



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

Region 1

**5 Post Office Sq., Suite 100
BOSTON, MA 02109-3912**

February 15, 2017

Michael Kuhns, Director
Bureau of Water Quality
Maine Department of Environmental Protection
17 State House Station
Augusta, ME 04333-0017

Re: Maine's 2014 Clean Water Act §303(d) List

Dear Mr. Kuhns:

Thank you for Maine's submittal of the State's 2014 Clean Water Act (CWA) §303(d) list dated September 28, 2016, and received by EPA Region 1 electronically on October 4, 2016. In accordance with §303(d) of the CWA and 40 CFR §130.7, the U.S. Environmental Protection Agency (EPA) conducted a complete review of Maine's 2014 §303(d) list. Based on this review, EPA has determined that Maine's 2014 §303(d) list of water quality limited segments still requiring total maximum daily loads (TMDLs) meets the requirements of CWA §303(d) and EPA's implementing regulations, as described in the attached approval documentation. Therefore, EPA hereby approves Maine's decision to include the waters the State placed in Categories 5A, 5B, and 5D of Maine's 2014 integrated list of surface waters, as well as Maine's decision to remove specific waters from the 2014 list.

We greatly appreciate the effort by your staff on the preparation and well documented submittal of the 2014 list. As you are aware, in February 2015, EPA approved sustenance fishing as a designated use for waters in Indian lands and for any waters outside of Indian lands subject to sustenance fishing rights under the Maine Implementing Act. In decisions issued in February, March, and June 2015, EPA disapproved certain WQS for waters in Maine, including, but not limited to, waters in Indian lands. On December 19, 2016, EPA promulgated WQS to address the disapprovals, and to address the Administrator's determination that Maine's human health criteria are not adequate to protect the designated use of sustenance fishing for certain waters (81 FR 92466). The federal WQS took effect on January 18, 2017. Accordingly, Maine's future §303(d) listing decisions should take into account the sustenance fishing designated use and the federal criteria, where applicable, when determining whether a water is impaired and should be listed in Category 5. The sustenance fishing use and federal criteria are also relevant to whether waters previously placed in Categories 4A (TMDL approved) and 4B (other controls in place obviating the

need for a TMDL) should remain in that Category or should be returned to Category 5. See 40 CFR 130.7(b)(1)(iii). We would be happy to discuss this with you and your staff if you have any questions or concerns.

Maine's submittal includes a list of those waters for which technology-based and other required controls for point and nonpoint sources are not stringent enough to attain or maintain compliance with the State's Water Quality Standards. The submittal also describes a priority-setting approach and identifies those waters for which TMDLs will be completed and submitted to EPA over time. The statutory and regulatory requirements, and EPA's review of Maine's compliance with each requirement, are described in detail in the enclosed approval document.

The Maine Department of Environmental Protection (ME DEP) also successfully completed a public participation process in 2016, during which the public was given the opportunity to review and comment on the State's proposed §303(d) list. As a result of this effort, Maine has considered public comments in the development of the final list. A summary of the public comments and ME DEP's response to comments were included in the final submittal.

My staff and I look forward to continued cooperation with ME DEP in implementing the requirements under §303(d) of the CWA. Please feel free to contact me or Ralph Abele at 617-918-1629 if you have any questions or comments on our review.

Sincerely,

/s/

Lynne A. Hamjian for

Kenneth Moraff, Director
Office of Ecosystem Protection

Enclosure

Cc (electronic):

Susanne Meidel, ME DEP
Don Witherill, ME DEP
Jennie Bridge, WQB, EPA Region 1
Greg Dain, ORC, EPA Region 1
Ann Williams, ORC, EPA Region 1
Ralph Abele, Chief, Water Quality Branch, EPA Region 1

EPA NEW ENGLAND'S REVIEW OF MAINE'S 2014 CWA §303(d) LIST

I. INTRODUCTION

EPA has conducted a complete review of Maine's 2014 Section §303(d) list and supporting documentation and information and, based on that review, EPA has determined that Maine's list of water quality limited segments (WQLSs) still requiring TMDLs meets the requirements of §303(d) of the Clean Water Act ("CWA" or "the Act") and EPA's implementing regulations. Therefore, by this order, EPA hereby approves Maine's 2014 §303(d) list, included as part of the State of Maine Department of Environmental Protection's 2014 *Integrated Water Quality Monitoring and Assessment Report* (IR), dated September 28, 2016. The statutory and regulatory requirements, and EPA's review of Maine's compliance with each requirement, are described in detail below.

