dissolved solids. The NYSDEC stated that these will be included on the 303(d) list for total dissolved solids.

| Segment ID | Waterbody Name                   |
|------------|----------------------------------|
| 0102-0018  | Ellicott Creek, Lower, and tribs |
| 0704-0034  | Great Brook and minor tribs      |
| 1101-0007  | Dwaas Kill and tribs             |

**EPA Response to Comment #3.1.a:** The EPA received this supplemental information in draft form from the NYSDEC on June 2, 2022, as the NYSDEC noted in its comments. However, upon receiving the New York 2020-2022 303(d) List from the NYSDEC on September 11, 2024, these three (3) waterbodies were not on the 303(d) list for total dissolved solids, and therefore, consistent with the draft markings on this supplemental information submitted to the EPA on June 2, 2022, the EPA considered this supplemental information to indeed be draft and therefore, not part of the New York 2020-2022 303(d) List submission. The EPA will consider this information if submitted in the next 303(d) listing cycle.

- b. **Comment #3.1.b:** The NYSDEC commented that it provided water quality monitoring data indicating good cause for its delisting of the following waterbody the NYSDEC originally listed for silt/sediment.

| Segment ID | Waterbody Name                           |
|------------|------------------------------------------|
| 1006-0008  | Tribs to Lake George, Lk. George Village |

**EPA Response to Comment #3.1.b:** The EPA received supplemental information including the above-mentioned data in draft form from the NYSDEC on June 2, 2022, as the NYSDEC noted. However, upon receiving the New York 2020-2022 303(d) List and supporting information from the NYSDEC on September 11, 2024, the NYSDEC did not identify this information in its final submission as the basis for the delisting. The EPA acknowledges that this supplemental information indicates that the numeric criterion for TDS is met for this waterbody. “Silt/sediment,” however, is defined by the NYSDEC in its 2017 CALM, which was in place at the time the NYSDEC identified these 26 waterbody/pollutant combinations on the New York 303(d) list, as “determined by TSS [total suspended solids]/TDS [total dissolved solids]/turbidity measurement, as well as observation of deposition.”<sup>32</sup> See the EPA’s Support Document at page 25.

Because silt/sediment is defined as consisting of TDS, TSS, and turbidity, and these are different parameters for each of which New York has an applicable water quality criterion, to support a decision to delist these waters, the NYSDEC would need to demonstrate that all applicable WQS associated with “Silt/Sediment” are met, unless the NYSDEC can provide the data used for the original listing and that data indicates that these waters were listed based on TDS data alone.

- c. **Comment #3.1.c:** The NYSDEC commented that they do not have water quality data to assess if applicable WQS are met for 22 waterbodies originally listed for silt/sediment.

**EPA Response to Comment #3.1.c:** As stated in the EPA’s Support Document, “[t]he NYSDEC did not provide new data and/or information indicating that the applicable water quality criteria for turbidity, total dissolved solids, and suspended, colloidal and settleable solids are met in these waters, nor did it provide an updated analysis of the data and/or information that supported the original listing. The NYSDEC’s previous determination that these waters were impaired by Silt/Sediment, as evidenced by their inclusion on the New York 2018 303(d) List, is information indicating that the applicable water quality criteria for turbidity, total dissolved solids, and suspended, colloidal and settleable solids are not met.”<sup>33</sup> These 22 waterbodies remain on the NY 2020-2022 303(d) list for “silt/sediment.”

- d. **Comment #3.1.d:** The NYSDEC commented that it provided information related to biological assessment profile (BAP) scoring, and that “based on the 2017 CALM and silt/sediment, NYSDEC reviewed BAP and clarity results from User Perception survey information for waterbodies where that data was available.” The NYSDEC indicated that, “[e]ight (8) waterbodies had BAP greater than 5 and clarity results varied. The best use of fishing for these waterbodies will be assessed as

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<sup>32</sup> NYSDEC, The New York State Consolidated Assessment and Listing Methodology; Section 305(b) Assessment Methodology, March 2017, page 17. <https://attains.epa.gov/attains-public/api/documents/cycles/12144/209078>

<sup>33</sup> Id.

fully supported/unconfirmed and reported to EPA in IR 3 – Insufficient Information.”<sup>34</sup>

**EPA Response to Comment #3.1.d:** The EPA appreciates the NYSDEC’s efforts to consider BAP and clarity data, but it is unclear how this relates to whether the applicable WQS for TDS, TSS and turbidity are met in these waterbodies. The NYSDEC has not described how BAP scores are used to make assessment determinations for waters impaired for silt/sediment, nor has it established a consistent approach for using BAP scores in making assessment determinations in general. For example, the NYSDEC delisted 40 waterbodies originally listed for “unknown (biological impact)” based on BAP scores because the NYSDEC claimed that there are no adopted WQS for aquatic life protection.

