

303(d) List Decision Template

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1. Introduction

This document sets forth the U.S. Environmental Protection Agency's (EPA) reasoning for approving New Hampshire's 2024 Clean Water Act (CWA) Section 303(d) list (303(d) list). The EPA received New Hampshire's 2024 303(d) list on December 18, 2024, through electronic correspondence (i.e., email).

The EPA has conducted a complete review of the state's 2024 303(d) list and supporting documentation and information, including changes from the previous 303(d) list. The 2024 303(d) list, supporting documents, and historical lists can be accessed on the New Hampshire Department of Environmental Services (NHDES) website at <https://www.des.nh.gov/water/rivers-and-lakes/water-quality-assessment/swqa-publications>. Based on this review, the EPA has determined that the state's 303(d) list of water quality-limited segments (WQLSs)¹ still requiring TMDLs (i.e., Category 5 of the state's Integrated Report (IR)) satisfies the requirements of Section 303(d) of the CWA and the EPA's implementing regulations. Therefore, the EPA hereby approves New Hampshire's 2024 303(d) list.

2. The EPA's Analysis of New Hampshire's Submission

Section 303(d)(1) of the CWA and the EPA's implementing regulations at 40 CFR 130.7 require states, territories, and authorized Tribes (herein referred to as "states") to identify waters for which effluent limitations required by CWA Section 301(b)(1)(A) and (B) are not stringent enough to implement any applicable water quality standard. States need not identify on their lists 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. 40 CFR 130.7(b)(1) and (2). CWA Section 303(d) lists must identify WQLSs still requiring TMDLs. 40 CFR 130.7(b)). The definition of "water quality limited segment" in 40 CFR 130.2(j) includes any segment where it is known that water quality does not meet applicable water quality standards (referred to as "impaired waters") and any segment that is not expected to meet applicable water quality standards (referred to as "threatened waters").¹ The term "applicable water quality standards" refers to those water quality standards established under Section 303 of the Act, including numeric criteria, narrative criteria, waterbody uses, and antidegradation requirements. 40 CFR 130.7(b)(3). A WQLS must be on the 303(d) list and requires a TMDL unless the state can demonstrate that no pollutant(s) causes or contributes to the impairment.² In addition, in developing their CWA 303(d) lists, states must meet several procedural, submission, and content requirements as described in this decision document.

States must submit their 303(d) lists to the EPA on April 1 of every even-numbered year. 40 CFR 130.7(d)(1). The EPA must approve or disapprove the 303(d) list not later than 30 days after submission. The EPA approves a list only if it meets the requirements of 40 CFR 130.7(b). 40 CFR 130.7(d)(2). If the EPA approves the listing(s), the state must incorporate the listing(s) into its current Water Quality Management (WQM) plan. If the EPA disapproves a listing decision(s), the EPA must, not later than 30 days after the date of such disapproval, identify waters for inclusion on the 303(d) list

¹ EPA uses this term to reflect the combination of a water segment and an applicable WQS that is not attained or is threatened. For example, if a segment is not meeting three applicable WQS then there are three WQLS for that segment.

²See CWA Sections 303(d)(1)(A) and 303(d)(1)(C); 40 CFR § 130.7(b)(4); 2006 Integrated Reporting Memorandum, page 60; 2024 Integrated Reporting Memorandum, pages 18-19. EPA Integrated Reporting Memoranda may be found at <https://www.epa.gov/tmdl/integrated-reporting-guidance-under-cwa-sections-303d-305b-and-314>.

(i.e., add the waters to the list). The EPA then must promptly issue a public notice seeking comment on the listing(s). After considering public comment and making any revisions the EPA deems appropriate, the EPA must transmit the listing(s) to the state, which must incorporate the listing(s) into its WQM plan. 40 CFR 130.7(d)(2).

The statutory and regulatory requirements, and the EPA’s review of the state’s compliance with the requirements, are described in detail in this document. To the extent that any EPA-approved listing decisions are unchanged from prior approved Section 303(d) list actions, EPA incorporates the reasoning of those previous list actions unless otherwise noted.

