

February 25, 2022

Water Assessment and Implementation Section
NYSDEC, Bureau of Water Assessment and Management
625 Broadway, 4th Floor
Albany, NY 12233-3502

Re: Comments on State’s Draft Section 303(d) List of Impaired/TMDL Waters

Dear Sir or Madam:

Pace Environmental Litigation Clinic (“PELC”) submits the following comments on behalf of Riverkeeper, Inc. (“Riverkeeper”) regarding the New York State Department of Environmental Conservation’s (“DEC”) Draft 2020-22 New York State Section 303(d) List of Impaired/TMDL Waters (the “Draft List”).

The Draft List would remove nearly 300 known impairments from the list; not because the pollution impairments have been remedied, but because the agency essentially moved the goalposts for including them. The state changed its methodology for listing waters, stopped testing for certain pollutants, and ignored clear evidence of severe impairments. As discussed in further detail below, DEC has delisted waters impaired by PCBs, dioxin and mirex contamination, silts and sediments, and “biological impacts.”

As DEC changes its listing methodologies, it is crucial to remain aware that waters may fail to achieve their designated uses even where water quality criteria are satisfied, and such waters must remain on the 303(d) list. “The water quality standard is attained when all designated *uses and associated criteria* are met as determined in accordance with a state’s or territory’s assessment and listing methodology.”¹

Riverkeeper understands the value of having a clear and accurate system of categorization and appreciates the important role of the 303(d) list as a step toward remediating poor water quality. It is most important for DEC, moving forward, to address issues arising from the application of its methodology to available water quality data. As described throughout this comment, the changes in methodology and how it's implemented, along with DEC’s ongoing failure to monitor or even sample for certain pollutants, have caused multiple erroneous delistings or failures to list waterbodies that are clearly known to be impaired for their uses due to excessive pollution.

I. Although positive changes within the data management system are welcome, inclusion of all available and reliable data is not observed in the Draft List.

¹ Memorandum from Robert H. Wayland III, Dir., Off. of Wetlands, Oceans and Watersheds, to EPA Regional Water Mgmt. Dirs., EPA Reg’l Sci. & Tech. Dirs., State Territory and Authorized Tribe Water Quality Program Dirs., “2002 Integrated Water Quality Monitoring and Assessment Rep. Guideline” 4 (Nov. 19, 2001) (emphasis added), https://www.epa.gov/sites/default/files/2015-10/documents/2002_02_13_tmdl_2002wqma.pdf.

Before addressing shortcomings in the Draft List, Riverkeeper acknowledges the benefits of the new methodologies. DEC has proposed nearly 250 new listings, including more than 60 waterbody segments in the Hudson River Watershed. It is commendable that DEC has systematically identified where available data demonstrates impairments. We particularly appreciate the addition of Sturgeon Pool, part of the Wallkill River, to the Draft List. The Wallkill River is in dire need of a phosphorus TMDL, and listing this pool will allow this TMDL to proceed. We also acknowledge that in May 2021, DEC released a revised Consolidated Listing and Assessment Methodology (“CALM”) that laid out a streamlined process for assessing water quality impairments and lesser impacts. At the same time, DEC staff have briefed Riverkeeper staff on changes to the DEC water quality database and data analysis processes that have helped the agency to analyze data more rapidly and comprehensively. It is encouraging to see these new processes result in important listings such as Sturgeon Pool.

Yet other waterways seem to have been overlooked. Developing a TMDL for the Mohawk River has been a DEC priority since at least 2012,² and a draft phosphorus TMDL for the Mohawk Watershed is anticipated to be completed this year.³ This work has proceeded without including the Mohawk River on the List of Impaired Waters. Only two waterbody segments in the Mohawk River Watershed (Steele Creek tributaries, 1201-0197, and Ballou, Nail Creeks and tributaries 1201-0203), each a relatively minor contributor to the total Mohawk River flow, are included on the Draft List for phosphorus.

