

MEMORANDUM

SUBJECT: National Clarifying Guidance For 1998 State and Territory Section 303(d) Listing Decisions

FROM: Robert H. Wayland III, Director
Office of Wetlands, Oceans, and Watersheds

TO: Water Division Directors, Regions I-X
Directors, Great Water Body Programs
Water Quality Branch Chiefs, Regions I-X

DATE: August 17, 1997

States and Territories (referred to collectively in this memorandum as "States") have made significant progress in developing their section 303(d) lists since the 1992 revision of the water quality management and planning regulations (at 40 CFR Part 130). The attached guidance clarifies several key policies related to listing of waters under section 303(d) for the 1998 listing cycle. The attached guidance is intended to supplement existing EPA section 303(d) listing guidance; all existing national guidance is also applicable to development of the 1998 lists, except with regard to those issues that are explicitly addressed and clarified in today's guidance.

Today's clarifying guidance applies only to the State section 303(d) lists of waters due on April 1, 1998, as required by 40 CFR section 130.7. EPA has convened an advisory committee under the Federal Advisory Committee Act to recommend long-term changes to the TMDL program. After the Federal advisory committee on TMDLs presents its recommendations to the Administrator in mid-1998, EPA may propose significant changes to current regulations, as well as the policies presented in this guidance and other existing guidance, which would then govern the development and approval of State section 303(d) lists for the year 2000 and beyond.

Today's guidance is one of several interim steps that EPA is taking to strengthen the TMDL program while the Federal advisory committee deliberates. The attached guidance addresses only a limited number of key issues that must be clarified before the 1998 section 303(d) lists are submitted to EPA. Other issues not addressed here will be addressed in future guidance or regulations, after consideration of the advisory committee's recommendations.

Important Reminders

The increased scrutiny that we all face as we assist States in implementing the TMDL program requires that we do our best to help States develop approvable and defensible section 303(d) lists in 1998. Therefore, in addition to the clarifications set out in the attached guidance, I would like to highlight several issues that we have addressed in past guidance:

- First, I ask that you each work closely with your Regional Counsel's Office and with each of your States to ensure that there is a complete administrative record supporting every list approval and disapproval decision.
- Under 40 CFR section 130.7(b)(5), States must consider all "existing and readily available water quality-related data and information" in compiling section 303(d) lists. EPA regulations provide that such data and information should be actively solicited from

various sources, including local, State, or Federal agencies, the public, or academic institutions (40 CFR section 130.7(b)(5)(iii)). In addition, the information contained in EPA's Index of Watershed Indicators is appropriate to consider as part of the listing process, but should not form the only documentation upon which a listing decision is based. In making decisions to approve or disapprove State section 303(d) lists, EPA should evaluate whether States have used all "existing and readily available water quality-related data and information."

- EPA's regulations require a State to include an impaired waterbody on the State's section 303(d) list if pollution controls (including technology-based effluent limitations for point sources and best management practices (BMPs) for nonpoint sources) are not stringent enough to implement any applicable water quality standards (40 CFR section 130.7(b)). EPA's Guidance for 1994 Section 303(d) Lists (November 26, 1993) clarifies that, if "BMPs or [Coastal Zone Act Reauthorization Amendments] management measures have been established or implemented and water quality standards have been attained or are expected to be attained in the near future, then the waterbody need not be included on the section 303(d) list." This 1993 guidance also clarifies that "near future" in this context should normally be viewed as prior to the required date for the next section 303(d) list.
- Consistent with EPA regulations (40 CFR section 130.7(b)(4)), States should include on the 1998 section 303(d) lists an identification of the specific pollutant(s) causing or expected to cause exceedances of applicable water quality standards. The 1998 lists should also indicate whether the waterbody is impaired for one or more pollutants.
- Finally, several States have chosen to provide to EPA an annual update to their section 303(d) list. 40 CFR section 130.7(d) requires that States submit section 303(d) lists to EPA "on April 1 of every even numbered year." EPA is therefore not required to take a formal approval or disapproval action on an annual list update. However, I ask that each Region respond in some way to any such updates, if the update is provided prior to the April 1, 1998 list submission deadline, either by informally advising the State of the adequacy of the update or by advising the State that such an update should be incorporated into the State's 1998 list submittal.

