



**UNITED STATES ENVIRONMENTAL PROTECTION AGENCY**

REGION 1

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

March 1, 2007

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

**Re: Section 303(d) list approval**

Dear Commissioner Wennberg:

Thank you for your final submittal of the 2006 Clean Water Act Section 303(d) list, **State of Vermont 303(d) List of Waters**, dated February, 2007 and your submittal letter dated February 9, 2007. In accordance with Section 303(d) of the Clean Water Act and 40 CFR §130.7, the U.S. Environmental Protection Agency (EPA) conducted a complete review of Vermont's 2006 Section 303(d) list and supporting documentation. Based on this review, EPA has determined that Vermont's list of water quality limited segments still requiring Total Maximum Daily Loads (TMDLs) meets the requirements of Section 303(d) of the Clean Water Act (CWA) and EPA's implementing regulations. Therefore, by this order, EPA hereby approves Vermont's Section 303(d) list.

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

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

EPA has approved the placement of a number of waters on Vermont's Part B list (Impaired Surface Waters – No Total Maximum Daily Load Determination Required) on the grounds that other pollution control requirements are expected to bring the waters into compliance with water quality standards, consistent with 40 CFR §130.7. Please remember that EPA's Guidance for 2006 Assessment, Listing and Reporting Requirements specifies that these waters need to be

monitored to determine whether water quality standards are met as expected in a reasonable period of time. If monitoring finds that standards have not been met in the expected timeframe, then the State will need to put the affected water(s) back on the Section 303(d) list during future listing cycles.

Your staff have done an excellent job of preparing a comprehensive and informative list, and providing EPA with thorough supporting documentation. We are pleased with the quality of your submittal. My staff and I look forward to continued cooperation with VTDEC in implementing the requirements under Section 303(d) of the CWA. Please feel free to contact me or Eric Perkins at 617-918-1602, if you have any questions or comments on our review.

Sincerely,

A handwritten signature in black ink, appearing to read "Stephen S. Perkins". The signature is fluid and cursive, with the first name "Stephen" and last name "Perkins" clearly distinguishable.

Stephen S. Perkins, Director  
Office of Ecosystem Protection

Enclosure

cc: Tim Clear, VTDEC

## **VT §303(d) Approval Documentation: 3/1/07**

### **I. INTRODUCTION**

EPA has conducted a complete review of Vermont's 2006 Section 303(d) list and supporting documentation and information and, based on this review, EPA has determined that Vermont's list of water quality limited segments (WQLSs) still requiring TMDLs meets the requirements of Section 303(d) of the Clean Water Act ("CWA" or "the Act") and EPA's implementing regulations. Therefore, by this order, EPA hereby approves Vermont's 2006 Section 303(d) list. The statutory and regulatory requirements, and EPA's review of Vermont's compliance with each requirement, are described in detail below.

### **II. STATUTORY AND REGULATORY BACKGROUND**

#### **Identification of WQLSs for Inclusion on 303(d) List**

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

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

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

In developing Section 303(d) lists, States are required to assemble and evaluate all existing and readily available water quality-related data and information, including, at a minimum, consideration of existing and readily available data and information about the following categories of waters: (1) waters identified as partially meeting or not meeting designated uses, or as threatened, in the State's most recent Section 305(b) report; (2) waters for which dilution calculations or predictive modeling indicate nonattainment of applicable standards; (3) waters for which water quality problems have been reported by governmental agencies, members of the public, or academic institutions; and (4) waters identified as impaired or threatened in any Section 319 nonpoint assessment submitted to EPA. See 40 CFR §130.7(b)(5). In addition to

these minimum categories, States are required to consider any other data and information that is existing and readily available. EPA's Guidance for 2006 Assessment, Listing and Reporting Requirements describes categories of water quality-related data and information that may be existing and readily available. See Guidance for 2006 Assessment, Listing and Reporting Requirements Pursuant to Sections 303(d), 305(b) and 314 of the Clean Water Act – EPA Office of Water-- July 29, 2005. While States are required to evaluate all existing and readily available water quality-related data and information, States may decide to rely or not rely on particular data or information in determining whether to list particular waters.

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

### **Priority Ranking**

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

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

EPA first reviewed Vermont's Draft 2006 Section 303(d) list dated February 2006. The Vermont Department of Environmental Conservation (VT DEC) then revised the list based on comments received during the public comment period including EPA comments sent by email on March 24, 2006. Vermont submitted its final 2006 §303(d) list to EPA-New England on September 8, 2006. The submittal package included the following components:

1. State of Vermont 2006 §303(d) List of Waters (September, 2006). This submission included "Part A", the list of impaired waters needing TMDLs, and an "interim list" containing waters which the state identified would be delisted upon EPA approval.