The Mohawk River’s absence from the Draft List is not due to a lack of data. In 2015 and 2016, DEC increased its sampling efforts in the Mohawk River Watershed and also partnered with the United States Geological Survey (“USGS”) to further expand its monitoring capacity, with the express purpose of updating the Waterbody Inventory/Priority Waterbodies List (“WI/PWL”) and making progress toward a TMDL.⁴ The Water Quality Exchange database contains over 1,500 surface water phosphorus measurements from the Mohawk River Watershed, taken every year from 2012 to 2020, and over 330 fecal indicator bacteria measurements taken in 2016. Phosphorus eutrophication and elevated levels of fecal-indicator bacteria are well documented in the watershed.⁵

² N.Y. State Dep’t of Env’tl. Conservation, Mohawk River Basin Action Agenda, 2012-2016 14 (Katherine M. Czajkowski, Mohawk Watershed Coordinator, 2012) (explaining that “Critical Total Maximum Daily Load (TMDL) for affected portions of the Mohawk River should be established.”), https://www.dec.ny.gov/docs/water_pdf/mohawkactionag2012.pdf.

³ Pers. comm. Kathy Czajkowski, Mohawk Watershed Coordinator, and Andrea Conine, Research Scientist, N.Y. State Dep’t of Env’tl. Conservation (May 7, 2021).

⁴ Alexander J. Smith, Ph.D., N.Y. State Dep’t of Env’tl. Conservation, Progress Report-Mohawk River Basin Action Agenda: Env’t Sustainability and Flood Hazard Risk Reduction 24 (Mar. 2018) (detailing how “data from this project will be used beginning in 2017 to update the DEC Division of Water’s Waterbody Inventory/Priority Waterbody List for the Mohawk River...the data will be used to calibrate a water quality model the DEC is developing in collaboration with the USGS. This model will be used to...improve and protect water quality throughout the watershed. This will be accomplished through the DEC[’s]...[TMDL] process.”), https://www.dec.ny.gov/docs/water_pdf/mohawkprgrpt18.pdf.

⁵ E.g. N.Y. Water Sci. Ctr., *Mohawk River Basin Water Quality*, U.S. Geological Survey (Aug. 29, 2017), <https://www.usgs.gov/centers/new-york-water-science-center/science/mohawk-river-basin-water-quality> (last accessed Feb. 22, 2022); Andrea Conine, et al., *Characterization of disinfection by-product formation potential in Mohawk River source waters to support TMDL implementation*, Proceedings of the 2019 Mohawk Watershed

Riverkeeper notes that the Draft List is the first list since 2012 to include new listings within the Mohawk River watershed. While four new segments are included in the Draft List, none of those are listed for phosphorus, and there are no new listings for pathogens. Riverkeeper appreciates the steady progress that has been made toward developing a phosphorus TMDL for the Mohawk River and agrees that a TMDL is of high importance. However, a complete and accurate assessment of the watershed, reflected in updates to the WI/PWL and, where appropriate, the 303(d) List, are fundamental to ensuring full access to the broad array of NYS funding and programs to reduce pollution and protect designated waterbody uses. DEC must update the WI/PWL and Draft List to accurately reflect the full body of data available in the Mohawk River Watershed.

II. DEC must consider and incorporate readily available data from multiple sources.

While DEC appears to have made progress in using available data from some sources to update the Draft List, it is apparent that important datasets were not consulted. DEC must integrate relevant datasets across both DEC and the New York State Department of Health (“DOH”), as well as the United States Environmental Protection Agency (“EPA”), where appropriate. DEC has access to several disparate sources of relevant data that have not been utilized to create a comprehensive list. For instance, it appears that data gathered by public drinking water systems and reported to DOH have not been comprehensively analyzed, nor have data from DEC/DOH efforts to screen for PFOA, PFOS and 1,4-dioxane. DEC must consider datasets across both DEC and DOH to ensure that the effort to utilize all available water quality data continues. The consideration of these databases is essential to ensure the Draft List continues to reflect accurate and full data.

In addition, as discussed further in the following sections, the set of databases relied upon in making the Draft List must include the Division of Remediation’s various hazardous waste programs and the Division of Wildlife’s fish tissue sampling. Other agency datasets must be included, including DOH’s fish advisories (based on the DEC fish tissue sampling) and DOH drinking water data. Although inclusion of datasets is not limited to these alone, the syncing of these databases is necessary to complete the goals of the DEC-DOH formation.

DEC must consider readily available data and information. *See* 40 CFR § 130.7(b)(5) (2022). This is especially true where the accuracy of the data is confirmed and relied upon by other divisions within DEC or other state agencies. It is incumbent upon DEC to create a combined database of all data available to the state, or otherwise ensure that relevant data informs the list.

III. DEC must monitor for PCBs and pathogens and consider available data for these pollutants, as a complete 303(d) list cannot be compiled without such data.