State Assistance

A number of efforts are underway to assist States in implementing the TMDL program. Without your help, many of these efforts would not be possible.

First, the President's FY 1998 Budget requests substantially increased resources directly aimed at helping States succeed in their section 303(d) listing and TMDL activities. EPA technical and program assistance resources supporting section 303(d) activities would be increased by 10 FTE and \$8 million in available contract support. State 106 grants would also be increased by \$5 million for State section 303(d) responsibilities. EPA technical and program assistance for nonpoint source management would be increased by \$5 million in available contract support. These funds have been requested by the President, but will not be available unless appropriated by the Congress.

To provide additional technical assistance to the States, EPA's Office of Science and Technology has begun a series of Regional workshops on BASINS, a tool that will allow States to organize and display geographic information and model pollutant loadings to characterize the overall condition of specific watersheds. In addition, OWOW's Assessment and Watershed Protection Division is working with the Regional TMDL Coordinators and others to complete a series of

protocols for developing TMDLs for nutrients, bacteria, clean sediment, and variable flow situations. These TMDL protocols will be peer reviewed in the Fall of 1997, at which time they will be made available to the States in draft form. We will also provide technical and financial assistance to a number of States in FY 1998 to help establish Reach File 3 georeferencing capabilities for waterbodies on 1998 section 303(d) lists.

To help administer the TMDL program, we are currently developing a TMDL tracking system -- a data management system to track and analyze State and EPA activities and commitments related to section 303(d), including the status of State lists, identification of listed waters, TMDL development schedules, and any court ordered obligations. A prototype of the system will be tested during the Fall of 1997.

Thank you for your continued hard work and dedication. If you have any questions, please call me or Geoff Grubbs, Director of the Assessment and Watershed Protection Division, at (202) 260-7040, or ask your staffs to contact your Headquarters TMDL liaison or Don Brady, Chief, Watershed Branch, at (202) 260-1261.

Attachment

cc: Mike Llewelyn, President, ASIWPCA Alan Hallum, Chair, ASIWPCA Watershed Task Force All Members, TMDL FACA Committee TMDL Coordinators, Regions I-X

Introduction: The following guidance clarifies several key policies related to development of Clean Water Act section 303(d) lists by States and Territories (referred to collectively in this guidance as "States"). It applies only to the State lists of impaired waters due on April 1, 1998, as required by 40 CFR section 130.7. It is very important that States meet this deadline since EPA will be reviewing the State lists in April 1998 and taking appropriate action, consistent with applicable regulations and guidance.

Today's guidance clarifies existing EPA section 303(d) listing guidance documents, i.e., *Guidance for Water Quality-based Decisions: The TMDL Process (April 1991)*; *Supplemental Guidance on Section 303(d) Implementation (August 12, 1992)*; *Approval of 303(d) Lists, Promulgation Schedules/Procedures, Public Participation (October 30, 1992)*; and *Guidance for 1994 Section 303(d) Lists (November 26, 1993)*. These national guidance documents remain applicable to the development of the 1998 lists except with regard to those issues that are explicitly addressed and clarified below.

Waterbodies Where Water Quality Standards Are in the Process of Being Revised

State section 303(d) lists and the subsequent development of TMDLs are linked to applicable State water quality standards. 40 CFR section 130.7(b)(1) provides that waterbodies included on State section 303(d) lists are those waterbodies for which pollution controls required by local, State, or Federal authority, including technology-based or more stringent point source effluent limitations or nonpoint source best management practices, are not stringent enough to implement any water quality standard applicable to such waters. 40 CFR section 130.7(b)(3) defines "water quality standard applicable to such waters" as "those water quality standards established under section 303 of the [Clean Water] Act, including numeric criteria, narrative criteria, waterbody uses, and antidegradation requirements."

States may revise their water quality standards to address changes such as a Use Attainability Analysis (as provided by 40 CFR section 131.10), development of a site-specific criterion, or updated science. Several States have asked whether they may exclude waters from the State section 303(d) lists if a water quality standard is in the process of being revised to be less stringent than the standard that is in effect. They are concerned that once the water quality standard has been revised, a waterbody that was water quality-limited under the old water quality standard may not be water quality-limited under the revised water quality standard.