2. State of Vermont 2006 List of Priority Surface Waters Outside the Scope of Clean Water Act Section 303(d) (September, 2006). This submission included: Part B, impaired waters – no TMDL required; Part C, waters in need of further assessment; Part D, waters with completed and approved TMDLs; Part E, waters altered by exotic species; and Part F, waters altered by channel alteration

3. Response to Public Comments on the February 2006 draft list by VT DEC.

VT DEC conducted a public participation process in which it provided the public the opportunity to review and comment on the 2006 draft Section 303(d) list. A public comment period was opened upon the release of the draft list on February 28, 2006 and was closed on March 24, 2006. During the comment period a public meeting was held in Waterbury VT (on March 10, 2006), and comments were solicited from the public both through regional newspapers and the VT DEC website. EPA concludes that Vermont's public participation process was consistent with its Continuing Planning Process (CPP), and that Vermont provided sufficient public notice and opportunities for public involvement and response.

The final submittal took into account, and in many instances incorporated, suggested changes to the draft list from interested parties. VT DEC prepared a "Response to Comments" document which lists each comment and the State's response. EPA reviewed VT DEC's responses and concludes that Vermont adequately responded to the comments.

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

EPA has reviewed the State's submission, and has concluded that the State developed its Section 303(d) list in compliance with Section 303(d) of the Act and 40 CFR §130.7. EPA's review is based on its analysis of whether the State reasonably considered existing and readily available water quality-related data and information and reasonably identified waters required to be listed.

Vermont used the VT DEC Water Quality Division assessment databases to develop its 2006 §303(d) list. The same databases are used to assist in the preparation of the biennial §305(b) report. These databases contain all reported water quality information. In the development of the 2006 §303(d) list, Vermont began with its existing EPA approved 2004 §303(d) list and relied on new water quality assessments (i.e., post-2004) to update the list accordingly. All data sources used to develop previous §303(d) lists were carefully reviewed. Where valid monitoring data, including recent data as well as data older than 5 years, and/or evaluative information were collected and determined to be sufficient to make §303(d) listing judgments, waterbodies that were assessed as impaired for one or more uses due to pollutants were added to the 2006 §303(d) list. Vermont believes that information pertaining to impairment status must be well substantiated, preferably with actual monitoring data, for it to be used for §303(d) listing.

EPA has reviewed Vermont's description of the data and information it considered, and its

methodology for identifying waters. EPA concludes that the State properly assembled and evaluated all existing and readily available data and information, including data and information relating to the categories of waters specified in 40 CFR §130.7(b)(5).

In addition, the State provided a rationale for not relying on particular and readily available water quality-related data and information as a basis for listing waters. Beginning with the 1998 list and continuing through the 2004 listing process, Vermont chose not to list waters where the only information regarding water quality was unsubstantiated anecdotal information (e.g., citizen complaint). Vermont analyzed relevant data and information for each water body in the State in deciding whether there was sufficient, reliable data to support listing. The State's use of this listing methodology is reasonable and consistent with EPA's regulations. The regulations require states to "assemble and evaluate" all relevant water quality related data and information, and Vermont did so for each of its waterbodies. The regulations permit states to decide not to use any particular data and information as a basis for listing, provided they have a reasonable rationale in doing so. Vermont's decision not to use unsubstantiated anecdotal information is reasonable in light of the uncertainty about the reliability of such information. Moreover, it is reasonable for Vermont to decide to focus its listing and TMDL development resources on waters where water quality impairments are well-documented, rather than on waters with only unreliable water quality information. As additional waters are assessed, EPA expects Vermont would add waters to its list where such assessments show water quality standards are not being met.

Vermont did include waters on the 2006 §303(d) list based solely on evaluative information in certain cases when it had confidence that an impairment exists. For example, most critically and chronically acidified waters, which have only limited measurements of pH and alkalinity, are listed based on the "evaluative" relationship between aquatic biota, pH and alkalinity rather than actual measurements of biological integrity.

In the development of the 2006 §303(d) list, Vermont listed waters based on data older than 5 years of age (i.e., "evaluated" waters under §305(b) guidance) where such data showed exceedences of one or more criteria of Vermont water quality standards. Although data older than 5 years is considered "evaluative" information under EPA's Section 305(b) guidance, Vermont chose to use such data as a basis for listing. The State concluded that the use of such data is reasonable because, without specific information to the contrary, there is no reason to believe that data older than 5 years are no longer representative of the 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 they provide a reasonable rationale for not doing so.

