



**UNITED STATES ENVIRONMENTAL PROTECTION
AGENCY**

**REGION 8
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DENVER, CO 80202-2466**

Ref: 8EPR-EP

Jan Sensibaugh, Director
Montana Department of Environmental Quality
P.O. Box 200901
Helena, MT 59620-0901

Re: Clean Water Act Section 303(d)
Total Maximum Daily Load (TMDL)
Waterbody List

Dear Ms. Sensibaugh:

Thank you for the submittal of Montana's year 2002 list of water quality-limited segments requiring Total Maximum Daily Loads under Section 303(d) of the Clean Water Act. Montana's submittal was dated September 24, 2002. EPA received the list on September 26, 2002. EPA has conducted a complete review of this waterbody list and its supporting documentation and information. Based on this review, EPA has determined that Montana's year 2002 list meets the requirements of Section 303(d) of the Clean Water Act ("CWA" or "Act") and EPA's implementing regulations. Therefore, by this order, EPA hereby APPROVES Montana's year 2002 Section 303(d) list. Please see the enclosure for a description of the statutory and regulatory requirements and a summary of EPA's review of Montana's compliance with each requirement.

As with prior Section 303(d) list approvals, today's approval relates only to the State's identification of waters in need of TMDLs or TMDTLs (total maximum daily thermal loads) under Section 303(d)(1)(A) and 303(d)(1)(B) of the CWA. It does not apply to any TMDL or TMDTL that the State has established under Section 303(d)(1)(C) and 303(d)(1)(D) of the CWA. Nor does it constitute any decision by EPA regarding the State's pace of developing TMDLs or TMDTLs.

EPA's approval of Montana's Section 303(d) list extends to all waterbodies on the list with the exception of any waters that are within Indian Country, as defined in 18 U.S.C. Section 1151. EPA is taking no action to approve or disapprove the State's list with respect to those tribal waters at this time. EPA or eligible Indian Tribes, as appropriate, will retain responsibilities under Section 303(d) for those waters.

The public participation process sponsored by the Montana Department of Environmental Quality ("DEQ") relating to this list included direct mailings to over 600 stakeholders soliciting them for comments, legal notices, news releases, and Internet announcements. A 60 day period comment period was held from June 7 to August 2, 2002. The materials that were made available to the public included a detailed database of information on the waters and pollutants included on the list as well as narrative descriptions of the process and assessment results and GIS map files. Further, DEQ has relied on input from a citizen TMDL Workgroup to aid in development of the year 2002



list. Since there are few changes in the State's list since its year 2000 list, the thorough effort made in 2000 to obtain public input has also had benefits to the year 2002 list. We commend the State for its thorough public participation process.

EPA takes the position that neither the Clean Water Act nor EPA's regulations require the State to establish TMDLs for waters not on the most recent EPA-approved Section 303(d) list. However, in view of the recent orders in the case of Friends of the Wild Swan, et al. v. U.S. Environmental Protection Agency, et al., CV 97-35-M-DWM, U.S. District Court for the District of Montana, Missoula Division, which require TMDLs for all waters on Montana's 1996 Section 303(d) list, EPA is committed to working with Montana in developing TMDLs for all waters on Montana's 1996 Section 303(d) list, regardless of whether those waters are on the year 2002 list as approved today.

Consistent with the terms of a consent decree in the lawsuit of Friends of the Wild Swan, et al. v. U.S. Environmental Protection Agency, et al., Civil Action No. CV99-87-M-LBE, United States District Court for the District of Montana, Missoula Division, our Agency has consulted with the U.S. Fish and Wildlife Service on our proposed approval of the State's list. We wish to inform you that our office has received concurrence from the U.S. Fish and Wildlife Service regarding our biological evaluations of the approval of the State's year 2002 waterbody list. Our biological evaluation that addressed our approval was submitted to the Service in accordance with Section 7 of the Endangered Species Act. In our evaluation, we assessed the effects of our approval on the threatened, endangered, proposed, and candidate species throughout the State. Our conclusion was that our approval of the State's list would not likely have an adverse effect on the species of concern. Any effect of the list approval was seen as either insignificant or beneficial to the species.