A. Supporting documentation for making listing determinations

The EPA regulations at 40 CFR 130.7(b)(6) require states to include, as part of their submissions to the EPA, documentation to support the state’s determination to list or not to list its waters. Such documentation must include, at a minimum, the information discussed in subsections i through iv, immediately below.

i. Description of the methodology used to develop the 303(d) list. 40 CFR 130.7(b)(6)(i).

The EPA regulations at 40 CFR 130.7(b)(6) require states to include a description of the methodology used to develop the 303(d) list.³ EPA does not approve or disapprove assessment methodologies. Instead, in acting on CWA 303(d) lists, EPA evaluates whether the state, territory, or authorized tribe met listing requirements in determining whether applicable WQS are met and included waters requiring TMDLs on its 303(d) list. 2024 Integrated Reporting Memorandum (IR Memo) at 15.

The EPA finds that New Hampshire has provided a description of its methodologies used for determining whether its waters are achieving the state’s WQS, satisfying the regulatory requirement to provide a “description of the methodology used to develop the list.” 40 CFR 130.7(b)(6)(i). See the document titled *2024 Section 305(b) and 303(d) Consolidated Assessment and Listing Methodology* (December 18, 2024). The EPA has considered the state’s methodology as part of its review of the state’s 303(d) list.

ii. Description of the data and information used to identify waters. 40 CFR 130.7(b)(6)(ii).

The EPA regulations at 40 CFR 130.7(b)(6)(ii) require states to provide a description of the data and information used to identify waters, including a description of the data and information used by the state as required by 40 CFR 130.7(b)(5). The EPA finds that New Hampshire has provided a description of the data and information that it assembled and evaluated. 40 CFR 130.7(b)(6)(ii). Section 1.3 – Data of NHDES’s *2024 Section 303(d) Surface Water Quality List Content introduction* discusses the data used and points to where it is available. The EPA has considered the state’s description as part of its review of the state’s 303(d) list.

³EPA’s Integrated Reporting Memoranda provide more information on assessment methods. See 2006 Integrated Reporting Memorandum at 29.

iii. A rationale for any decision to not use any existing and readily available data and information for any one of the categories of waters as described in 40 CFR 130.7(b)(5). 40 CFR 130.7(b)(6)(iii). The EPA regulations at 40 CFR 130.7(b)(6)(iii) require states to provide a rationale for any decision to not use any existing and readily available data and information for any one of the categories of waters as described in 40 CFR 130.7(b)(5). 40 CFR 130.7(b)(6)(iii). The EPA evaluates whether a state provides a technical, science-based rationale for decisions not to use data or information in developing the list.⁴ The EPA finds New Hampshire did not provide a rationale for not using the data it assembled and evaluated to develop its list, as they considered and evaluated all readily available data and information 40 CFR 130.7(b)(6)(iii).

iv. Other reasonable information requested by the Region. 40 CFR 130.7(b)(6)(iv). The EPA regulations at 40 CFR 130.7(b)(6)(iv) require states to provide any other reasonable information requested by EPA. Upon request by EPA, each state must demonstrate good cause for not including a water or waters on the list. Consistent with 40 CFR 130.7(b)(6)(iv), good cause includes, but is not limited to:

- assessment and interpretation of more recent or accurate data in the record demonstrate that the applicable WQS is met;
- more sophisticated water quality modeling;
- flaws in the original analysis that led to the water being listed;
- changes in conditions.

Good cause may also include, for example (see, e.g., 2006 IR Memo at 58-59):

- EPA approved or established TMDL;
- demonstration that the impairment is being addressed through more stringent effluent limits or other pollution control requirements; or
- demonstration that the impairment is not caused by a pollutant.