II. STATUTORY AND REGULATORY BACKGROUND

Identification of WQLSs for Inclusion on §303(d) List

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

EPA regulations provide that States do not need to list waters where the following controls are adequate to implement applicable standards: (1) technology-based effluent limitations required by the Act, (2) more stringent effluent limitations required by State or local authority, and (3) other pollution control requirements required by State, local, or federal authority. See 40 CFR §130.7(b)(1).

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

In developing §303(d) lists, States are required to assemble and evaluate all existing and readily available water quality-related data and information, including, at a minimum, consideration of existing and readily available data and information about the following categories of waters: (1) waters identified as partially meeting or not meeting designated uses, or as threatened, in the State's most recent §305(b) report; (2) waters for which dilution calculations or predictive modeling indicate non-attainment of applicable standards; (3) waters for which water quality problems have been reported by governmental agencies, members of the public, or academic institutions; and (4) waters identified as impaired or threatened in any §319 nonpoint assessment submitted to EPA. See 40 CFR §130.7(b)(5). In addition to these minimum categories, States are required to consider any other data and information that is existing and readily available. EPA's 2006 Integrated Report Guidance describes categories of water quality related data and information that may be existing and readily available. See EPA's *September 3, 2013 memorandum on Information Concerning 2012 Clean Water Act Sections 303(d), 305(b) and 314 Integrated Reporting Listing Decisions*, which recommended that the 2012 integrated water quality reports follow the *Guidance for 2006 Assessment, Listing, and Reporting Requirements Pursuant to Sections 303(d), 305(b) and 314*

of the Clean Water Act (2006 Integrated Report Guidance (IRG) issued July 29, 2005, available at http://www.epa.gov/owow/tmdl/2006_IRG/report/2006irg-report.pdf), as supplemented by an October 12, 2006 memo and attachments, a May 5, 2009 memo and attachments, the November 15, 2010 memorandum, and the March 21, 2011 memo and attachments. All guidance, memoranda and attachments may be found at: <https://www.epa.gov/tmdl/integrated-reporting-guidance>. While States are required to evaluate all existing and readily available water quality related data and information, States may decide to rely or not rely on particular data or information in determining whether to list particular waters.

In addition to requiring States to assemble and evaluate all existing and readily available water quality-related data and information, EPA regulations at 40 CFR §130.7(b)(6) require States to include as part of their submissions to EPA documentation to support decisions to rely or not rely on particular data and information and decisions to list or not list waters. Such documentation needs to include, at a minimum, the following information: (1) a description of the methodology used to develop the list; (2) a description of the data and information used to identify waters; and (3) any other reasonable information requested by the Region.

Priority Ranking

EPA regulations also codify and interpret the requirement in §303(d)(1)(A) of the Act that States establish a priority ranking for listed waters. The regulations at 40 CFR §130.7(b)(4) require States to prioritize waters on their §303(d) lists for TMDL development, and also to identify those WQLSs targeted for TMDL development in the next two years. In prioritizing and targeting waters, States must, at a minimum, take into account the severity of the pollution and the uses to be made of such waters. See §303(d)(1)(A). As long as these factors are taken into account, the Act provides that States establish priorities. States may consider other factors relevant to prioritizing waters for TMDL development, including immediate programmatic needs, vulnerability of particular waters as aquatic habitats, recreational, economic, and aesthetic importance of particular waters, degree of public interest and support, and State or national policies and priorities. See 57 FR 33040, 33045 (July 24, 1992), EPA's 2006 Integrated Report Guidance, and the 2006, 2009, 2011, and 2013 memoranda and attachments.

