



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

REGION 2
290 BROADWAY
NEW YORK, NY 10007-1866

JAN 13 2015

Mr. Mark Klotz
Director
Division of Water
New York State Department of Environmental Conservation
625 Broadway
Albany, New York 12233-3500

Dear Mr. Klotz:

Thank you for your submittal of New York's 2014 Clean Water Act (CWA) Section 303(d) list, dated November 3, 2014. In accordance with Section 303(d) of the Clean Water Act and Title 40 of the Code of Federal Regulations (CFR) Section 130.7, the U.S. Environmental Protection Agency (EPA) conducted a complete review of New York's Section 303(d) list and supporting documentation and information.¹ The statutory and regulatory requirements and EPA's review of New York State's compliance with each requirement are described in the enclosed Supporting Documentation.

Section 303(d) of the CWA and EPA's implementing regulations at 40 CFR 130.7 require the New York State Department of Environmental Conservation (NYSDEC) to identify waters within its boundaries for which technology-based and other controls are not stringent enough to implement any water quality standards applicable to those waters. Under EPA's regulations at 40 CFR 130.7(b)(4), the NYSDEC is required to identify the pollutants causing the impairment of the listed waters. Section 303(d) further requires the NYSDEC to establish a priority ranking for the listed waters, taking into account the severity of the pollution and the designated uses of the listed waters. Finally, NYSDEC is required to identify the waters targeted for TMDL development over the next two years.

New York State's 2014 Section 303(d) list identifies 834 waterbody segment/pollutant combinations requiring TMDLs. Of these, the NYSDEC has identified 121 as high priority waters targeted for development of TMDLs over the next two years.

New York State announced the availability of the 2014 Section 303(d) list in the State's Environmental Notice Bulletin on January 29, 2014, and provided a 45-day comment period, which ended on March 14, 2014. New York State prepared a response to comments summary document.

Based upon our review of the submittal, EPA partially approves and partially disapproves New York's 2014 Section 303(d) list. Specifically, EPA approves New York's decision to list waterbody segments and associated pollutants set forth in the November 3rd listing document along with the State's priority ranking for these waters and pollutants. However, EPA disapproves the State's decision not to list Jones Inlet/Jones Bay for nitrogen because anecdotal and photographic evidence indicates exceedances of New York State's narrative water quality standard for nutrients. Further detail is provided in the attached Supporting Documentation.

¹ 303(d) List dated 11/3/14, Category 4 Waters dated 1/5/15, Response to Comments dated 1/7/15 and delisting Document dated 11/3/14.

Pursuant to this partial disapproval, EPA will open a public comment period to receive comments concerning our decision to add Jones Inlet/Jones Bay to the State's 303(d) list. After examining comments received from the public, EPA will make any appropriate revisions to its decision and provide New York with a final action on the listing of Jones Inlet/ Jones Bay on New York's 2014 Section 303(d) list.

We look forward to continued cooperation with New York State in implementing the requirements under Section 303(d) of the CWA. Please feel free to contact me at 212-637-3873, or your staff may contact Dana Flint at 212-637-3635 if you have any further questions on this issue.

Sincerely,

A handwritten signature in black ink, appearing to read "Jeff Gratz", written over a horizontal line.

Jeff Gratz, Deputy Director
Clean Water Division

Enclosure

Supporting Documentation for Review and Partial Approval/Disapproval of New York State's 2014 303(d) List

Pursuant to Section 303(d) of the Clean Water Act (CWA), New York State (the State) submitted its "New York State 2014 Section 303(d) List of Impaired Waters Requiring a TMDL" (the 2014 303(d) list) to the U.S. Environmental Protection Agency (EPA) for approval or disapproval. EPA has reviewed New York's 2014 303(d) list and supporting documentation. New York's 2014 303(d) list and supporting documentation is referred to below collectively as the "submission."

EPA reviewed the submission based upon whether the State has developed its list in compliance with Section 303(d) of the CWA and EPA's implementing regulations. This included whether the State reasonably considered existing and readily available water quality-related data and information, and reasonably identified waters required to be listed. For the reasons set forth below, EPA is partially approving and partially disapproving New York's 2014 Section 303(d) list. Specifically, EPA is approving New York's inclusion of all waters and pollutants that the State identified as requiring a total maximum daily load (TMDL), EPA is disapproving New York's exclusion of Jones Inlet/Jones Bay from the 2014 303(d) list because readily available data indicates that this water exceeds New York's narrative water quality standard for nutrients.