The EPA finds New Hampshire provided additional reasonable information requested by EPA. Specifically, NHDES: (1) clarified discrepancies between past list decisions and undocumented changes in the 2024 list; (2) provided justification for removing listings when Assessment Units were combined; and (3) provided responses to questions on the NHDES CALM. Additional correspondence between EPA and NHDES on the 303(d) list submission and draft versions of it can be found in the Administrative Record. EPA has considered this information as part of its review of the state's 303(d) list.

B. Public participation

The EPA regulations require states to provide for public participation in the development of their 303(d) lists, including describing their process for involving the public and other stakeholders in their Continuing Planning Processes (CPPs). 40 CFR 130.7(a). States are expected to demonstrate how they considered public comments in their final decisions. The EPA considers the public comments and state responses as appropriate in its actions on 303(d) lists in determining whether a state has provided reasoned support for its submission. See 2006 IR Memo at 25-26.

⁴ 2024 IR Memo at FN 15 (citing court cases); 2006 IR Memo at 37 (EPA evaluates whether there is a "reasonable technical rationale").

NHDES released its assessment-related documents (including the 303(d) list and integrated report) for public comment on September 20, 2024. This submission included a Consolidated Assessment and Listing Methodology, an integrated report, spreadsheet files of the status of waters, and several other supporting texts. The documents were provided on NHDES's website at <https://www.des.nh.gov/water/rivers-and-lakes/water-quality-assessment/swga-publications>. The public comment period was open through October 21, 2024.

NHDES received three sets of comments on their assessment-related documents from:

- 1) OspreyOwl Environmental, LLC;
- 2) Connecticut River Conservancy; and
- 3) USEPA Region 1.

The first comment addressed proposed changes to the state's methodology for assessing aluminum criteria. These changes have not been formally submitted to EPA. As NHDES outlined in their responses, in general, these comments are not directly relevant to the 2024 assessment. Instead, these comments are more appropriately addressed through permitting or water quality standards processes. Overall, EPA finds that NHDES adequately addressed those parts of the comments that pertained to its assessment methodology.

The Connecticut River Conservancy's (CRC) comments addressed programmatic issues related to the state's general approach to Clean Water Act assessments rather than a focus on any given assessment unit's assessment decision. For example, CRC highlighted the large quantity of waterbodies that are in Category 3 due to lack of data. CRC emphasized that capacity building is the key to developing a robust assessment of NH waters and advocated for providing more staff support and funding programs such as the Volunteer River Assessment Program to ensure adequate data is provided. EPA finds that NHDES adequately addressed the comments submitted by CRC.

USEPA Region 1's comments addressed NHDES's 2022-2032 Vision and not the 303(d) list. NHDES responded to these comments adequately. EPA did not submit formal comments on the draft 303(d) list.

The EPA concludes New Hampshire provided an opportunity for public comment on its 303(d) list consistent with 40 CFR 130.7(a). In addition, the state demonstrated how it considered public comments in its final decision.

C. Assembling, evaluating, and using data and information

i. Assemble and evaluate data and information

States must assemble and evaluate all existing and readily available water quality-related data and information to develop the CWA 303(d) list. 40 CFR 130.7(b)(5). In reviewing a state's 303(d) list submission, the EPA considers whether the state has satisfied the requirements under 40 CFR 130.7(b)(5) to assemble and evaluate all existing and readily available water quality-related data and information when developing their CWA 303(d) lists. This includes, at a minimum, all 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 non-attainment of applicable water quality standards; (3) waters for which water quality problems have been reported by local, state, and federal agencies; members of the public; academic institutions (these organizations and groups should be actively solicited for research they may be conducting or reporting); and (4) waters identified as impaired or threatened in any CWA Section 319 nonpoint source assessment submitted to the EPA. In addition to these minimum categories, states are required to assemble and evaluate any other water quality-related data and information that is existing and readily available. 40 CFR 130.7(b)(5).

The EPA has reviewed the state's submission, including the state's description of the data and information that it assembled and evaluated and finds that the state satisfied the requirement to assemble and evaluate all existing and readily available water quality-related data and information to develop its list under 40 CFR 130.7(b)(5).