Waters were not added to the 2006 §303(d) list where limited information might indicate a possible impairment but it was determined to be insufficient (usually not well documented) for the purpose of listing on the §303(d) list. For example, waters were not listed for pathogens where questionable volunteer monitoring data (e.g., situations with few samples and data absent a QA/QC plan) indicate potential exceedences of the bacteria criterion.

For each water quality impairment not previously listed, where information indicated an impairment due to pollutants may exist, but available information was determined to be insufficient to support a §303(d) listing (due to lack of monitoring data or QA/QC documentation), the waterbodies were not included on the §303(d) list. Instead, they are included on a separate state list of priority waters in the category of waters in need of further assessment. In these cases, Vermont believes the information is limited (for reasons discussed above) creating considerable uncertainty with respect to the assessment and whether uses are truly impaired.

Based on the decisions Vermont made regarding the use of data and information for listing waters, the relationship between Vermont's 2006 §303(d) list and its most recent §305(b) report (2006) is summarized below:

1. All surface waters with documented exceedances of the Vermont Water Quality Standards or assessed as partially supporting or not supporting one or more designated uses based on information obtained through chemical, physical, or biological monitoring are included in the 2006 §303(d) list (with the exception of waters proposed for delisting and newly impaired waters which are expected to meet water quality standards in the near future consistent with §130.7(b)(1) – both of these exceptions are discussed below).
2. Waters assessed as partially supporting or not supporting uses based on certain types of information considered to be “evaluative” information under EPA’s §305(b) guidance are included on the 2006 Section 303(d) list (e.g., monitoring data older than 5 years, volunteer monitoring data with adequate quality assurance).
3. Generally, surface waters assessed as partially supporting or not supporting one or more designated uses for §305(b) reporting purposes based solely on unsubstantiated or anecdotal information are not included on the 2006 §303(d) list.

In summary, Vermont considered the most recent §305(b) assessments, as required by EPA’s regulations, and used information obtained primarily through monitoring as the basis for adding water quality impairments to the 2006 §303(d) list. Of the 185 unique water quality impairment problems appearing in the final 2006 §303(d) list, 182 entries appeared on the §303(d) list from 2004. The remaining entries (3) appearing on the final 2006 §303(d) list are additions (i.e., did not appear on the 2004 §303(d) list). EPA concludes that Vermont appropriately considered the waters listed in the most recent section 305(b) report during the development of the 2006 §303(d) list.

### **Priority Ranking**

As described in its methodology, Vermont established a priority ranking for listed waters by considering: 1) the presence of health issues, 2) the nature, extent, and severity of the pollutant(s) causing the impairment, 3) the use or uses that are impaired, 4) the availability of resources, and 5) the amount or degree of public interest in problem abatement. Additionally, Vermont also

considered the merits of addressing – on a regional or statewide basis – waters with similar problems (e.g., pH impaired waters due to acid rain). Individual priority rankings for listed waters are reflected in the list with indications of low, medium or high priority for TMDL development. The final Vermont 2006 §303(d) list identifies 49 waterbody segments in the high priority category targeted for TMDL development before or during the year 2008.

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

### **Waters which are not listed on Vermont's 2006 §303(d) list because of delisting**

Vermont did not include on its 2006 §303(d) list eleven waters included on the 2004 list, and EPA asked the State to provide rationales for its decisions not to list these previously listed waters. The State has demonstrated, to EPA's satisfaction, good cause for not listing these waters, as provided in 40 CFR §130.7(b)(6)(iv).

Of the eleven, Vermont did not include two water body segments because new monitoring data indicate applicable water quality standards are no longer exceeded. Two additional segments are no longer included because the State concluded the waters were previously listed inappropriately. The justifications for each of these four delistings are included below. The remaining seven waters are no longer listed because TMDLs have been completed for them since the 2004 list was prepared.

Poultney River, from Carvers Falls up to Castleton River (VT02-01) was impaired for aquatic life support due to nutrient loading based on biomonitoring data from 1998 and 1999. Following substantial upgrades and improvements to the Castleton and Fair Haven POTWs and a pump station on the Castleton River, the river was sampled again in 2003. VT DEC biological monitoring results from the 2003 round rated this section of the river "very good to good," indicating compliance with the Vermont water quality standards. EPA approves this delisting.