The EPA encourages the NYSDEC to continue collecting new data and information for these eight (8) waterbodies to determine if each applicable WQS are met. Additionally, and as stated in the EPA’s Support Document, the EPA encourages the NYSDEC to develop an assessment methodology for determining impairments due to turbidity, and suspended, colloidal, and settleable solids.<sup>35</sup> These eight (8) waterbodies remain on the NY 2020-2022 303(d) list for “silt/sediment.”

**Section 4:** The NYSDEC’s comments regarding the sixty-two (62) small lakes the NYSDEC re-segmented and delisted from the New York 2016 303(d) List.

1. **Comment #4.1:** The NYSDEC commented that the EPA encourages states to maintain a consistent segmentation approach when defining waterbody segments. The comments clarified that the NYSDEC chose 6.4 acres as the minimum area for a ponded water assessment unit and provided as a basis, the “USGS inventory of lakes from the 1950s (USGS Gazetteer of New York State Lakes). USGS applied the 6.4 acres minimum to maintain consistent classification and data collection for lakes across the regions.” When establishing assessment units for monitoring and reporting, the NYSDEC referenced the USGS 6.4 acres threshold as “a federally recognized method for inventorying NYS ponded waters.”<sup>36</sup>

**EPA Response to Comment #4.1:** The EPA acknowledges that the NYSDEC provides information about its segment delineation in Appendix C of its CALM. The CALM, however, does not include a reference to the USGS inventory from the 1950s mentioned. Nevertheless, for the reasons provided in the EPA’s Support Document, the EPA continues to find that these 62 waterbody/pollutant combinations meet 303(d) listing requirements.<sup>37</sup>

2. **Comment #4.2:** The NYSDEC commented that the EPA’s disapproval of these 62 waterbodies was inconsistent with the following comment submitted by the EPA on the draft New York 2018 303(d) List, because the NYSDEC contends that the EPA requested that the NYSDEC demonstrate WQS were attained or that the impairment does not impact more than 20 percent of the larger waterbody segment.

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<sup>34</sup> Letter from Carol Lamb-Lafay, NYSDEC, DOW to Ryan Van Manen, EPA Region 2, Water Division; February 18, 2025.

<sup>35</sup> The NYSDEC’s methodology for assessing total dissolved solids can be found in Table 5 of the 2023 CALM.

<sup>36</sup> Letter from Carol Lamb-Lafay, NYSDEC, DOW to Ryan Van Manen, EPA Region 2, Water Division; February 18, 2025.

<sup>37</sup> See pages 38-39 of the EPA’s Support Document.

***“Comment #13 – Smaller Lakes Impaired by Atmospheric Deposition (Acid Rain):*** The NYSDEC is proposing to delist all waters on Appendix A of the 2016 303(d) list. In the draft supplemental information submitted to the EPA regarding the draft 2018 303(d) list, the NYSDEC states that lakes, ponds, and reservoirs less than 6.4 acres are not assessed as individual waterbodies and are not included in the WI/PWL or CWA Section 305(b) report. In Appendix A of the 2016 303(d) list, the NYSDEC noted that each of these waters is included in a larger segment (identified in footnotes #25-93). The EPA requested geospatial data and any relevant information that demonstrated connectivity and hydrology between the small lakes and the associated larger segments. The NYSDEC did not provide this information and stated that they do not maintain this information. The EPA also requested documentation of the NYSDEC’s re-segmentation of these waters to reflect that they were consolidated into the larger segments identified. The NYSDEC did not provide this documentation. The larger segments identified in footnotes #25-93 of the draft 2018 303(d) list are not included on the draft 2018 303(d) list as impaired by pH. According to the NYSDEC’s March 2015 Section 303(d) Listing Methodology, NYSDEC states that “[g]enerally water quality impacts or impairments affecting more than 10-20% of a waterbody length/area are assigned to the entire waterbody segment. Any limitation regarding the extent of the impairment is noted in the segment narrative. If impacts/impairments are limited (specifically, if 80-90% of the waterbody does not experience impacts/impairment) the waterbody may be considered to be meeting uses and – in the case of an impairment that is limited – excluded from the Section 303(d) List.” Please provide documentation indicating that NYSDEC re-segmented the waters by consolidating the smaller segments into the larger segments. Please also provide the data that demonstrates that the larger segments meet the applicable pH criterion or that the impairment affects less than 10-20% of the larger segments length/area.”<sup>38</sup>