As part of the preparation of its assessment document, on December 19, 2022, NHDES sent out a request for data/information for the 2024 305(b)/303(d) submission. See 2024 NH CALM at page 21. The request was posted on the NHDES website and transmitted to a wide variety of historically interested parties, including municipalities, environmental organizations, research institutions, and government agencies.

Data used for assessment is collected and stored by NHDES in its Environmental Monitoring Database (EMD). Data is primarily collected by NHDES but also includes data from the Volunteer Lakes Assessment Program and Volunteer Rivers Assessment Program, the Piscataqua River Estuaries Partnership, the University of New Hampshire, and USEPA. NHDES's CALM outlines how it utilizes the data, see Chapter 3. EPA is not aware of data that was available in the EMD or from third parties that was not used for assessment purposes during this cycle.

ii. Use of data and information

States must use existing and readily available water quality-related data and information in developing the CWA 303(d) list, 40 CFR 130.7(b)(5), unless they provide a rationale not to use them, 40 CFR 130.7(b)(6)(iii). The EPA evaluates whether a state provides a technical, science-based rationale for decisions not to use data or information in developing the list.⁵

The EPA evaluated whether New Hampshire provided a technical, science-based rationale for any decisions not to use existing and readily available water quality-related data or information to make a WQS attainment status determination and concluded the state was not required to provide such a rationale for the purposes of 40 CFR 130.7(b)(6)(iii).

D. Identification of waters for inclusion on the Section 303(d) list

As noted above, the EPA regulations at 40 CFR 130.7(b)(6) require states to provide documentation to support the state's determination to list or not to list its waters. EPA has reviewed the state's

⁵ See FN 4.

submission, including its assessment methodology and additional supporting documentation for its listing determinations.

i. Approval of Identification of waters for inclusion on the 303(d) list

The EPA determined that New Hampshire's 2024 303(d) list encompasses waters consistent with the CWA 303(d) and 40 CFR 130.7 requirements, and the EPA is approving all waters the state included on the 303(d) list. The EPA's approval of the waters on the 303(d) list is based on the EPA's review of the state's submission including the description of the data and information concerning individual waters, documentation to support decisions to rely or not rely on particular data and information, and a description of how data and information were applied to make WQS attainment status determinations. As referenced above, the EPA also considered applicable public comments and responses.

Appendix A of NHDES's submission includes a spreadsheet of all WQLS in New Hampshire. A total of 2,767 impairments were submitted as part of this 2024 submission with multiple impairments for some waterbodies. Of these, 56 impairments were newly added to the 2024 list. Additions to the 2024 list, from the 2022 list are described and justified in the report, *Impairments Added to the 2024 303(d) List of Threatened or Impaired Waters*, available with the other assessment documents. NHDES thoroughly documented its analysis by including a narrative summary, summary statistics, and graphs. The new impairments NHDES identified highlight the wide-ranging scope of the state's monitoring program, with impairments due to metals, bacteria, chloride, chlorophyll-a, cyanobacteria, dissolved oxygen, bioassessments, and pH added this cycle. EPA provided clarifying comments and questions in emails to NHDES on July 5 and October 3, 2024. These questions touched on clarification of NHDES's assessment methodology, discrepancies in reported data, discrepancies between previous IR submissions and the current one, to name a few. EPA found that NHDES's responses adequately addressed EPA's concerns and where corrections were needed, NHDES made them.

ii. Approval of exclusion of waters identified on previous 303(d) lists

New Hampshire's 2024 303(d) list submission delists 9 WQLSs (12 impairments). In reviewing the state's 2024 303(d) list, the EPA carefully considered the state's decision to remove certain WQLSs from the 303(d) list submission, its justification for those removals, any applicable comments and responses, and the methodology used in making those decisions. The EPA concludes that the decisions to remove WQLS identified as part of the 303(d) list are reasonable, based on all existing and readily available water quality-related data and information, applicable WQS, and sound science, and the removal decisions are properly justified.