Taft Brook in Troy, from the mouth upstream 0.1 mile (VT06-08) was impaired for aquatic life support due to nutrient loading from a nearby farm. Following the construction of a new waste storage system on the farm, and the elimination of milkhouse and silo drainage to the stream, biological monitoring in 2004 found the stream's condition to be "good," a rating indicating compliance with the Vermont water quality standards. EPA approves this delisting.

The State has concluded that the Poultney River, 0.5 miles above to 0.5 miles below the Castleton River confluence (VT02-04) was inappropriately listed in previous years. The impairment was aquatic life support, but the 0.5 mile portion of this segment below the confluence with the Castleton River was identified by the wrong waterbody ID and is correctly identified as the upper limit of VT02-01. This portion of VT02-01 is being delisted (as described

above) because it now is in compliance with water quality standards. As for the 0.5 mile portion above the confluence, VT DEC indicates there is no biological monitoring data to indicate an impairment in this portion, and that this portion was inadvertently listed in the first place. Additionally, recent nutrient data collected by a local watershed group indicate nutrient levels are not elevated. EPA approves this delisting.

Via letter to EPA (dated January 16, 2007) the State indicated that segment VT08-03, titled "Winooski River, from Alder Brook Upstream to Bolton Falls Dam (10.5 miles)" was incorrectly listed in 2004 for fish consumption limitations based on mercury contamination in walleye. The segment was originally listed because the State mistakenly assumed that contaminated walleye from Lake Champlain were being transported above the dam to provide fishing opportunities in this section of the river. However, the State has recently learned that no walleye are being transported above the dam (and have not been for many years, if ever). Given that the State does not have any data indicating walleye contamination in this segment, and the segment has been listed based on incorrect information, the State has proposed that the segment be delisted. EPA approves this delisting.

Consistent with EPA's regulations and EPA's Guidance for 2006 Assessment, Listing and Reporting Requirements, Vermont did not include on the §303(d) seven waters for which acid TMDLs have been approved by EPA. These seven waters are: Little Mud (Winhall), Beebe Pond (Sunderland), Skylight Pond (Ripton), Little Pond (Winhall), Harriman Reservoir (Whitingham), Lost Pond (Glastenbury), and Levi Pond (Groton). EPA approves these delistings.

#### **Waters not listed on Vermont's 2006 §303(d) List which are expected to meet WQSs**

The State's decision not to include the following waters (listed below) on its 2006 Section 303(d) list is consistent with EPA regulations at 40 CFR §130.7(b)(1) and EPA's Guidance for 2006 Assessment, Listing and Reporting Requirements. All of these waters except for the Lower Lamoille River were not identified on the State's 2004 Section 303(d) list -- they were determined to be impaired after the 2004 list was completed. Under 40 CFR §130.7(b)(1), States are not required to list WQLSs still requiring TMDLs where effluent limitations required by the CWA, more stringent effluent limitations required by state or local authority, or other pollution control requirements required by state, local, or federal authority, are stringent enough to implement applicable water quality standards. The regulation does not specify the time frame in which these various requirements must implement applicable water quality standards to support a State's decision not to list particular waters.

Monitoring should be scheduled for these waters to verify that the water quality standard is attained as expected in a reasonable time frame. Where standards will not be attained through implementation of the requirements listed in 40 CFR §130.7(b)(1) in a reasonable time, it is appropriate for the water to be placed on the Section 303(d) list to ensure that implementation of the required controls and progress towards compliance with applicable standards is tracked. If it

is determined that the water is meeting applicable standards when the next Section 303(d) list is developed, it would be appropriate for the State to remove the water from the list at that time.

Vermont has proposed that the following six water body segments not be listed on the Section 303(d) list based on the criteria described in §130.7(b)(1)(ii) or (iii) and EPA's Guidance for 2006 Assessment, Listing and Reporting Requirements:

VT06-08 Jay Branch, mile 8.3 to 1.9

VT06-08 Jay Branch—Tributary #9

VT08-02 Unnamed Trib to Winooski River

VT08-16 Trib #23 to Stevens Brook

VT12-01 Lower Deerfield River below Harriman Reservoir

VT07-01 Lower Lamoille River from Clarks Falls Dam to Route 2 bridge (6 miles)