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

The Maine Department of Environmental Protection (ME DEP) submitted a final 2014 §303(d) list to EPA, along with responses to comments, dated September 28, 2016. Waters listed by Maine in Category 5 of the State's 2014 Integrated Report (IR, as defined below) represent the State's §303(d) list, which the State is required to submit to EPA for review and approval or disapproval. The water segments Maine placed into Categories 1 through 4 (as defined below) fulfill the requirements of §305(b) of the CWA and are not a part of Maine's §303(d) list. Such integrated listing format allows states to provide the status of all assessed waters in a single multi-part list. States may list each waterbody or segment thereof into one or more of the following five categories, as part of their IR:

- 1) All designated uses are supported; no use is threatened;
- 2) Available data and/or information indicate that some, but not all of the designated uses are supported (with the presumption that all uses are attained);
- 3) There are insufficient available data and/or information to make a use support determination;

- 4) Available data and/or information indicate that at least one designated use is not being supported or is threatened, but a TMDL is not needed;
 - 4a) A state-developed TMDL has been approved by EPA or a TMDL has been established by EPA for any segment-pollutant combination;
 - 4b) Other required control measures are expected to result in the attainment of an applicable water quality standard in a reasonable period of time;
 - 4c) The non-attainment of any applicable water quality standard for the segment is the result of pollution and is not caused by a pollutant; and
- 5) Available data and/or information indicate that at least one designated use is not being supported or is threatened by a pollutant(s), and a TMDL is needed.

The relevant §303(d) water segments (Listing Category 5) are identified in Maine's 2014 IR and the following pages of the IR appendices:

- Appendix II Rivers and Streams (pages 98-126);
- Appendix III Lakes (page 138);
- Appendix IV Wetlands (pages 149-150);
- Appendix V Estuarine and Marine waters (pages 157-178).

For purposes of evaluating Maine's §303(d) list, EPA also reviewed the following portions of Maine's 2014 IR relating to data sources and acknowledgements; listing methodology, assessment criteria, and data interpretation; Maine's process for solicitation of public comments; and Maine's responses to those comments:

- Maine's *Data Sources and Acknowledgements* (page 6, Chapter 1, IR);
- Maine's *Assessment Methodology, Assessment Criteria, Data Interpretation* (pages 37-46 Chapter 4, IR), *Nutrients/Eutrophication Biological Indicators* (pages 79-81, Chapter 4, IR), and *Tidal Flow Alteration* (page 81) (Chapter 4, IR);
- Maine's *Public Participation and Summary of Public Comments and Responses* (pages 12-19, Chapter 2, IR).

EPA reviewed and commented on Maine's public review draft 2014 §303(d) list, dated April 25, 2016. ME DEP then revised the list based on comments received during the public comment period. EPA also reviewed Maine's final 2014 §303(d) list, submitted September 28, 2016, which is included in Maine's final submittal of its 2014 *Integrated Water Quality Monitoring and Assessment Report*, or Integrated Report (IR) and its appendices.

Public Review

ME DEP conducted a public participation process, providing the public with an opportunity to review and comment on Maine's draft 2014 §303(d) list from April 25, 2016 to the close of business on May 27, 2016. On April 25, 2016, ME DEP posted Maine's draft list on ME DEP's website with a notice of public comment opportunity. During the week of April 25, 2016, ME DEP (1) sent a notice of the draft IR availability for comment via e-mail to approximately 170 subscribed "interested parties," and (2) published a legal notice in four daily newspapers around the state: Bangor Daily News (31,000), Kennebec Journal (11,600), Lewiston Sun Journal (44,000), and The Portland Press Herald (38,500) (page 14, IR). Hard copies of the draft report were made available to the public upon request. EPA concludes that Maine's public participation process was consistent with its Continuing Planning Process (CPP), and that Maine provided sufficient public notice and opportunities for public involvement and

response.

Piscataqua River Estuary Segment

The Piscataqua River Estuary Segment, (Eliot, Kittery) Waterbody ID 812-2, was initially listed in Category 5-A by ME DEP in the State's 2012 Integrated Report as being impaired for "marine life use support," with a stated cause of "nutrient/eutrophication biological indicators," and with explanations of "source unknown" and "eelgrass areal extent and density decreases documented since 1996 by NH DES and ME DMR." (p. 142 2012 IR Appendix). Maine DEP received comments from the Great Bay Municipal Coalition on this same listing during the comment period for the State's 2014 Integrated Report. Maine DEP also received comments from the Town of Kittery, ME, and one Kittery resident. The comments essentially requested that Maine DEP revise the cause of impairment from "nutrient/eutrophication biological indicators" to "unknown," asserting that there is insufficient available and reliable data and analyses for the Piscataqua River Estuary to designate a cause of the impairment. Maine DEP considered these comments in determining the final §303(d) listing status of this segment, but based on the data showing impairment, DEP retained the initial 2012 listing for the Piscataqua River Estuary Segment on its 2014 list of impaired waters.