Identification of Water Quality Limited Segments for Inclusion on the 303(d) List

Section 303(d)(1) of the CWA directs states to identify those waters within their jurisdiction for which effluent limitations required by Section 301(b)(1)(A) and (B) are not stringent enough to implement any applicable water quality standards, and to establish a priority ranking for those waters, taking into account the severity of the pollution and the uses to be made of those 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 do not require states to list waters where the following controls are adequate to implement applicable standards: (1) technology-based effluent limitations required by the CWA; (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 CWA 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 describes categories of water quality-related data and information that may be existing and readily available. See Guidance for Water Quality-Based Decisions: The TMDL Process, EPA Office of Water, 1991, EPA 440-4-91-001, Appendix C (EPA's 1991 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 depending on their listing methodology.

In addition to assembling and evaluating all existing and readily available water quality-related data and information, EPA regulations at 40 CFR 130.7(b)(6) require states to submit documentation in support of determinations to rely or not rely on particular data and information for list decisions. This 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; (3) documentation to support decisions not to use particular data and information, as well as documentation to support decisions to list or not list waters; and (4) any other reasonable information requested by EPA.

Consistent with EPA's guidance, Guidelines for Preparation of the Comprehensive State Water Quality Assessments (305(b) Reports) and Electronic Updates - EPA841-B-97-002A and EPA841-B-97-002B, 1997, and Guidance for 2006 Assessment, Listing and Reporting Requirements Pursuant to Sections 303(d), 305(b), and 314 of the Clean Water Act, July 29, 2005 ("EPA's 2006 Integrated Report Guidance"), the New York State Department of Environmental Conservation (NYSDEC) developed a Consolidated Assessment and Listing Methodology (CALM) to integrate the monitoring and assessment activities under Sections 305(b) and 303(d). The NYSDEC's CALM describes the process for evaluating and consolidating monitoring data and information. The CALM contains three sub-parts: Monitoring Strategy, Assessment Methodology and Listing Methodology. The Listing Methodology describes the process for developing the 303(d) list from evaluation and assessment of data gathered through the Monitoring Strategy and the Assessment Methodology. The State's CALM is updated periodically, generally in concert with the federal biennial assessment and listing cycle. EPA does not have approval authority with respect to the State's CALM.

The foundation for the State's listing process (both 305(b) and 303(d)) is the State's Water Inventory/Priority Waterbodies List (WI/PWL), which is based on the results of the State's monitoring and assessment methodologies. Waters listed on the 303(d) list are drawn directly from the WI/PWL. The WI/PWL is a comprehensive inventory of waterbodies throughout the State, including those waters known or suspected to have designated water uses with some degree of impairment or which are threatened by potential impairment. Designated use impairments are determined by evaluation of all available information on the waterbodies,

including use restriction orders (drinking water restrictions, bathing beach closures, fish consumption and shellfishing advisories); comparison of data from the NYSDEC ambient monitoring network, other agencies and local or public/citizen monitoring programs with parameter-specific water quality standards; the use of surrogate indicators; and qualitative perception and observational information (stream habitat assessments, recreation use or fisher resource surveys and citizen complaints).

Public input for the WI/PWL is provided through the Water Management Advisory Committee, the Statewide Nonpoint Source Committee, county water quality coordinating committees, citizen's advisory committees for Remedial Action Plans and Lake Management Plans and other interest groups. The WI/WPL also includes input from a public outreach program conducted by local county and soil and water conservation districts working in conjunction with the State.

The WI/PWL categorizes waters according to the severity of the problem (precluded, impaired, stressed, threatened, no known impact/impairment or unassessed waters) and the level of documentation of the problem (known, suspected, possible). Based upon WI/PWL categorization, the State determines which category described in EPA's Integrated Report Guidance the water is to be placed. Waterbody segments listed as "precluded" or "impaired" due to pollutants are listed under Section 303(d), or Category 5, as described in EPA's 2006 Integrated Report Guidance. The State's list identifies the pollutants causing the impairment for each listed segment.

The State also solicited data indicating impairment of waters in the July 10, 2013 Environmental News Bulletin (ENB). The State requested that all data submissions be received by September 30, 2013 to allow the State sufficient time for the review and consideration of all data and information.