For Jay Branch and Jay Branch Tributary #9, the State has demonstrated that there are other pollution control requirements required by state, local or federal authority that will result in attainment of water quality standards for aquatic life support within a reasonable time. These segments are impaired by sediment due to Jay Peak Resort's (JPL) non-compliance with construction and operational stormwater permits issued by VT DEC. For these streams, the pollution control requirements are both the permits themselves and enforcement orders that the VT DEC issued compelling the resort to come into compliance with the permits. The two most recent orders were issued in April 2006. One order requires JPL to implement a list of erosion and sediment control measures for portions of existing and future golf course construction, and includes the stipulation that JPR pay for a "clerk of the works" to be on site daily as a representative of the Agency to oversee construction until site stabilization is complete. The second order requires JPL to undertake all work necessary to come into compliance with the operational stormwater permit for JPR's Phase I and Phase II condominium developments. VT DEC believes that compliance with the permits will result in attainment of water quality standards. However, in case it turns out that other sources are also contributing to the impairment, VT DEC issued an order requiring JPR to hire a qualified consultant to complete a water quality remediation plan identifying any additional actions that may be necessary to achieve water quality standards. The order indicates that once VT DEC approves the remediation plan, the state will issue an additional order requiring implementation of the plan. While it is difficult to estimate the timing of restorations associated with stormwater-related impairments, the expected rapid pace of compliance activities leads the State to believe that water quality standards will be met in a reasonable period of time. If monitoring does not confirm an improving trend, these waters may be placed on the Section 303(d) list in future listing cycles.

For the Unnamed Tributary to Winooski River, the State has demonstrated that there are other pollution control requirements required by state, local or federal authority that will result in attainment of water quality standards for metals within a reasonable time. This is a small stream that was impaired due to leachate seeps (containing metals) from a closed and capped landfill. Curtain drains are in place and leachate is now pumped, collected and transported to a

wastewater treatment facility. The pollution control requirement is a post-closure court order requiring maintenance of the site and water quality monitoring. Water quality monitoring is scheduled for summer of 2006 to determine effectiveness of the treatment. Water quality standards are expected to be met this year. If this is found not to be the case, the court order specifies that more remediation will be required.

For the Tributary to Stevens Brook, the aquatic life impairment was caused by nutrient discharges from the Williamstown POTW. System upgrades were completed at the POTW in 2005. These upgrades are believed to be sufficient to attain water quality standards. Biological monitoring from 2005 (after the POTW improvements) indicated improved conditions, approaching attainment of water quality standards (some metrics are already attaining). VT DEC expects the biota to continue to rebound and that standards will be met within the next two years.

For the Lower Deefield River, the State has demonstrated that there are other pollution control requirements required by state, local or federal authority that will result in attainment of water quality standards for aquatic life support within a reasonable time. The impairment was caused by low temperatures resulting from a deep reservoir release from the Harriman Reservoir. The flow in this section of the river is controlled by TransCanada Hydro Northeast under a FERC license and conditions specified in a VT DEC 401 water quality certification issued in 1995. The Deerfield Project was relicensed in 1997. Low temperatures were identified in the water quality certification as a potential concern, and the conditions indicated that if monitoring results found adverse impacts to the biota, more mitigation would be required. In recent years, a temperature study was conducted, along with additional biological monitoring. The data are currently being reviewed by the VT Dept. of Fish and Wildlife to determine whether additional mitigation measures are needed. If no further mitigation is needed, water quality standards should be met within the next couple of years. If further mitigation is needed, restoration will likely take a little longer, but still should be achieved within a reasonable period of time (within the next 4-6 years).

For the Lower Lamoille River, the State has demonstrated that there are other pollution control requirements required by state, local or federal authority that will result in attainment of water quality standards for aquatic life support within a reasonable time. The impairment was caused by low dissolved oxygen resulting from the presence of three dams in this stretch of the river. A new federal FERC license for the Lamoille River Hydroelectric Project was issued in June 2005. This license requires (through articles 407 and 408) conservation flows that should be sufficient to meet water quality criteria for dissolved oxygen. The license also requires post-licensing water quality monitoring. If the monitoring indicates that the river is not in compliance with the dissolved oxygen criteria (as determined by VT ANR and the U.S. Fish and Wildlife Service) the license specifies that mechanical enhancements, such as turbine aspiration, will be required as necessary to meet the dissolved oxygen criteria. While the dissolved oxygen criteria may be met very soon, it may take a few more years for the aquatic life standards to be attained.

EPA concurs with VT DEC's decision to not list these waters on Vermont's 2006 Section 303(d) list, and to instead place these waters on its "B list" (impaired surface waters – no TMDL

required) consistent with EPA regulations at 40 CFR §130.7(b)(1) and EPA's Guidance for 2006 Assessment, Listing and Reporting Requirements.

### **Waters impaired by nonpoint sources of pollution**

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