Maine explained that the basis for the Department's identification of the cause "nutrient/eutrophication biological indicators" consisted of 2010 eelgrass epiphyte observations. Maine further explained that the use of qualitative epiphytic coverage information to support a decision of marine life use impairment, and identifying "nutrient/eutrophication biological indicators" as the cause, are consistent with the State's "Data Interpretation" section of the CWA §305(b) report for non-numeric listing criteria. Maine also explained that the Department was not able to collect field data in either 2011 or 2012 (the years covered by the 2014 report), and so Maine was unable to provide a comparison between epiphyte conditions and total nitrogen observed in 2010 and these subsequent years. The Department asserted that it therefore had no justification for changing the 2012 §303(d) listing during the 2014 list cycle. The Department also reasonably explained in response to the comments, that it would evaluate any additional relevant data for the 2016 list cycle, including the data and other information identified by the commenters and others. Finally, the Department explained that, regarding the comment pertaining to nutrient removal requirements for the Kittery wastewater license, the Department will assess the need for nutrient limits via the current wastewater discharge permit renewal process.

Summary of ME DEP's Public Review Process

EPA reviewed the original comment letters ME DEP received and ME DEP's responses to those comments. In preparing the final list, Maine considered suggested changes to Maine's draft 2014 §303(d) list in comments and questions from interested parties. ME DEP prepared a summary of public comments received, and provided the State's responses. EPA has reviewed ME DEP's responses to public comments and all original public comments submitted, and concludes that Maine responded adequately to all of those comments.

IV. IDENTIFICATION OF WATERS AND CONSIDERATION OF EXISTING AND READILY AVAILABLE WATER QUALITY-RELATED DATA AND INFORMATION

EPA has reviewed Maine's submission, and has concluded that the State developed its §303(d) list in compliance with §303(d) of the Act and 40 CFR §130.7. EPA's review is based on its analysis of

whether the State reasonably considered existing and readily available water quality-related data and information and reasonably identified waters required to be listed.

Water quality attainment decisions for Maine's 2014 report were primarily based on monitoring data collected in 2011 and 2012, although more recent data were consulted where appropriate. Maine used the water quality assessment results stored in Maine's version of the EPA Assessment Database (ADB) to develop its 2014 §303(d) list. Assessment results for the IR are based on data stored in Maine's relational database (EGAD) (see pages 188-189, Chapter 9, IR). ME DEP has several departmental monitoring programs, and routinely works cooperatively with various professional and volunteer monitoring groups on projects yielding surface water quality data that are taken into consideration during the §303(d) list preparation. Sources of data include other state agencies and resources, federal and other government agencies, Tribes, volunteer watershed groups / conservation organizations that work with DEP staff and employ approved monitoring practices for a specific list of sources of assessment data for rivers and streams, lakes, wetlands, estuarine and marine resources (see *Data Sources and Acknowledgements*, pages 6-7, Chapter 1 of the IR).

ME DEP identified the pollutants (when known) causing or expected to cause exceedances of the applicable water quality standards, including those pollutants for which there were no corresponding numeric criteria in the State's standards (e.g., nutrients). In the cases where the identity of the pollutant was unknown, ME DEP identified the listing cause as the water quality standards impairment (e.g., dissolved oxygen, benthic macroinvertebrate assessment, habitat assessment, fish consumption).

Maine's 2014 §303(d) list is part of *Maine's 2014 Integrated Water Quality Monitoring and Assessment Report* which includes the most recent §305(b) report. As ME DEP explains in its 2014 IR listing methodology, three criteria for listing waters in Category 5 (impaired waters for which a TMDL must be established) are as follows (page 40, Chapter 4 of the IR):

- 1. Current data (collected within five years) for a standard indicates either impaired use, or a trend toward expected impairment within the listing period [threatened], and quantitative or qualitative data/information from professional sources indicates that the cause of impaired use is from a pollutant(s),*
- 2. Water quality models predict impaired use under current loading for a standard, and where quantitative or qualitative data/information from professional sources indicates that the cause of impaired use is from a pollutant(s), or,*
- 3. Those waters that were previously listed on the State's 303(d) list of impaired waters, based on current or old data that indicated the involvement of a pollutant(s), and where there has been no change in management or conditions that would indicate attainment of use.*