**EPA Response to Comment #4.2:** The EPA’s requests are not inconsistent. The EPA’s request that the NYSDEC provide the spatial percent of the impairment in the assessment unit does not equate to an EPA endorsement of the NYSDEC’s spatial percent threshold of impairment the NYSDEC provides in its 2015 CALM, or any spatial percent threshold of impairment. Upon the EPA’s request, New York is required to provide good cause for not including a waterbody/pollutant combination on the 303(d) list. 40 CFR 130.7(b)(6)(iv). The EPA has made multiple requests for additional information to support the NYSDEC’s delisting of these 62 waterbody/pollutant combinations, including the request made in the above comment.

**Section 5:** The NYSDEC’s comments regarding the number of waterbody/pollutant combinations identified on the New York 2020-2022 303(d) list for TMDL development in the next two years.

1. **Comment #5.1:** The NYSDEC commented that in addition to the priority ranking of waters targeted for TMDL development in the next two years, New York’s Vision priorities, including TMDL commitments, were provided to EPA via email and recently uploaded to ATTAINS.

**EPA Response to Comment #5.1:** The EPA acknowledges that New York’s Vision priorities, including TMDL commitments, were provided to the EPA and uploaded into ATTAINS.

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<sup>38</sup> Letter from Carol Lamb-Lafay, NYSDEC, DOW to Ryan Van Manen, EPA Region 2, Water Division; February 18, 2025.

2. **Comment #5.2:** The NYSDEC requested “that the EPA consider both the priority ranking on the 303(d) list and the portion of the Vision Metrics identified for TMDL development provided to EPA outside of the 303(d) list when characterizing the number of segments NYSDEC has committed to TMDL development.”<sup>39</sup>

**EPA Response to Comment #5.2:** The EPA acknowledges this comment and notes that this comment is outside the scope of the EPA’s addition of 96 waterbody/pollutant combinations to the New York 2020-2022 303(d) List. As discussed in the EPA’s Support Document, while the EPA acknowledges the potential for confusion, Priority Ranking and Vision Priorities are distinct. Please see Section H, Comment 4 of the EPA’s Support Document for this discussion.<sup>40</sup>

The number of waterbody/pollutant combinations targeted for TMDL development in the next two years is a regulatory requirement (40 CFR 130.7(b)(4)) and therefore, New York is required to identify waterbody/pollutant combinations specifically targeted for TMDL development in New York’s 303(d) submission. The NYSDEC identified six (6) waterbody/pollutant combinations as high priority in its 303(d) submission. Should the NYSDEC want to include more discussion and context for how the high priority waters for TMDL development in the next two years relate to the other Vision Priority waters, New York can include this information as a narrative element of its Integrated Report.

## **G. Pace Environmental Litigation Clinic on behalf of Riverkeeper, Waterkeeper Alliance, and Save the Sound**

Submitted by: Todd D. Ommen  
78 North Broadway, White Plains, NY 10603

**Section 1:** Pace Environmental Litigation Clinic’s (PELC) comments regarding the addition of 96 waterbody/pollutant combinations to the New York 2020-2022 303(d) List, as well as additional waterbody/pollutant combinations PELC believes meet 303(d) listing requirements.

1. **Comment #1.1:** The PELC commented that they support the EPA’s addition of the 96 waterbody/pollutant combinations to the New York 2020-2022 303(d) List.