Symposium, vol. 11, Mar. 22, 2019; Thomas Suro et al., *Development of a water-quality model for the Mohawk River*, Proceedings of the 2018 Mohawk Watershed Symposium, vol. 10, Mar. 23, 2018; Alexander J. Smith & E. Nystrom, *Enhanced water quality monitoring in support of modeling efforts in the Mohawk River Watershed*, Proceedings of the 2017 Mohawk Watershed Symposium, vol. 9, Mar. 17, 2017.

DEC has prepared the Draft List despite a lack of data for several pollutants in many waterbodies or water body segments. This shortcoming results from a combination of (1) DEC's decision not to perform its own monitoring and sampling, (2) DEC's disregard of readily available data within DEC as well as from other state and federal agencies, and (3) DEC making it impractical for the public to successfully submit community science data. The combination of these shortcomings results in the errant delisting of many waterbodies and waterbody segments, where DEC is basing its decisions on no sampling data whatsoever, even when relevant data and information are readily available. Riverkeeper recognizes that there is a balance between "employing only the very highest quality data, and employing as much useful information about the condition of as many segments as possible,"⁶ and we contend that DEC has up-ended that balance by ignoring and/or placing less weight on useful and credible information the agency once relied upon.

This is especially true with respect to PCBs and pathogens. As discussed above, states are required to consider and "evaluate all existing and readily available water quality-related data and information" in developing 303(d) lists. 40 CFR § 130.7(b)(5) (2022). It appears that DEC has not sampled for either of these pollutants since 2013.⁷ Sampling for PCBs and pathogens must be conducted regularly for the conditions of waterways to be properly determined, and DEC's own listing methodology requires the use of data that is no older than 10 years.

Moreover, DEC is not relieved of its obligations under 40 CFR § 130.7(b)(5) to consider all relevant data just because the agency decided to no longer sample for either PCBs or pathogens. Indeed, such data includes fish tissue and pathogen data:

[f]or purposes of determining whether a segment is impaired and should be included on section 303(d) lists states are required to consider all existing and readily available data and information (see 40 CFR 130.7 [2005]). This should include physical, chemical and biological data, including *data on pathogens* (such as bacteria and phytotoxins) as well as *fish and shellfish tissue concentration data*, where such data are existing and readily available.⁸

⁶ Memorandum from Diane Regas, Dir., EPA Off. of Wetlands, Oceans and Wetlands, to Regional Water Division Dirs., "Guidance for 2006 Assessment, Listing and Reporting Requirements Pursuant to Sections 303(d), 305(b) and 314 of The Clean Water Act", 32 (Jul. 29, 2005) [hereinafter Regas Memorandum 2005], <https://www.epa.gov/sites/default/files/2015-10/documents/2006irg-report.pdf>.

⁷ *Exhibit A*, Presentation, N.Y. State Dep't of Env'tl. Conservation Division of Water, Water Quality and Assessment Programs, at slide 12 (2013) ("Reductions to RIBS; elimination of: 2 sampling events; coliform analysis; PCB/pesticide analysis from sediment and tissue chemistry; [and] diatom community analysis."); *see also* National Water Quality Monitoring Council, Water Quality Portal, <https://www.waterqualitydata.us/> (last accessed Feb 24, 2022).

⁸ Regas Memorandum 2005, *supra* note 6, at 60 (emphasis added).

There is a wealth of data available on PCB contamination in the Hudson River below Fort Edward and Hudson Falls,⁹ and elsewhere in the state,¹⁰ which DEC must examine as part of its 303(d) decision-making process. This is especially true where a Superfund Record of Decision has been published.¹¹ For instance, DEC should review the EPA and USGS Water Quality Data Portal,¹² as well as EPA’s STORET Legacy Data Center.¹³ These PCB and other Superfund data must be incorporated into DEC’s database and decision-making to ensure impairments that are grounded in ample data are not ignored.¹⁴

Moreover, DEC must solicit and consider as evidence of impairment, “closures, restrictions and/or advisories applicable to *swimming, fish consumption, and drinking water.*”¹⁵

⁹ E.g., U.S. Env’t. Prot. Agency, *Hudson River PCBs Site Reassessment Reports*, www3.epa.gov/hudson/reports.htm (last visited Feb 23, 2022); National Oceanic and Atmospheric Administration DIVER [Data Integration Visualization Exploration and Reporting] database, www.diver.orr.noaa.gov (last visited Feb 23, 2022).