ME DEP appropriately considered all existing and readily available information in the development of the 2014 §303(d) list, consistent with Maine's 2014 listing methodology. The IR explains that "A determination of nonattainment is only made when there is documented, quality assured, evidence (e.g. monitoring data) indicating that one or more criteria are not attained. Such data are also weighed against evidence that there are plausible human-caused factors that may contribute to the violation of criteria (38 MRSA Section 464(4)(C))." (see page 42, Chapter 4, IR) (Note that a special case is made for wetland assessments with respect to documented evidence of impairment, depending on the location of a wetland with respect to a related river/stream, or lake/pond).

In its listing methodology, the State provided a rationale for not relying on particular readily available water quality-related data and information as a basis for listing waters. Beginning with the 1998 list and continuing through the 2014 listing process (page 38, IR), Maine chose not to list waters where the only information regarding water quality was unsubstantiated anecdotal information. Maine analyzed relevant data and information for each water body in the State in deciding whether there was sufficient, reliable data to support listing. The State's use of this listing methodology is reasonable and consistent with EPA's regulations. The regulations require states to "assemble and evaluate" all relevant water quality related data and information, and Maine did so for each of its waterbodies. The regulations permit states to decide not to use any particular data and information as a basis for listing, provided they have a reasonable rationale in doing so. Maine's decision not to use unsubstantiated anecdotal information is reasonable in light of the uncertainty about the reliability of such information. Moreover, it is reasonable for Maine to decide to focus its listing and TMDL development resources on waters where water quality impairments are well-documented, rather than on waters with only unreliable water quality information. As additional waters are assessed, EPA expects Maine would add waters to its list where such assessments show water quality standards are not being met.

In accordance with its listing methodology, Maine may, in certain cases, include waters on the 2014 §303(d) list based solely on evaluative information, i.e., information the evaluation of which requires the use of judgment, in contrast to information consisting of straightforward numerical sampling results. Maine based a listing decision on evaluative information when the State had confidence that an impairment existed. For example, Maine's use of evaluative information includes waters based on data older than 5 years of age (i.e., "evaluated" waters under EPA's §305(b) guidance) where such data showed exceedances of one or more criteria of Maine water quality standards. Although data older than 5 years is considered "evaluative" information under EPA's §305(b) guidance, Maine chose to use such data as a basis for listing. The State concluded that the use of such data is reasonable because, without specific information to the contrary, there is no reason to believe that data older than 5 years are no longer representative of the water quality of the waterbody in question. EPA believes this conclusion is reasonable, and it is consistent with EPA regulations for states to decide to list waters based on data older than 5 years. The regulations require states to consider all available data and to use it unless the state provides a reasonable rationale for not doing so.

In summary, ME DEP considered the most recent §305(b) assessments, as required by EPA's regulations, and evaluated all existing and readily available water quality-related data and information, obtained primarily through monitoring, as the basis for adding water quality impairments to the 2014 §303(d) list. The State added a total of 12 new impaired waterbody segments to the 2014 §303(d) list (Category 5), associated with 9 river and stream segments, 1 newly impaired wetland, and 2 estuarine/marine waters (CSO impairments erroneously omitted from the previous list); no new impairments were listed for lakes (see summary in Chapter 8, pp. 131-137 IR). EPA concludes that the State properly assembled and evaluated all existing and readily available data and information, including data and information relating to the categories of waters specified in 40 CFR §130.7(b)(5).

Priority Ranking

As described in its listing methodology, Maine established a priority ranking of TMDL development for listed waters by considering: 1) the value of a particular water (a water's size, public use, proximity to population centers, level of public interest for water quality improvement), 2) the nature of the impairment and the source(s) of the problem, 3) available information to complete the TMDL, and 4)