NYSDEC organizes the 303(d) list in separate sections, allowing NYSDEC to manage its 303(d) list to meet its different programmatic needs. The following describes the structure and nomenclature of NYSDEC's 303(d) list:

Part 1: Individual Waterbody Segments with Impairments Requiring TMDL Development

These waters have verified impairments that do not fit succinctly into categories of impaired waters (such as those described below)

Part 2: Multiple Segment Categorical Waterbody Impairments Requiring TMDL Development

Part 2a: Waters Impaired by Atmospheric Deposition (acid rain)

Part 2b: Waters Impaired by Fish Consumption Advisories

Part 2c: Waters Impaired by Shellfishing Restrictions

Part 3: Waterbodies for which TMDLs are/may be Deferred

Part 3a: Waterbodies Requiring Verification of Impairment

Part 3b: Waterbodies Requiring Verification of Cause/Pollutant/Source

Part 3c: Waterbodies Awaiting Development/Evaluation of Other Restoration Efforts

Appendix A: Smaller Lakes Impaired by Atmospheric Deposition (Acid Rain)

Part 2a and Appendix A differ only in the size of the affected waterbody

Appendix B: Listed Waterbodies Not Meeting Dissolved Oxygen Standards

The 2014 303(d) list is comprised of 834 waterbody/pollutant combinations as designated by NYSDEC:

- Part 1 includes 218 waterbody/pollutant combinations;
- Part 2a includes 103 waterbody/pollutant combinations;
- Part 2b includes 209 waterbody/pollutant combinations;
- Part 2c includes 27 waterbody/pollutant combinations;
- Part 3a includes 41 waterbody/pollutant combinations;
- Part 3b includes 86 waterbody/pollutant combinations;
- Part 3c includes 35 waterbody/pollutant combinations;
- Appendix A includes 71 waterbody/pollutant combinations; and
- Appendix B includes 44 waterbody/pollutant combinations.

EPA has reviewed the State's description of the data and information considered, its methodology for classifying waters, and the WI/PWL. EPA has also compared the waters listed on New York's 2012 303(d) list with those listed on New York's 2014 303(d) list and found no discrepancies.

EPA investigated interstate waters to ensure assessment and listing consistency between New York and other border states. Differences in listing of interstate waters were noted in Vermont, Connecticut, New Jersey, Massachusetts, and Pennsylvania. Because states have different waterbody classifications and water quality standards, and because data may not be available for an entire waterbody, these differences are not inconsistent with regulatory requirements under 40 CFR 130.7. None of the states that border New York submitted comments on New York State's draft 2014 303(d) list.

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), with the exception of data submitted regarding Jones Inlet/Jones Bay.

EPA sent NYSDEC evidence of an impairment in Jones Inlet/Jones Bay in an e-mail dated February 19, 2014. The e-mail included links to several articles about excess amounts of algae washing up on the shores of Point Lookout Beach; pictures of the algae; and blogs where boaters, fishers and visitors of Jones Inlet/Jones Bay complained about the algae problem. Based on the photographs, articles and citizen complaints, EPA has determined that the narrative standard for nutrients ("None in amounts that will result in growths of algae, weeds and slimes

that will impair the waters for their best usages” 6 NYCRR §703.2) is exceeded in Jones Inlet/Jones Bay. Though nitrogen levels are low in Jones Inlet/Jones Bay, the algal growth is caused by nitrogen originating from sources in the waters of the Western Bays.

Exceedances of the narrative water quality standard for nutrients are evident in Jones Inlet/Jones Bay. NYSDEC has not included these waters on its 303(d) list; therefore, EPA is partially disapproving New York’s 2014 303(d) list and will take subsequent action to add these waters to the list.

Delistings

In the section of the submittal entitled, “DELISTED Waters NOT Included on the 2014 Section 303(d) List,” the State has identified eight waterbody/pollutant combinations for delisting. As per 40 CFR 130.7(b)(6)(iv), the State has shown good cause to delist these eight waterbody/pollutant combinations based on one of the following reasons:

1. Approval or establishment by EPA of a TMDL since the last 303(d) list

Four waterbody/pollutant combinations have been delisted due to completion of new TMDLs:

- Java Lake (0104-0004) for Phosphorus
- Chautauqua Lake, South (0202-0020) for Phosphorus
- Chautauqua Lake, North (0202-0072) for Phosphorus
- Basic Creek Reservoir (1309-0001) for Phosphorus

2. The assessment and interpretation of more recent or more accurate data demonstrate that an applicable water quality standard (WQS) is being met/the use has been restored

Four waterbody/pollutant combinations have been delisted due to water quality standard attainment:

- Keuka Lake (0705-0003) for DDT
- Saint James Pond (1702-0049) for Chlordane/DDT
- Cayuga Lake, Southern End (0705-0040) for Pathogens
- Mattituck or Marratooka Pond (1701-0129) for Metals

Additional Impaired Waters Not Included on the 303(d) List because Development of a TMDL Is Not Necessary

To provide a comprehensive inventory of all waters of New York State that are considered impaired, NYSDEC has included in its submission a number of waterbody/pollutant combinations for which a TMDL is not necessary.