¹⁰ E.g., Simon Litten, Contaminant Assessment and Reduction Project [CARP] Water (N.Y.S. Dept. of Env’t Conservation Bureau of Water Assessment and Management, Div. of Water eds. Aug. 2003), available at www.dec.ny.gov/docs/water_pdf/carp.pdf (last visited Feb 24, 2022).

¹¹ Regas Memorandum 2005, *supra* note 6, at 30.

¹² National Water Quality Monitoring Council, *Water Quality Portal*, <https://www.waterqualitydata.us/> (last accessed Feb 24, 2022).

¹³ U.S. Env’tl. Protection Agency, Storet Legacy Data Center, <https://www3.epa.gov/storet/legacy/gateway.htm> (last accessed Feb 2, 2022); *see also* Regas Memorandum 2005, *supra* note 6, at 30.

¹⁴ Regas Memorandum 2005, *supra* note 6, at 30; *see also* Memorandum from Geoffrey H. Grubbs, Dir., EPA Assessment and Watershed Protection, to Water Management Division Directors, Regional TMDL Coordinators, Regions I-X, “Guidance for 1994 Section 303(d) Lists” 4 (Nov. 26, 1993), (“There are a number of sources that can be used to help determine whether a particular waterbody belongs on the section 303(d) list. These include section 305(b) reports, Waterbody System information, toxics chemical release inventory (TRI) data, CWA section 314 and 319 assessments, USGS streamflow information, STORET data, fish consumption advisory information, anecdotal information and public reports, and other State and Federal databases. States should use the best available information in making section 303(d) list determinations.”) <https://www.epa.gov/sites/default/files/2015-10/documents/1994guid.pdf>; Memorandum from Wayland III, *supra* note 1 at 5 (“Data and information found in the following documents is existing and readily available data and should be considered as a basis for identifying impaired waters consistent with the state’s or territory’s water quality standards and assessment and listing methodology: 1. The Section 305(b) report, including the Section 314 lakes assessment; 2. The most recent Section 303(d) list; 3. The most recent Section 319(a) nonpoint assessment; 4. Reports of water quality problems provided by local, state, territorial or federal agencies, volunteer monitoring networks, members of the public or academic institutions; 5. Reports of dilution calculations or predictive models; 6. Fish and shellfish advisories, restrictions on water sports or recreational contact; 7. Reports of fish kills or abnormalities (cancers, lesions, tumors); 8. Water quality management plans; 9. Safe Drinking Water Act Section 1453 source water assessments; 10. Superfund and Resource Conservation and Recovery Act reports; and 11. The most recent Toxic Release Inventory.”); Memorandum from Diane Regas, Dir., EPA Off. of Wetlands, Oceans and Watersheds, to Regional Water Div. Dirs., “Guidance for 2004 Assessment, Listing and Reporting Requirements Pursuant to Sections 303(d) and 305(b) of the Clean Water Act; TMDL-01-03”, at 20 (July 21, 2003) (“States should consider data and information from the sources listed below for the 2004 Integrated Report: reports prepared in 2002 to satisfy CWA Sections 305(b), 303(d) and 314 and any updates; the most recent Section 319(a) nonpoint source assessment; reports of ambient water quality data including State ambient water quality monitoring programs, complaint investigations, etc., from the public and other readily available data sources (e.g., STORET, USGS, research reports, etc.), and data and information provided in public comments; reports of dilution calculations or predictive models; water quality management plans; Superfund Records of Decision; SDWA source water assessments.”) [hereinafter Regas Memorandum 2003], https://www.epa.gov/sites/default/files/2015-10/documents/2003_07_23_tmdl_tmdl0103_2004rpt_guidance.pdf.

¹⁵ Regas Memorandum 2005, *supra* note 6, at 30.

There is no justification to ignore evidence of impairments due to fish consumption advisories. EPA cites those advisories as justification for impairment listings:

EPA generally believes that fish and shellfish consumption advisories and certain shellfish growing area classifications based on segment specific information demonstrate impairment of CWA Section 101(a) “fishable” uses. This applies to fish and shellfish consumption advisories and certain shellfish area classifications for all pollutants that constitute potential risks to human health.¹⁶

DOH has issued a fish consumption advisory for the Hudson River from Saratoga County down to New York Harbor.¹⁷ If a waterway has fish you cannot eat, then it cannot be said to meet its intended use, and therefore there is sufficient data to justify the inclusion of all waters with impairments based on fish tissue and/or DOH health advisory data on the Draft List.