availability of staff and contractual resources to acquire information and complete the TMDL study (Chapter 4, page 40 of the IR). Additionally, Maine has considered the merits of addressing, on a regional or statewide basis, waters with similar problems (e.g., impaired waters related to bacteria alone, or to excessive stormwater). Category 5-A waters are assigned a projected scheduled date and priority level of high, medium, or low for TMDL development; Category 5-D waters (legacy pollutants, and coastal waters that have a consumption advisory for the tomalley of lobsters due to the presence of persistent bioaccumulating toxins found in that organ) are assigned a low priority for TMDL development. There are no waters currently listed in Categories 5-B and 5-C for freshwaters (p. 119 IR List). Maine's 2014 list priorities fall into the following time frames: H = high, 1-2 years; M = medium, 3-6 years; L = low, 6+ years (see Tables 8-13 through 8-16 in Chapter 8 of the IR for a list of projected TMDL schedules). For estuarine and marine waters, Maine's "2014 list has been updated to include DMR shellfish harvest closures as of 2012, and all closure areas and corresponding DEP Waterbody IDs have been moved from Category 4-a to Category 5-B-1(a) until a major revision [of Maine's Statewide Bacteria TMDL] can be completed to include all DMR closure areas" (see p. 158 IR List). Maine explains that, "As soon as permissible, the revision will encompass all current closure areas pertaining to the most recent report and DMR closure information" (see p. 187, IR).

EPA reviewed Maine's priority ranking of listed waters for TMDL development and finds that the waterbody prioritization and targeting method used by Maine is reasonable and sufficient for purposes of §303(d). Maine properly took into account the severity of pollution and the uses to be made of listed waters, as well as other relevant factors described above. EPA acknowledges that the schedule of TMDL completion establishes a meaningful priority ranking system.

Waterbody Segment Impairments Not Listed on Maine's 2014 §303(d) List, But Which Were Listed on Maine's 2012 §303(d) List.

Maine did not include on its 2014 §303(d) list the following waterbody segment impairments included on the State's 2012 §303(d) list, and EPA asked the State to provide a rationale for its decision to "delist" these previously listed waters. The State has demonstrated, to EPA's satisfaction, good cause for not listing these waters on its 2014 §303(d) list, consistent with 40 CFR §130.7(b)(6)(iv).

Category 5 in 2012, delisted to Category 4-A in 2014:

The following four waterbody segment impairments are no longer listed as TMDL required, because a TMDL addendum to Maine's 2009 Statewide Bacteria TMDL was approved by EPA on September 22, 2014. The TMDLs in the addendum addressed recreational use impairments associated with bacterial pollution. These four segments are all impaired for recreational use, and are changing list categories as described below (see Table 8-9, pp. 161-167 ME 2014 IR):

- *W. Br. Sheepscot River (below Halls Corner, Rt. 17/32) ME0105000305_528R02* is impaired for recreational use, being moved from 5-A in the 2012 list to 4-A in the 2014 list. This segment remains in 2014 List Category 5-A for (Algae) (Aufwuchs) Periphyton.
- *Goosefare Brook above I-95 (Goosefare Brook, Saco) ME0106000106_612R01* is impaired for recreational use, being moved from 5-B (bacteria only) in the 2012 list to 4-A in the 2014 list.
- *Goosefare Brook below I-95 (Saco, Old Orchard Beach) ME 0106000106_612R01_01* is impaired for recreational use, being moved from 5-A in the 2012 list to 4-A in the 2014 list. This segment

remains in 2014 List Category 4-A for seven metals addressed by a different TMDL approved by EPA September 29, 2003.

- *Duck Brook and tributaries (Arundel) ME0106000301_622R03* is impaired for recreational use, being moved from 5-B (bacteria only) in the 2012 list to 4-A in the 2014 list.

New impaired segments for Category 4-A Listings

Maine added the following three new freshwater wetland waterbody segments impaired for aquatic life use to Category 4-A for the 2014 impaired waters list because these assessment areas are contiguous to or directly adjacent to the aquatic life use-impaired Prestile Stream segment addressed by TMDLs approved for phosphorus, nitrogen, and suspended solids by EPA May 10, 2010 (see Table 8-3, page 135, 2014 IR). EPA approves Maine's §303(d) list without these new waterbody-pollutant combinations because the placement of these impairments in Category 4-A is consistent with EPA's regulations and EPA's *Guidance for Assessment, Listing and Reporting Requirements*:

- *Tributary wetlands to Prestile Stream above dam in Mars Hill (ME 0101000501_149R_W200)*, a 2-acre Class B wetland assessment area located on the west side of the Prestile Stream channel in the town of Easton.
- *Prestile Stream wetlands above dam in Mars Hill (ME0101000501_149R01)W203*, a 135-acre Class A wetland assessment area that includes all open water wetland habitats along the Prestile Stream channel between the outlet of Christina Reservoir and the dam in Mars Hill. (Note: the Category 5-D listing due to legacy pollution with DDT will remain in place.)
- *Christina Reservoir wetlands (ME 0101000501_9525_W115)* a 149-acre Class GPA wetland assessment area, on the northeast side of the reservoir.