**EPA Response to Comment #1.1:** The EPA acknowledges this comment.

2. **Comment #1.2:** PELC commented that the “NYSDEC failed to assemble and evaluate data from various sources, including NYSDEC’s own NYHABS program and from the United States Geological Survey. These various sources have data on additional waterbodies that is similar or identical to the data on the waterbodies included in the Addition, which the EPA believed warranted listings.”<sup>41</sup> The PELC noted that the USGS has collected data on the Mohawk River that indicates this waterbody is impaired due to phosphorus and the NYSDEC has not included the Mohawk River on the 303(d) list for phosphorus, despite making progress on a TMDL for the Mohawk River watershed.

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<sup>39</sup> Letter from Carol Lamb-Lafay, NYSDEC, DOW to Ryan Van Manen, EPA Region 2, Water Division; February 18, 2025.

<sup>40</sup> 2020-2022 Support Document, page 43.

<sup>41</sup> Letter from Todd D. Ommen, PELC, to Ryan Van Manen, EPA Region 2, Water Division; March 12, 2025.

**EPA Response to Comment #1.2:** The evaluation of data for the Mohawk River that PELC references is outside the scope of the EPA's addition of 96 waterbody/pollutant combinations to the New York 2020-2022 303(d) List. However, please see the EPA's response to the Comment #1.4 from the NYSDEC above regarding assembly and evaluation of data from sources, including the NYHABS program and USGS data sets. Also, see Section II.C.i of the EPA's Support Document, for the EPA's review of the assembly and evaluation of all existing and readily-available data and information, in particular from NYHABS, USGS, and other NYS agency datasets. The EPA appreciates that PELC has identified the phosphorus data for the Mohawk River that the NYSDEC and USGS have collected and encourages PELC to submit this data to the NYSDEC during the NYSDEC's next public data solicitation.<sup>42</sup>

**Section 2:** PELC's comments that the EPA should disapprove and add the 40 waterbody/pollutant combinations originally listed for "unknown (biological impact)."

1. **Comment #2.1:** PELC commented that for the 40 waterbody/pollutant combinations originally listed for "unknown (biological impact)," there are sufficient grounds for these waters to be listed based on biological assessment profile (BAP) scores, which are a sign of poor water quality that threaten aquatic life. PELC notes that the NYSDEC, in their CALM, considers BAP scores as Supplemental Indicators and because the EPA found that the NYSDEC did not provide a technical, science-based rationale for not using data and information it considers Supplemental Indicators, the EPA should consider BAP score data and identify these 40 waterbody/pollutant combinations on the list.

**EPA Response to Comment #2.1:** PELC's comment on the 40 waterbody/pollutant combinations originally listed for "unknown (biological impact)" is outside the scope of the EPA's addition of 96 waterbody/pollutant combinations to the New York 2020-2022 303(d) List. The EPA's reasoning for approving the NYSDEC's delisting of these 40 waterbody/pollutant combinations, however, is found on page 19 of the EPA's Support Document. While the EPA has generally concluded that the NYSDEC has not provided a technical, science-based rationale for not using Supplemental Indicators (see the EPA's response to Comment 1.3 from the NYSDEC above and Section II.C.ii of the Support Document), BAP score data is an exception. New York asserted that it has not adopted water quality standards for which BAP scores can be compared against. New York has not adopted water quality criteria or guidance values to protect for biological impacts and does not consider its Best Use of Fishing to include full aquatic life protection.<sup>43</sup> The EPA supports the NYSDEC's commitment to prioritize these waters for monitoring, and encourages the use of BAP score data for assessment purposes when New York updates its fishing designated use to clarify aquatic life protection.

PELC correctly points out that where the cause of an impairment is unknown, this does not negate the need to list waters that are impaired. CWA Section 303(d)(1), 33 U.S.C. 1313(d)(1). For impaired waters where the cause of impairment is not yet known, the NYSDEC would include those waters on the 303(d) list for "cause unknown," and thereafter, continue to conduct monitoring to identify the cause of impairment of the applicable WQS.<sup>44</sup>

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<sup>42</sup> New York Water Science Center, Mohawk River Basin Water Quality. <https://www.usgs.gov/centers/new-yorkwater-science-center/science/mohawk-river-basin-water-quality#overview>.