Consistent with the EPA's regulations at 40 CFR 130.7(b), the state appropriately moved previously-listed waters to Category 4a of the IR where an EPA-approved TMDL is now in place. The following four waterbody-impairment combinations were moved to 4A due to the completion of a TMDL.

- Haunted Lake (NHLAK700060605-04-01). Chlorophyll-a for Aquatic Life Integrity. TMDL Action ID: R1_NH_2019_01.
- Haunted Lake (NHLAK700060605-04-01). Total Phosphorus for Aquatic Life Integrity. TMDL Action ID: R1_NH_2019_01.
- Shellcamp Pond (NHLAK700060201-05). Chlorophyll-a for Aquatic Life Integrity. TMDL Action ID: R1_NH_2022_1.

- Shellcamp Pond (NHLAK700060201-05). Total Phosphorus for Aquatic Life Integrity. TMDL Action ID: R1_NH_2022_1.

The majority of the impairments that were removed from the 303(d) list this cycle were due to new data indicating lack of impairment. In these cases, no TMDL was developed but the waterbody recovered and now meets WQS for unspecified reasons. The following waterbody-impairment combinations moved from category 5 to category 2.

- Hampton/Seabrook Harbor – Hampton Harbor Beach (NHEST600031004-09-06). Bacteria for Secondary Contact Recreation (i.e., boating).
- McQuesten Brook (NHRIV700060803-16). Dissolved Oxygen Saturation for Aquatic Life Integrity.
- Powwow Pond (NHIMP700061403-04). Chlorophyll-a for Aquatic Life Integrity
- Squamscott River North (NHEST600030806-01-02). Chlorophyll-a for Primary Contact Recreation.
- New Pond (NHLAK700060201-03). Chlorophyll-a for Primary Contact Recreation.

Three additional impairments were removed from the 303(d) list for unique reasons, which are discussed further below.

- Bellamy River – Unnamed Brook (NHRIV600030903-09). Chlorophyll-a for Primary Contact Recreation
- Powwow Pond (NHIMP700061403-04). Phosphorus (Total) for Aquatic Life Integrity.
- Nesenkeag Brook (NHRIV70061002-05). Macroinvertebrates for Aquatic Life Integrity.
 - 5-M to 3-ND. Mistakenly impaired due to sampling on adjacent A.U. That sampling was also marginal and likely wouldn't have lead to an impairment decision now.

For the Bellamy River, successful dam removal projects were largely responsible for the improvement in water quality. Dissolved oxygen concentration had been removed from the 303(d) list during a previous cycle, while this cycle dissolved oxygen percent saturation was also found to be meeting water quality standards. Chlorophyll-a concentrations were meeting the state's assessment threshold and so the assessment unit was moved to Category 2.

Powwow Pond's chlorophyll-a concentrations were at concentrations no longer indicating impairment based on assessment thresholds for mesotrophic lakes. Phosphorus was still above thresholds for mesotrophic lakes. However, given the lack of identified biological impact (i.e., elevated chlorophyll-a levels), NHDES has also removed the total phosphorus impairment from the list. Given that phosphorus levels have not yet fallen below the mesotrophic threshold, NHDES has chosen to move this impairment to Category 3, consistent with their assessment methodology for waterbodies without chlorophyll-a impairments but elevated phosphorus.

Nesenkeag Brook's macroinvertebrate impairment was also moved from category 5 to category 3. In developing the 2024 303(d) list, NHDES had found that the original impairment was a mistake. The data the impairment decision was based on was for an adjacent assessment unit, rather than this assessment unit. Further, the data was marginal, with one value above and one below the state's

assessment threshold. Given the borderline status of this data, the state has chosen not to list the other assessment unit as impaired.