A decision not to list because a water quality standard is in the process of being revised would be inconsistent with the regulations cited above and the Clean Water Act, which require a State to identify "those waters within its boundaries" where controls "are not stringent enough to implement *any water quality standard applicable to such waters*" (section 303(d)(1)(A) of the Clean Water Act, emphasis added). Therefore, for the 1998 listing cycle, States should include on their section 303(d) lists waters that do not meet an applicable water quality standard at the time of listing, even if the standard is in the process of being revised to be less stringent. If the standard is in fact revised in the future, the water may be removed from the section 303(d) list at that time provided the water no longer meets the listing requirements. States have the discretion, of course, to assign a low priority to those waters where there is a likelihood that they may be removed from the list in the near future.

Standards Exceedances Due to Atmospheric Deposition of Pollutants

In past section 303(d) lists submitted to EPA, some States have included waterbodies that do not meet applicable water quality standards due to pollutants from atmospheric deposition, while other States have not listed such waterbodies. 40 CFR section 130.7(b)(1), which requires State section 303(d) lists to include water quality-limited waterbodies still requiring TMDLs, does not differentiate between exceedances of applicable standards based on the source of pollution.

Although EPA recognizes that controlling pollutants from atmospheric deposition may be difficult, section 303(d) and the implementing regulations at 40 CFR section 130.7 do not allow the decision to include a waterbody on a State section 303(d) list to depend upon the ease with which a source of a pollutant can be controlled. Further, EPA's *Guidance for 1994 Section 303(d) Lists* (November 26, 1993) specifies that "[t]he section 303(d) list provides a comprehensive inventory of waterbodies impaired by *all sources*, including point sources, nonpoint sources, or a combination of both" (emphasis added).

For the 1998 State section 303(d) lists, States should include waterbodies that do not meet an applicable water quality standard due entirely or partially to pollutants from atmospheric deposition. For sources of the airborne pollutant located within State boundaries, States should consider the extent to which existing air pollution control authorities in State Implementation Plans adopted pursuant to the Clean Air Act and local ordinances could be used or enhanced to further reduce emissions of the air pollutant and abate the associated water quality problem. In those cases where atmospheric deposition is associated with long-range transport of pollutants across State boundaries and sources and effects are not completely understood at this time, EPA Regional Offices should take a leadership role to join the air pollution and water pollution programs of the Region and the involved States, and to create a regional research and abatement strategy.

Waterbodies Impaired by Temperature

Even though State section 303(d) lists provide a comprehensive inventory of waterbodies impaired by all sources, States have not listed waterbodies with temperature problems under section 303(d) in a consistent manner. For the 1998 State section 303(d) lists, waterbodies that do not meet an applicable State water quality criterion for temperature or a designated use due to temperature should be listed. Listing is appropriate because the applicable water quality standard is not met. Heat, the cause of the impairment, is defined as a "pollutant" under section 502(6) of the Clean Water Act and can be allocated. It is immaterial to the listing decision whether the source of the temperature-related impairment is a thermal discharge or solar radiation. Both are sources of heat, and the heat can be allocated through the TMDL process.

Waterbodies Impaired by an Unknown Source or an Unidentified Pollutant

40 CFR section 130.7(b)(1) provides that waterbodies included on State section 303(d) lists are those waterbodies for which pollution controls required by local, State, or Federal authority, including technology-based or more stringent point source effluent limitations or nonpoint source best management practices, are not stringent enough to implement any water quality standard applicable to such waters. In addition, 40 CFR section 130.7(b)(4) requires States to identify, in each section 303(d) list submitted to EPA, the "pollutants causing or expected to cause violations of the applicable water quality standards."

These regulatory provisions apply even if the source of the pollutant cannot be identified at the time of listing. Therefore, for the 1998 listing cycle, waterbodies impaired by an unknown source should be included on 1998 State section 303(d) lists, as long as there is a pollutant associated with the impairment. Listing may be based on pollutant loadings from unknown point and nonpoint sources, and includes situations where a pollutant is found in fish tissue such that there is an exceedance of applicable water quality standards, but the pollutant is not traceable to a particular source.