The primary stressors identified in the Prestile Stream nonpoint source TMDLs apply to these new impairments, and the recommended best management practices explained in the existing TMDL are also applicable to address the impairments in these wetland resources.

Maine added the following two estuarine and marine waterbody segments impaired for bacteria due to combined sewer overflows to Category 4-A(b) for the 2014 impaired waters list in order to restore the Category 4-A status initially identified for both CSO receiving waters in Maine's 2010 impaired waters list (based on the 2009 approval of Maine's bacteria TMDLs for both waters). Both marine segments were re-added in 2014 for the following different reasons (see Table 8-4, page 137, 2014 IR, and revised Table 4-A(b), and p. 155 2014 4-A(b) List):

- *Calais POTW (DEP Waterbody ID 702-4)* was unintentionally omitted from the 2012 List Category 4-A.
- *Rockland PCF (DEP Waterbody ID 722-8)* was intentionally removed from the 2012 List Category 4-A due to the elimination of the Town Landing CSO discharge point, but was re-added to Category 4-A in Maine's 2014 impaired waters list due to the need for an emergency discharge point at Lermond Cove for high inflows.

EPA approves Maine's §303(d) list without these segments because the placement of these impairments in Category 4-A is consistent with EPA's regulations and EPA's *Guidance for Assessment, Listing and Reporting Requirements*.

New impairment for Category 4-B Listings

Maine added the following nutrient impairment indicator of "periphyton (Aufwuchs) bioassessments" to the following Category 4-B impairment listing (carried over from prior listing cycles), which has been addressed under an existing permit (see Table 8-1, page 133 ME 2014 IR). EPA approves Maine's §303(d) list without this new waterbody-pollutant combination because the placement of this impairment in Category 4-B is consistent with EPA's regulations and EPA's *Guidance for Assessment, Listing and Reporting Requirements*:

- *Martin Stream* in Dixmont (ME 0103000308_331R01) is a 0.5 mile Class A segment impaired for aquatic life use based on benthic macroinvertebrates and ammonia data. The source of both causes of the impairment was traced to a concentrated animal feeding operation (CAFO) immediately adjacent to Martin Stream. A permit was issued in August 2006, renewed in 2009, which required both best management practices to prevent farm-related discharges to the stream, and development of a Nutrient Management Plan. Several BMPs were implemented to remove the CAFO effects on the stream before the CAFO ceased operation in late 2013. Results of a more recent bioassessment monitoring method for periphyton have indicated continued nutrient impairment, so this additional listing cause has been added to the 2014 listing in category 4-B. (Although the permit expired in 2009, it has not been withdrawn, and is still in effect). ME DEP intends to reassess this stream's listing categorization for the 2016 cycle, depending on the impairment situation and the operational status of the farm.

Waters impaired by nonpoint sources of pollution

The State properly listed waters with nonpoint sources causing or expected to cause impairment, consistent with §303(d) and EPA guidance. Section 303(d) lists are to include all WQLSs still needing TMDLs, regardless of whether the source of the impairment is a point and/or a nonpoint source. EPA's long-standing interpretation is that §303(d) applies to waters impacted by point and/or nonpoint sources. In *Pronsolino v. Marcus*, the District Court for the Northern District of California held that §303(d) of the Clean Water Act authorizes EPA to identify and establish total maximum daily loads for waters impaired by nonpoint sources. *Pronsolino v. Marcus*, 91 F. Supp. 2d 1337, 1347 (N.D.Ca. 2000). This decision was affirmed by the 9th Circuit court of appeals in *Pronsolino v. Nastri*, 291 F.3d 1123 (9th Cir. 2002). See also EPA's *Guidance for 2006 Assessment, Listing and Reporting Requirements Pursuant to Section 303(d), 305(b), and 314 of the Clean Water Act* – EPA Office of Water, July 29, 2005.