<sup>43</sup> "NYSDEC considers the 'best usage' of 'fishing' to mean fish, shellfish, and wildlife survival. This differs from the Clean Water Act (CWA) section 101 (a)(2) goal of 'fishable,' which includes fish propagation." Letter from Mark Klotz, NYSDEC DOW, to Javier Laureano, EPA Region 2, Water Division, November 5, 2018.

<sup>44</sup> See 2024 IR Memo, page 18.

2. **Comment #2.2:** PELC commented that Krum Kill, one of the waterbody/pollutant combinations originally listed for “unknown (biological impact)” the NYSDEC delisted (“Krum Kill, Upper, and tribs” 1311-0004), is likely impacted due to factors including a combined sewer overflow, and presents reports of overflows, NYSDEC chemistry samples, and macroinvertebrate data that together, suggest that there is a likely water quality standard violation.

**EPA Response to Comment #2.2:** PELC’s comment regarding data and information on NYSDEC’s assessment unit “Krum Kill, Upper, and tribs” 1311-0004 is outside the scope of the EPA’s addition of 96 waterbody/pollutant combinations to the New York 2020-2022 303(d) list. The EPA encourages PELC to submit this data to the NYSDEC during the public data solicitation for the next 303(d) listing cycle. The NYSDEC must assemble and evaluate all existing data and information and use the data and information for assessing whether any applicable water quality standard is met for the respective assessment unit, unless the NYSDEC provides a technical, science-based rationale for not using any of the data or information.

3. **Comment #2.3:** PELC commented that NYSDEC’s assessment unit “Upper Blind Brook & tribs” are impacted by urban stormwater runoff and/or aging sewer infrastructure resulting in chronic elevated pathogen indicator bacteria concentrations and submitted monitoring data for bacteria collected by the NYSDEC that indicate potential impairment.

**EPA Response to Comment #2.3:** The evaluation of this data for “Blind Brook & tribs” is outside the scope of the EPA’s addition of 96 waterbody/pollutant combinations to the New York 2020-2022 303(d) List. The EPA notes, however, that “Upper Blind Brook & tribs” are Class C waters with applicable water quality criteria for fecal coliforms. Although PELC submitted data for enterococci and e. coli, the NYSDEC may nevertheless, consider this data when prioritizing follow-up monitoring for fecal coliforms in this waterbody.

**Section 3:** PELC’s comments regarding the 82 waterbody/pollutant combinations for which further action by the EPA is pending additional analysis and discussion.

1. **Comment #3.1:** PELC commented that the EPA should add to the New York 303(d) list, the 82 waterbody/pollutant combinations for which further action by the EPA is pending additional analysis, and stated that the EPA has a non-discretionary duty to either approve or disapprove the 303(d) list. PELC stated that the NYSDEC has failed to provide good cause for not listing the 72 waterbody/pollutant combinations it placed in Category 4c as impaired due to pollution rather than a pollutant.

**EPA Response to Comment #3.1:** The EPA is actively working with the NYSDEC to determine if any of the 72 waterbody/pollutant combinations that the NYSDEC placed in Category 4c meet 303(d) listing requirements. To make this determination, the NYSDEC, with assistance by the EPA, is developing a framework for determining whether or not a pollutant causes these particular impairments that are due to algal/weed growth. This effort is scientifically complex and involves the assembly and review of invasive macrophyte data for these waters and the identification of other potential causes of impairment. The EPA and the NYSDEC anticipate completing this work by the next Integrated Reporting cycle. At this point, the EPA has not determined whether the NYSDEC has provided good cause for not including these waters on the 303(d) list and considers the additional analysis and research, including the submission of additional data and information from the NYSDEC, necessary

to make this determination.

2. **Comment #3.2:** PELC commented that 3 of the 82 waterbody/pollutant combinations pending further action by the EPA have been delisted by the NYSDEC from the NY 2018 303(d) list, and that these waterbody/pollutant combinations remain off the 303(d) list but should be disapproved by the EPA and added to the list. These 3 waterbody/pollutant combinations are Spring Creek/pathogens, Thurston Basin/fecal coliform, and Onondaga Lake, northern end/mercury.