In addition, 40 CFR section 130.7(b)(4) requires States to include on their lists an identification of the *specific* pollutant(s) causing or expected to cause exceedances of applicable water quality standards. In some situations, however, a *specific* pollutant has not been identified at the time of listing. Therefore, for the 1998 listing cycle, where a water is impaired but a specific pollutant has not been identified, States should, if possible, indicate on the 1998 State section 303(d) lists the class of pollutants (e.g., metals or nutrients) causing, or believed to be causing, the impairment. Moreover, for the 1998 listing cycle, States should indicate whether the water is impaired for one or more pollutants.

Waterbodies Impaired Solely by Physical Barriers to Fish Migration

If a waterbody is not meeting its designated use, the applicable water quality standard is also not met and the waterbody is therefore impaired. In some situations, a physical barrier to fish migration (e.g., a culvert) can result in an impairment to a waterbody's use as an aquatic fishery. The TMDL process may be used to establish load allocations for pollutants that are preventing the attainment of water quality standards. In the specific case of a physical barrier to fish migration such as a culvert, however, there is no pollutant to allocate and the TMDL process is not appropriate. Therefore, for the 1998 section 303(d) lists, States are not required to list waterbodies where the use impairment results solely from a physical barrier to fish migration.

Waterbodies "Not Expected to Meet" Water Quality Standards

40 CFR section 130.2(j) defines water quality-limited segments as those waterbodies "where it is known that water quality does not meet applicable water quality standards, *and/or is not expected to meet* applicable water quality standards" (emphasis added). 40 CFR section 130.7(b)(4) requires States to identify, in each section 303(d) list submitted to EPA, the "pollutants causing or *expected to cause* violations of the applicable water quality standards" (emphasis added). In addition, 40 CFR section 130.7(b)(5)(1) requires States to consider waters identified in the State's most recent section 305(b) report as "threatened" as part of the "existing and readily available water quality-related data and information" considered when developing the section 303(d) list.

Therefore, States should consider inclusion of both impaired and threatened waters on their 1998 section 303(d) lists. EPA's *Guidance for Water Quality-based Decisions: The TMDL Process* (1991) also recommended that threatened waters be included on State section 303(d) lists. However, EPA has never articulated a time frame for this expectation that water quality standards will be exceeded in the future.

For the 1998 section 303(d) lists, a reasonable time frame is the two-year section 303(d) listing cycle itself. States should therefore include a waterbody on the 1998 section 303(d) lists .if the

waterbody presently meets an applicable water quality standard, but is expected to exceed that standard before the next list submission deadline, i.e., April 2000.

In making determinations whether waterbodies are expected to continue to meet water quality standards, States should use the definition of "threatened" in the *Guidelines for Preparation of the 1996 State Water Quality Assessments (305(b) Reports)*, issued in May 1995. These guidelines state on page 3-3 that:

A waterbody is fully supporting but threatened for a particular designated use when it fully supports that use now but may not in the future unless pollution prevention or control action is taken because of anticipated sources or adverse pollution trends . . . States should use this category to describe waters for which actual monitoring or evaluative data indicate an apparent declining water quality trend (i.e., water quality conditions have deteriorated, compared to earlier assessments, but the waters still support uses).

EPA and States are currently in the final stages of revising the section 305(b) guidelines for the 1998 section 305(b) reporting cycle. This definition has not been changed for 1998, and should be used as the basis for determining whether a waterbody is expected to continue to exceed a water quality standard before April 2000.

Removal of Previously Listed Waterbodies from Section 303(d) Lists

EPA's *Guidance for 1994 Section 303(d) Lists* (November 26, 1993) describes two instances when a previously listed waterbody may be removed from a State's section 303(d) list prior to TMDL development: (1) if such waterbody is meeting all applicable water quality standards (including numeric and narrative criteria and designated uses) or is expected to meet these standards in a reasonable timeframe (e.g., two years) as a result of implementation of required pollutant controls; or (2) if, upon re-examination, the original basis for listing is determined to be inaccurate.