As for pathogens, in the past, DEC has relied on DOH beach closure data as readily available evidence of fecal pathogen impairments. These data have been accepted by DOH as reliable; though their limited extent, geographically, make them a necessary but insufficient source of data on recreational water quality impairments. They should be utilized in the future as DEC assesses water quality. Where DEC has not collected its own data, DEC has to consider alternative, reliable sources of data. DOH regularly tests for pathogens, so where DEC has not collected data, data analyzed by DOH must be considered the best available evidence.

Further, Riverkeeper has previously provided DEC with significant data regarding the fecal indicator bacteria enterococcus. Despite this indicator being recommended for use in EPA Recreational Water Quality Criteria published in 2012, none of the data provided by Riverkeeper to DEC in its 305(b) submissions in 2017 and 2021 have been accepted for consideration in assessing water quality, not even as background information. It is inappropriate to summarily reject data merely because it does not meet the state’s Quality Assurance Project Plan (QAPP). “Lack of a State-approved QAPP should not . . . be used as the basis for summarily rejecting data and information submitted by such organizations, or assuming it is of low quality, regardless of the actual QA/QC protocols employed during the gathering, storage, and analysis of these data.”¹⁸

Such data gathered by Riverkeeper and other volunteer networks, at the least, can and should be considered as part of a holistic evaluation of water quality and to determine future sampling sites. Particularly in the absence of DEC’s own sampling data for fecal indicator bacteria, data gathered by universities, non-governmental organizations, municipalities, and others should be treated as valuable sources of *information*, if not data, as DEC complies with the Clean Water Act requirements to assess the state’s water for recreational uses. Sampling must be conducted by DEC to verify or deny Riverkeeper’s data.

¹⁶ *Id.* at 60.

¹⁷ N.Y. State Dep’t of Health, New York State Health Advice on Eating Fish You Catch, https://www.health.ny.gov/environmental/outdoors/fish/health_advisories/ (last visited Feb. 2, 2022)..

¹⁸ Regas Memorandum 2005, *supra* note 6, at 33.

Additionally, with respect to pathogens, the specific fecal indicator bacteria relied on by DEC for adherence to water quality standards must be consistent with EPA's 2012 Recreational Water Quality Criteria. As DEC is aware, EPA has determined that enterococci (in fresh or marine waters) or E. coli (in fresh waters) are the appropriate FIB for waters that are designated for or must be suitable for primary contact recreation. As such, DEC should be monitoring and sampling for enterococci or E. coli for all waters where best uses include primary contact (including Class A, B freshwaters and Class, SA, SB and SC saline waters) as well as waters that should be suitable for primary contact (including Class C and D freshwaters, and SD and I saline waters). Riverkeeper is aware that DEC has attempted to remove the "suitable for primary contact recreation" language from the SD and I regulations, but that amendment, in addition to the challenge to its lawfulness currently on appeal, has not been submitted to EPA. Accordingly, Class SD and Class I waters are still designated as suitable for primary contact recreation. DEC's sampling and Draft List must comply with the Clean Water Act.

IV. DEC may not delist waterways solely because the Consolidated Assessment and Listing Methodology sets new parameter qualifications for water quality criteria compliance.

DEC has changed its methodologies for assessing water quality impairments and has elected to delist waterbodies based solely on these new methodologies rather than maintaining existing listings until sufficient data are gathered and evaluated according to the revised methodologies. The delisting of waterways as a result of these changes is premature and unacceptable. When the methodology for a category within the Draft List changes and results in a waterway no longer fitting the parameters, this waterway must not yet be removed from the Draft List. Instead, the waters must remain in the assigned categories until and unless a new methodology is established for each water or segment. This re-evaluation is necessary to ensure impaired waterways are properly listed and the extent and duration of impairment is not lost or "reset." Waterways that no longer align with category parameters should only be re-evaluated, not preemptively removed from the list, as this removal gives a false impression that these waterways are no longer impaired. This false impression may leave water quality impairments to persist indefinitely or complicate or distort state priorities for waters that have been long impaired.