V. WATERS IN INDIAN LANDS

Since EPA's February 2004 approval of Maine's 2002 §303(d) list, EPA's approvals of Maine's §303(d) lists explicitly stated that EPA was taking no action with respect to waters in Indian lands in Maine, because EPA had not determined whether Maine's WQS applied in such waters. On February 2, 2015, EPA determined that the state and federal Indian claims settlement acts applicable to the federally recognized Indian tribes in Maine grant Maine the authority to set WQS for waters in Indian lands. In that decision, EPA also approved Maine's various designated uses for all waters in Indian lands. With

respect to the “fishing” designated use, EPA interpreted it to include “sustenance fishing” for all waters in Indian lands, and EPA also approved section 6207(4) and (9) of the Maine Implementing Act (MIA) as a sustenance fishing designated use for inland waters of the reservations of the Penobscot Indian Nation and the Passamaquoddy Tribe. In the February 2015 decision and subsequent decisions in March and June 2015, and January and April 2016, EPA approved most of Maine’s WQS for waters in Indian lands, but also disapproved some WQS for waters in Indian lands and disapproved several WQS for all waters in Maine. In April 2016, EPA proposed federal WQS to remedy the disapproved WQS and also to address the Administrator’s determination that more stringent human health criteria are needed in waters outside of Indian lands where the sustenance fishing designated use based on MIA section 6207(4) and (9) applies. On December 19, 2016, EPA promulgated final WQS to address the WQS that it disapproved and for which it made a necessity determination. The promulgated WQS will take effect on January 18, 2017.

Since EPA has determined that Maine has the authority to apply its WQS to waters in Indian lands, and has approved many of Maine’s WQS for such waters, EPA’s approval of Maine’s 2014 §303(d) list includes Maine’s listing of any waters in Indian lands that are impaired for any of the WQS that EPA has, from February 2, 2015 to the present, approved for those waters.

Maine listed certain segments of waters in Indian lands, and of waters outside of Indian lands where the sustenance fishing use applies, as impaired for fish consumption use based on fish and/or shellfish consumption advisories that apply to the waters due to contamination by legacy pollutants (mercury, PCBs, dioxin, and DDT).¹ Specifically, Maine listed as impaired for DDT a segment of the Meduxnekeag River (ME0101000504_152R01_03),² a portion of which is in waters in Indian lands. It also listed all marine waters due to the statewide marine consumption advisory for a variety of finfish and shellfish based on elevated mercury, PCB and dioxin levels³; and all waterbody segments covered by the statewide lobster tomalley consumption advisory that is in place for all Maine estuarine and marine waters capable of supporting lobster due to the presence of PCBs and “other persistent bioaccumulating substances.”⁴ The intertidal waters at the Passamaquoddy Tribe’s Pleasant Point reservation are covered by these narrative marine waters listings. In addition, Maine listed as impaired for PCBs three segments of the Penobscot River that, based on current case-law,⁵ are waters outside of Indian lands, but where the sustenance fishing use applies, either in whole (ME0102000502_231R and ME0102000506_232R), or in part (ME0102000509_233R_01).⁶ EPA is approving the listing of these waters because the existence of the fish and/or shellfish consumption advisories demonstrate that the sustenance fishing designated use applicable to these waters is impaired.

Accordingly, EPA’s approval of Maine’s §303(d) list extends to all waterbodies on the State’s list.

¹ EPA disapproved, and made a necessity determination for, Maine’s human health criteria for mercury, PCBs, dioxin, and DDT as applied to waters in Indian lands and waters outside of Indian lands where the sustenance fishing use applies, respectively. EPA’s criteria for mercury, PCBs, and DDT will take effect in these waters on January 18, 2017. EPA has not yet promulgated dioxin criteria for these waters.

² ME DEP 2014 Integrated Report, page 174 and Appendix 2, page 121.

³ ME DEP 2014 Integrated Report, Appendix 5, page 178.

⁴ *Id.*

⁵ See *Penobscot Nation v. Mills*, 151 F. Supp. 3d 181 (D. Maine Dec. 16, 2015) (formerly, *Penobscot v. Schneider*), appeal docketed, No. 16-1435 (1st Cir. April 26, 2016).

⁶ ME DEP 2014 Integrated Report, Appendix 2, page 121.