EPA's *Guidance for 1994 Section 303(d) Lists* (November 26, 1993) also describes several circumstances under which a previously listed waterbody could be retained on a State's section 303(d) list after a TMDL had been established (and approved by EPA) for that waterbody. 40 CFR section 130.7(b)(1) describes the section 303(d) list as "water quality-limited segments still requiring TMDLs." This regulatory language is best interpreted to mean that, once a TMDL has been established (and approved by EPA) for a waterbody, that waterbody may be removed from the State's next section 303(d) list.

For purposes of the 1998 listing cycle, the State may (but is not required to) remove a previously listed waterbody from its 1998 section 303(d) list if a TMDL has been approved by EPA for that waterbody. However, if a waterbody is listed for more than one pollutant and a TMDL for one of the pollutants has been approved, that waterbody may be removed from the 1998 section 303(d) list for that pollutant, but not for the remaining pollutants.

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.

Waterbodies Impaired by Nonpoint Sources Only

EPA has consistently interpreted section 303(d)(1)(A) to apply to all waterbodies that do not meet applicable water quality standards, except for those where certain technology-based or other requirements will achieve standards. Consistent with long-standing EPA policy, regulations, and practice, States should include waterbodies impaired by nonpoint sources alone on 1998 section 303(d)(1)(A) lists, including such waterbodies on Federal lands.

Georeferencing Listed Waterbodies

It is important to accurately identify the location and extent of waterbodies on State section 303(d) lists. EPA's Reach File Version 3.0 (RF3) is a data base that interconnects and uniquely identifies the 3.2 million stream segments or "reaches" that comprise the Nation's surface water drainage system. The process of geographically referencing (georeferencing) involves the assignment of reach addresses to these waterbodies in order to establish their locations relative to one another in a manner similar to street addresses.

To the extent possible, States should use RF3 for georeferencing 1998 State section 303(d) listed waterbodies in a nationally consistent manner. When georeferencing to RF3 is not possible, States should provide the latitude and longitude of the start and end of the listed waterbody; when such waterbody is a lake or reservoir, States should use the latitude and longitude of the center of the waterbody. By georeferencing 1998 State section 303(d) lists to RF3, States and EPA will be able to analyze and track patterns, trends, and progress on local, State, regional, and national scales. Also, States will be able to analyze upstream/downstream relationships, as well as effectively link section 303(d) information to other water quality information, such as industrial dischargers, drinking water supplies, streams affected by fish consumption advisories, wild and scenic rivers, and section 305(b).

While some States have already assigned RF3 addresses to section 303(d) listed waterbodies, others have used a stream addressing system other than RF3 or have not yet georeferenced their section 303(d) lists. In FY 1998, EPA will provide technical and financial assistance to help a number of States who either have been using a stream addressing system other than RF3 or have not yet georeferenced their section 303(d) lists to assign RF3 addresses to section 303(d) lists.

Indian Tribes

Protection of Tribal treaty rights and historic and accustomed uses can be an important consideration as States develop their section 303(d) lists. Therefore, when identifying State waters needing TMDLs, EPA strongly encourages States to cooperate closely with Tribes to assure that appropriate attention is given to Tribal concerns.

In addition, several States have included waters in Indian country on their section 303(d) lists in previous listing cycles. For the 1998 listing cycle, EPA's approval actions will extend to all the waterbodies on 1998 State section 303(d) lists with the exception of those waters that are within Indian country, as defined at 18 USC section 1151. For 1998, EPA will take no action to approve or disapprove State section 303(d) lists with respect to those waters within Indian country. EPA or eligible Indian Tribes, as appropriate, will retain responsibilities under section 303(d) for those waters. In addition, EPA approval actions of State section 303(d) lists do not constitute a finding of State and/or Tribal jurisdiction over particular waters.

Finally, this guidance does not address other section 303(d) listing requirements for waters in Indian country because circumstances are different from those of most States. However, a long-term approach, including new policies and guidance, is needed for developing section 303(d) lists for waterbodies in Indian country, as well as for developing and implementing TMDLs. The Office of Wetlands, Oceans, and Watersheds is working with EPA's American Indian Environmental Office and others to develop specialized TMDL policies and guidance for these waterbodies.