DEC seems to have removed waters impaired for silt/sediment based on such a change in methodology, though the proposed delistings are left largely unexplained in the Draft List. Regardless of DEC's new methodology, such waterbodies are still impaired under the narrative standards for turbidity; for each water listed as impaired by silt/sediment, the silts and sediments have caused a substantial visible contrast to natural conditions. 6 NYCRR § 703.2. These waterways cannot be entirely delisted and should be re-evaluated under applicable water quality standards. Indeed, "[w]hen deciding whether to identify a segment as impaired, states need to determine whether there are impairments of *designated uses and narrative* criteria, as well as the numeric criteria."¹⁹ If DEC does re-categorize these waters under the turbidity standards, the listed impairment date should remain the same as it was prior to the 2020/2022 list.

¹⁹ *Id.* at 61 (emphasis added).

By way of example, it is clear that Ashokan Reservoir and Upper Esopus Creek remain impaired for silt/sediment, turbidity, and their designated uses.²⁰ The DEC is, or should be, aware of USGS and New York City Department of Environmental Protection data on turbidity in those waters. Delisting these and other waters for turbidity is clearly unlawful. Riverkeeper is also concerned that the multi-decade effort to address water quality impairments in Wappinger Lake will be derailed by the proposal to remove its silt/sediment listing, as local stakeholders near the completion of a nine-element plan for the Wappinger Creek Watershed.

This same error is repeated for waters listed as impaired for biological impacts, despite the evidence of poor water quality and inability to support fish survival or propagation. Evidence of a biological impairment is enough to confirm that the the ability of the waters to sustain and propagate fish life is impaired and threatened:

States should include impaired and threatened waters in Category 5 when a water is shown to be impaired or threatened in relation to biological assessments used to evaluate aquatic life uses or narrative or numeric criteria adopted to protect those uses even if the specific pollutant is not known. These waters should be listed unless the State can demonstrate that non-pollutant stressors cause the impairment, or that no pollutant(s) causes or contribute to the impairment.²¹

Waters where there is poor health of benthic (or bottom dwelling) macroinvertebrates indicates poor overall condition of the water, which endangers fish and other aquatic life.

Regardless of whether DEC has yet established in regulation a new numeric or narrative water quality criteria for macroinvertebrates, which Riverkeeper does understand the agency intends to do, the evidence that DEC has been relying on for decades continues to indicate that these waters are not meeting their designated uses for fish survival and propagation. Indeed, according to EPA, it is inappropriate to delist a waterbody segment until the waters have been assessed according to such a new methodology:

EPA does not believe it would be appropriate to remove segments previously listed in Category 5 (without new data or information) *solely* because they have not yet been assessed with a new methodology.²²

In this case, DEC has not yet developed a new, credible methodology for assessing biological impairments.²³ If and when DEC sets a new water quality criteria, pursuant to public comment

²⁰Draft Environmental Impact Statement (DEIS) for the Modification of the CATALUM SPDES Permit <https://www.dec.ny.gov/lands/79771.html>; Draft SPDES Discharge Permit NY 026 4652 (examining methods to address excessive turbidity in the Ashokan Reservoir coming from the Upper Esopus Creek and other upstream tributaries in the ongoing permitting process) https://www.dec.ny.gov/docs/water_pdf/catalumdraftpermit.pdf.

²¹ Regas Memorandum 2003, *supra* note 14, at 11.

²² Regas Memorandum 2005, *supra* note 6, at 59.

²³ Regas Memorandum 2003, *supra* note 14, at 9 (“EPA may request this demonstration if the State does not develop a credible methodology (consistent with the State’s WQs, relevant sections of CALM, and this

and approval by EPA, the affected waters should at that time be re-evaluated and re-categorized to align with the new methodology.

V. DEC may not delist waters unless it can show how the initial listings were inaccurate.

New York State cannot remove waters from the 303(d) List without demonstrating “good cause” for doing so. 40 CFR § 130.7(b)(6)(iv) (2022). In any event, DEC must provide *some* justification for removing such waters: “removing a segment from Category 5 prior to TMDL development may be warranted, but the justification for doing so should be documented.”²⁴ While DEC claims roughly 300 listings were initially made in error, the agency has not provided enough information for the public to understand why those previous determinations were wrong.