E. Identification of pollutants causing or expected to cause a violation of applicable WQS (130.7(b)(4))

As part of their CWA 303(d) lists, states are required to identify the pollutants causing or expected to cause violations of the applicable WQS. 40 CFR 130.7(b)(4). This includes a pollutant that by itself or in combination with other pollutants causes or is expected to cause violations of applicable WQS. States must identify in their 303(d) lists all pollutants that are known to be causing or are expected to cause violations of the applicable WQS. 40 CFR 130.7(b)(4), see also, 2024 IR memo at 17-19. For listed waters, if the available data and information do not support identification of pollutants causing or expected to cause the exceedance, list submissions would identify the pollutant as “unknown.”

Consistent with 40 CFR 130.7(b)(4), New Hampshire appropriately identified the pollutants that were causing or expected to cause a violation of the applicable WQS.

F. Priority ranking and two-year TMDL development (130.7(b)(4))

The CWA and the EPA’s regulations, require states to establish a priority ranking for the waters on their CWA 303(d) list “taking into account the severity of the pollution and the uses to be made of such waters.” CWA Section 303(d)(1)(A); 40 CFR 130.7(b)(4). The regulations at 40 CFR 130.7(b)(4) provide that this priority ranking must include “all listed water quality limited segments still requiring TMDLs” and further require that states submit their priority rankings to the EPA as a component of their biennial CWA 303(d) lists. Additionally, the regulations require that the priority ranking identify the waters targeted for TMDL development in the next two years. 40 CFR 130.7(b)(4).

NHDES’s description of how all listed WQLSs are prioritized for TMDL development, including identification of waters targeted for TMDL development in the next two years, is included within the State’s 303(d) list submission. In addition, New Hampshire described how its priority ranking took into account the severity of pollution and the uses to be made of such waters.

New Hampshire’s prioritization scheme for TMDL development is outlined in its Consolidated Assessment and Listing Methodology. See Section 3.1.26. While the scheme is flexible, the state places the highest priority on impairments that impact public water supplies, outstanding resource waters, designated beaches, and waters designated as “natural” under the Rivers Management and Protection Act (RSA 483). In addition, if the impairment poses a threat to human health or federally recognized threatened or endangered species, the waterbody is prioritized for TMDL development. Once a preliminary ranking is made based on the above factors, practical decisions further refine the prioritization scheme. Some considerations include whether there is public support, legal requirements to develop the TMDL, public support for the TMDL, and technical feasibility.

In support of the prioritization scheme, NHDES is also working with EPA to update the Recovery Potential Screening Tool. This is a tool designed to aid in TMDL selection with waterbodies ranked based on their potential for water quality restoration. While not a replacement for the prioritization scheme detailed above, NDHES sees RPST as an important complement to determining where to

allocate limited TMDL-development resources. Section 2.2 *Prioritization* of NHDES's 2022-2032 Vision provides further details on NHDES's prioritization scheme.

EPA's review of NHDES's submission finds that the state established a priority ranking for all waters on the CWA 303(d) list, taking into account the severity of the pollution and the uses to be made of such waters.⁶ In addition, the state identified the waters targeted for TMDL development in the next two years.

G. Tribal Consultation by EPA

EPA's policy is to consult on a government-to-government basis with federally recognized tribal governments when EPA actions and decisions may affect Tribes. To promote coordination and consultation, all Tribes that may be affected by EPA's upcoming action on the state's CWA 303(d) list were identified, notified of the upcoming state's list submission for EPA action, and offered the opportunity to engage in consultation with EPA. There are no federally recognized tribal governments in New Hampshire and therefore EPA did not consult with any Tribes.

3. Summary of EPA's decision on the 2024 CWA 303(d) list

After careful review of New Hampshire's final CWA 303(d) list submission package, EPA has determined that New Hampshire's 2024 303(d) list meets the requirements of Section 303(d) of the CWA and EPA's implementing regulations. Therefore, EPA approves New Hampshire's 2024 303(d) list.

⁶ In addition to these two statutory factors, states may also consider other factors when prioritizing TMDLs. See 57 Fed. Reg. 33040, 33,044-45 (July 24, 1992).