1. TMDL development is not necessary because a TMDL has already been approved or established by the EPA (Integrated Report Category 4a waters).

NYSDEC has placed the following four waterbody/pollutant combinations into Integrated Report Category 4a because a TMDL was approved or established by EPA for these waters since the last listing cycle:

Java Lake (0104-0004) for Phosphorus
Chautauqua Lake, South (0202-0020) for Phosphorus
Chautauqua Lake, North (0202-0072) for Phosphorus
Basic Creek Reservoir (1309-0001) for Phosphorus

2. A TMDL is not necessary because other required control measures are expected to result in the attainment of water quality standards within a reasonable amount of time (Integrated Report Category 4b waters).

NYSDEC has not placed any new waterbody/pollutant combinations into Integrated Report Category 4b since the last listing cycle.

3. A TMDL is not appropriate because the waters are impaired by "pollution" and not by a "pollutant" that can be allocated through a TMDL (Integrated Report Category 4c)

NYSDEC has placed eight waterbody/pollutant combinations in Category 4c. These waterbodies include:

Claverack Creek, Upper, and minor tribs (1310-0048) for Restricted Passage
Jones Inlet/Jones Bay (1701-0373) for Algal/Weed Growth*
Reynolds Channel, East (1701-0215) for Algal/Weed Growth**
Hempstead Bay (1701-0032) for Algal/Weed Growth**
Hog Island Channel (1701-0020) for Algal/Weed Growth**
LI Tidal Tribs to Hempstead Bay (1701-0218) for Algal/Weed Growth**
Reynolds Channel, West (1701-0216) for Algal/Weed Growth**
Woodmere Channel (1701-0219) for Algal/Weed Growth**

*As noted, EPA has determined that the narrative standard for nutrients in these waters is exceeded and will take subsequent action to add these waters to the list as impaired for nitrogen.

**These waters are also included on the 2014 303(d) list as impaired for nitrogen.

Priority Ranking

EPA regulations codify Section 303(d)(1)(A) of the Clean Water Act, which requires states to 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 to identify those waterbody segments targeted for TMDL development in the next two years. In prioritizing and targeting waters, states must take into account the severity of the pollution and the uses of the waters. See Section 303(d)(1)(A) of the Act. States may consider other factors relevant to prioritizing waters for TMDL development, including immediate programmatic needs, vulnerability of particular waters as aquatic habitats, recreation, economic and aesthetic

importance of particular waters, degree of public interest and support and state or national policies and priorities. See *57 Federal Register* 33040, 33045 (July 24, 1992) and EPA's 1991 Guidance.

The State has identified 121 waterbodies for which TMDLs will be completed over the next two years. These waters are considered high priority for TMDL development, while the remaining waters on the 303(d) list have been ranked as medium or low priority for TMDL development.

According to NYSDEC's Listing Methodology, the identification of high priority waters is based on factors such as the current understanding of the water quality problem and sources, the availability of the necessary data to develop a TMDL and the value (i.e. presumed effectiveness) of a TMDL toward addressing the problem and other factors. To provide a more general sense of these factors and their impact on priorities, and the timing of TMDL development, the waters on the 303(d) list are segregated into sub-parts, as described on page three of this document. These sub-parts allow for clarification of widely differing conditions, limitations and other circumstances that affect the scheduling and development of TMDLs or other strategies.

EPA has reviewed the State's priority ranking of listed waters for TMDL development and concludes that the State properly took into account the severity of pollution and the uses to be made of the waters. EPA also believes that the 121 waterbodies selected by New York State for completion over the next two years are appropriate waters to target for near-term TMDL development.

Public Participation

The NYSDEC public participation process for developing its 2014 Section 303(d) list included public solicitation of data, requests for comment on the methods document and requests for comments on the draft 303(d) list. NYSDEC announced the availability of its 303(d) list in the State's January 29, 2014 ENB and provided a public comment period, which ended on March 14, 2014. Following the conclusion of the comment period, the State provided copies of all comments and responses received during the data solicitation and public comment periods to EPA. Based upon its review of the State's "Response to Comments," EPA concludes that NYSDEC adequately addressed the issues raised in the comments received on the 2014 303(d) list, with the exception of comments regarding Jones Inlet/Jones Bay.