VI. The original listing year of waterways must stay unaltered with each finalized Draft List.

As new waterbodies are removed and returned to the Draft List, it has come to Riverkeeper’s attention that the “year listed” data of certain waterbodies has changed without any alteration to that waterbody’s impairment or presence on the Draft List. This reassignment of a listed year distorts the length of time a waterbody has been listed, and risks changing the priority of developing a TMDL or other remedy. Tracking the implementation of TMDLs is crucial:

EPA and States should ensure that mechanisms are in place to track previously listed waterbodies that have been removed from a subsequent section 303(d) list. Such mechanisms may include reporting under section 305(b) and updates to State Water Quality Management Plans under 40 CFR section 130.6.²⁵

Listed waterbodies for a particular pollutant should maintain the same “year listed” for the same pollutant through each successive 303(d) List. The alteration of the year listed for waterbodies that have not been removed or recategorized creates an illusion that waterbodies have not been impaired for the true amount of time that they truly have been. This is seen on the Draft List with Flushing Creek/Bay (1702-0005), Newtown Creek (1702-0002), Jamaica Bay (1701-0005), Hendrix Creek (1701-0006), Westchester Creek (1702-0012), and many more. Curiously, it

guidance).”); Memorandum from Wayland III, *supra* note 1, at 7 (“A state or territory assessment and listing methodology should establish how biological monitoring will be used to determine if biological impairment of an AU exists, the cause of the impairment, and the appropriate listing category for the AU. If a state or territory determines that an AU does not meet a use based on biological information, and the impairment is caused or is suspected to be caused by a pollutant(s), the AU should be listed in Category 5.”).

²⁴ Memorandum from John Goodin, Chief, Watershed Branch, Assessment and Watershed Protection Div., Off. of Wetlands, Oceans and Watersheds, to CWA Section 303(d) Program Coordinators, Regions I-X, “2006 IR Clarification Memorandum”, 2 (Mar. 31, 2006), available at https://www.epa.gov/sites/default/files/2015-10/documents/2006_10_27_tmdl_2008_ir_memorandum.pdf.

²⁵ Memorandum from Robert H. Wayland III, Dir. Off. of Wetlands, Oceans and Watersheds, to Water Div. Dirs., Regions I-X, Dirs, Great Water Body Programs, Water Quality Branch Chiefs, Regions I-X, “National Clarifying Guidance for 1998 State and Territory Section 303(d) Listing Decisions”, at 7 (Aug. 17, 1997), <https://www.epa.gov/sites/default/files/2015-10/documents/lisgid.pdf>.

seems connected to waterbodies listed on this Draft List in 2016 for dissolved oxygen impairments. In the finalized 2008 Section 303(d) List, Flushing Creek/Bay's "year listed" is 2004 for dissolved oxygen. However, in this Draft List, Flushing Creek/Bay's "year listed" is 2016. This same pattern is seen in Newtown Creek and Westchester Creek. Jamaica Bay's "year listed" for dissolved oxygen in the finalized 2008 Section 303(d) List was 2002. On this Draft List, Jamaica Bay's "year listed" is 2016. Even more egregious, Hendrix Creek's "year listed" for dissolved oxygen in the finalized 2008 Section 303(d) List is 1998. On this Draft List, Hendrix Creek's "year listed" is 2016. That is 18 years that Hendrix Creek has been impaired that is not properly represented in the Draft List. The need to accurately display the amount of time waterbodies are listed is paramount to not only ensure that the amount of time waterbodies have been impaired is accurately portrayed but also so these waterbodies may be properly assessed in relation to their 303(d) listing. This data must be altered in the Draft List to accurately do so.

VII. Harmful algal blooms ("HABs") are evidence of impairment but were not used in developing Draft List.

The EPA has stated that, in lieu of numeric nutrient criteria, states should use other methods of determining nutrient impairments, including visual assessments, and identifying algal blooms:

A State can determine whether a waterbody is attaining its applicable narrative nutrient or other relevant narrative criteria and designated uses by using results of visual assessments. For example, field observations of excessive algal growth, macrophyte proliferation, adverse impacts on native vegetation (e.g., eelgrass), presence or duration of harmful algal blooms, unsightly green slimes or water column color, and/or objectionable odors may be a basis to include a waterbody on the State's Section 303(d) list for failing to meet one or more applicable narrative criteria and designated uses.²⁶

Identifying the presence of algal blooms is especially relevant in New York State, where the narrative water quality standard for phosphorus and nitrogen is "none in amounts that will result in growths of algae, weeds and slimes that will impair the water for their best usage." 6 NYCRR § 703.2. Under DEC's standards and according to sampling results guided by DEC's HABs Program,²⁷ numerous waterways throughout the state with HABs are clearly impaired.²⁸ However, no affected waterways are listed as impaired in the Draft List, despite extensive reporting of HABs in multiple waters. DEC is failing to take HABs into account and thus failing to list these impaired waterways, despite the referenced DEC standard for phosphorus and