**EPA Response to Comment #3.2:** These 3 waterbody/pollutant combinations retain the listing status of the previous cycle that EPA acted on, meaning that they are on the 303(d) list due to the EPA's approval of the New York 2016 303(d) list, on which these waterbody/pollutant combinations were identified.<sup>45</sup> For Onondaga Lake, northern end, for example, the EPA's Support Document notes: "[b]ecause further action by EPA is pending additional analysis by the EPA and the NYSDEC on Onondaga Lake, northern end, this waterbody/pollutant combination remains on the New York 303(d) list."<sup>46</sup>The EPA has not yet determined whether the NYSDEC has provided good cause for not including these waters on the 303(d) list because additional analysis by the state is necessary to make this determination. For more information on each of these 3 waterbody/pollutant combinations, see Section II.D.iv of the EPA's Support Document.

#### **Section 4:** PELC's comments regarding New York's priority ranking.

1. **Comment #4.1:** PELC commented that the NYSDEC did not meet its requirement to establish a priority ranking for their 303(d)-listed impaired waters because the ranking only contains "medium" and "high," and "a plain meaning of 'ranking' would require a more descriptive system that properly positions each combination standing in relation to the others on the list."<sup>47</sup>

**EPA Response to Comment #4.1:** The EPA acknowledges this comment and notes that this comment is outside the scope of the EPA's addition of 96 waterbody/pollutant combinations to the New York 2020-2022 303(d) List. The EPA notes, however, that the Clean Water Act and the EPA's regulations do not require a specific format for how states prioritize the waters on the 303(d) list for TMDL development. While the NYSDEC has recently switched from using three tiers ("low," "medium" and "high" priority) to using two tiers ("medium" and "high" priority) to prioritize its list, the NYSDEC subcategorizes the waters on the 303(d) list. Category 5r identifies waters for which an advanced restoration plan has been developed and is being implemented. To allow time for water quality to improve as these advanced restoration plans are being implemented in these waters, the NYSDEC considers the waters in Category 5r as having a lower priority for TMDL development than those waters with a medium priority for TMDL development.

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<sup>45</sup> As noted in Table 11 (page 29) of the 2020-2022 Support Document, "New York delisted Spring Creek (1701-0361) as impaired by Pathogens, from the New York 2016 303(d) list, however, because further action is pending by the EPA on this waterbody/pollutant combination, Spring Creek continues to be on the 303(d) list for Pathogens, as the EPA approved the inclusion of this waterbody/pollutant combination on the New York 2016 303(d) list."

<sup>46</sup> 2020-2022 Support Document, page 31.

<sup>47</sup> Letter from Todd D. Ommen, PELC, to Ryan Van Manen, EPA Region 2, Water Division; March 12, 2025.

## H. Individual Commenter

Submitted by: Kathleen Yen  
Ithaca, NY 14850

1. **Comment #1:** The commenter was supportive of the addition of the 96 waterbody/pollutant combinations to the New York 2020-2022 303(d) List. Additionally, they expressed the importance of the NYSDEC use of science and data-informed rationales for delisting waters, and the development of water quality standards and guidance values for pollutants including toxins produced from harmful algal blooms and micro and nano plastic particles.

**EPA Response to Comment #1:** The EPA acknowledges this comment, and notes that the development of water quality standards is outside the scope of the 96 waterbody/pollutant combinations that the EPA added to the New York 2020-2022 303(d) List.

### III. Commenter Log

| <b>Document Section</b> | <b>Commenter</b> | <b>Affiliation</b>                                |
|-------------------------|------------------|---------------------------------------------------|
| A                       | Sarah Bartlett   | The Fund for Roaring Brook Lake, Inc.             |
| B                       | Cynthia Brock    | Tompkins County Water Resources Council           |
| C                       | Kevin Olvany     | Canandaigua Lake Watershed Council                |
| D                       | Kathleen Cuddy   | Cayuga County Health Department                   |
| E                       | Roxy Johnston    | Cayuga Lake Watershed Intermunicipal Organization |
| F                       | Carol Lamb-Lafay | NYSDEC, Division of Water                         |
| G                       | Todd Ommen       | Pace Environmental Law Clinic                     |
| H                       | Kathleen Yen     | n/a                                               |