²⁶ Memorandum from Denise Keehner, Dir., Off. of Wetlands, Oceans and Watersheds, to Regional Water Div. Dirs., Robert Maxfield, Dir., Off. of Env't. Measurement and Evaluation, Region 1, "Information Concerning 2014 Clean Water Act Sections 303(d), 305(b) and 314 Integrated Reporting and Listing Decisions", at 8 (Sept. 3, 2013), https://www.epa.gov/sites/default/files/2015-10/documents/final_2014_memo_document.pdf.

²⁷ N.Y. State Dep't of Env't Conservation, *Harmful Algal Blooms (HABs) Program Guide*, vers. 3, https://www.dec.ny.gov/docs/water_pdf/habsprogramguide.pdf.

²⁸ N.Y. State Department of Environmental Conservation, *Harmful Algal Blooms (HABs) Archive Page*, <https://www.dec.ny.gov/chemical/83332.html> (last accessed Feb. 22, 2022).

nitrogen. Nor has DEC employed another workable methodology to assess waters for nutrient impairments. This concern is exemplified at Owasco Lake. Owasco Lake has a nine-element plan in development as well as issues with HABs, but is not listed on the Draft List.²⁹

Within past CALMs, a way to translate the narrative standard into concrete observations was provided. Guidance set forth credible guidelines by which the agency would assess waters using DEC's HABs Notification List. In the 2017 CALM, DEC stated that HABs would be used as a "surrogate indicator" until the agency developed numeric nutrient criteria.³⁰ DEC changed direction in the 2021 CALM, despite the fact that numeric nutrient criteria have not been established, and removed the guidelines for using HABs to assess nutrient impairments from the assessment and listing methodology altogether. This reversal is not congruent with EPA's 2014 consolidated listing guidance quoted above.

While we appreciate the clear relationship between NYS WQS and waterbody assessment set forth in the 2021 CALM, the fact remains that NYS's narrative nutrient standard is insufficient. Until numeric criteria are established and can be used within the 2021 CALM, HABs should be considered as a basis for confirmed nutrient impairment listings. If DEC is unsure whether nutrients are a contributing factor to HABs, then it is incumbent on the agency to sample those waters and reject the probable conclusion that nutrients were a significant contributing factor.

VIII. DEC must update its Vision Approach to Implement the Clean Water Act 303(d) Program and Clean Water Planning ("Vision Approach")

Riverkeeper calls on DEC to update its 2015 Vision Approach and to include stakeholders and public comments as part of its revision process. This update is necessary to ensure DEC and its stakeholders have the opportunity to collaboratively define how various water quality problems should be prioritized and remedied. Riverkeeper appreciates that the Vision Approach is necessary to prioritize actions, given the large number of water quality impairments in New York State, and that different problems call for different interventions. Riverkeeper does not hold a goal of simply identifying long lists of impaired waters. The goal is ultimately the same: to find solutions to the water quality problems we face. As with the 2015 Vision Document, a revision must start with a complete list of impaired waters on an updated 303(d) list, reinforcing the importance of our other comments challenging delisting proposals.

We appreciate your consideration of the foregoing comments in finalizing the 303(d)List. Riverkeeper and the Pace Environmental Litigation Clinic are happy to respond to any questions or concerns that the State may have regarding these comments. We look forward to your responses.

²⁹ Cayuga Cnty., NY, *Owasco Lake Watershed & Revitalization Plan Update*, <https://www.cayugacounty.us/1244/Owasco-Watershed-Plan> (last accessed Feb. 22, 2022); *see also* Cuyaga Cnty. Dep't of Plan. and Econ. Dev., *Owasco Lake Watershed Management and Waterfront Revitalization Plan* (N.Y.S. Dep't of State, Mar. 2016) <https://www.cayugacounty.us/DocumentCenter/View/4889/Owasco-Lake-Watershed-Management-Plan?bidId=>.

³⁰ *Exhibit B*, N.Y. State Dep't of Env'tl. Conservation, *The New York State Consolidated Assessment and Listing Methodology*; Section 305(b) Assessment Methodology (2017).

Respectfully,

X  _____
Todd D. Ommen

X  _____
Alanna Mecca