Under current regulations, the next Section 303(d) list is required to be submitted on April 1, 2004. We suggest you stay abreast of EPA's pending rulemaking for the TMDL program since there may be a change in the April 2004 date. In any case, we invite states to recommend changes to the list during the interim period as they deem necessary. All additions, deletions and modifications to the list will require EPA approval.

We would like to compliment the hard work and professionalism of your staff in the careful evaluation of data and the development of the Section 303(d) list for the year 2002. If you have questions or comments regarding this approval action, please feel free to give me, or Bruce Zander (303-312-6846) of my staff, a call.

Sincerely,

Max H. Dodson
Assistant Regional Administrator
Office of Ecosystems Protection and Remediation

Enclosure

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Review of Montana's 2002 Section 303(d) Waterbody List

*Attachment to January 13, 2003 letter from Max H. Dodson, Assistant Regional Administrator,
Office of Ecosystems Protection and Remediation, US EPA, Region VIII to Jan Sensibaugh, Director
Montana Department of Environmental Quality*

Date of Transmittal Letter from State: September 24, 2002
Date of Receipt by EPA: September 26, 2002

This attachment is organized in the following manner:

I. Introduction

II. Statutory and Regulatory Background

- A. Identification of Water Quality Limited Segments (WQLSs) for Inclusion on Section 303(d) List**
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- B. Identification of Waters and Consideration of Existing and Readily Available Water Quality-Related Data and Information**
- C. Montana's Assessment and Listing Methodology**
- D. Priority Ranking**
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I. Introduction

The purpose of this document is to describe the rationale for EPA's approval of Montana's Year 2000 Section 303(d) waterbody list. EPA reviewed the entire package submitted by the State, including the methodology used by the State in developing the §303(d) list and the State's description of the data and information it considered. EPA's review and approval of Montana's §303(d) list is based on EPA's analysis of whether the State reasonably considered existing and readily available water quality-related data and information and reasonably identified waters, pollutants, priorities, and targeted waters as required by the CWA and EPA's regulations. EPA

considered applicable federal laws, regulations and guidance in its approval decision.

II. Statutory and Regulatory Background

A. Identification of Water Quality Limited Segments (WQLSs) for Inclusion on Section 303(d) List

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

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

B. Consideration of Existing and Readily Available Water Quality-Related Data and Information

In developing Section 303(d) lists, States are required to assemble and evaluate all existing and readily available water quality-related data and information, including, at a minimum, consideration of existing and readily available data and information about the following categories of waters: (1) waters identified as partially meeting or not meeting designated uses, or as threatened, in the State's most recent Section 305(b) report; (2) waters for which dilution calculations or predictive modeling indicate nonattainment of applicable standards; (3) waters for which water quality problems have been reported by governmental agencies, members of the public, or academic institutions; and (4) waters identified as impaired or threatened in any Section 319 nonpoint assessment submitted to EPA. (See 40 CFR 130.7(b)(5)) In addition to these minimum categories, States are required to consider any other data and information that is existing and readily available. EPA's 1991 Guidance for Water Quality-Based Decisions describes categories of water quality-related data and information that may be existing and readily available. (See Guidance for Water Quality-Based Decisions: The TMDL Process, EPA Office of Water, 1991, Appendix C ("EPA's 1991 Guidance")) While States are required to evaluate all existing and readily available water quality-related data and information, States may decide to rely or not rely on particular data or information in determining whether to list particular waters.

In addition to requiring States to assemble and evaluate all existing and readily available water quality-related data and information, EPA regulations at 40 CFR 130.7(b)(6) require States to include as part of their submissions to EPA documentation to support decisions to rely or not rely on particular data and information and decisions to list or not list waters. Such

documentation needs to include, at a minimum, the following information: (1) a description of the methodology used to develop the list; (2) a description of the data and information used to identify waters; and (3) any other reasonable information requested by the Region.

C. Priority Ranking

EPA regulations also codify and interpret the requirement in Section 303(d)(1)(A) of the Act that States establish a priority ranking for listed waters. The regulations at 40 CFR 130.7(b)(4) require States to prioritize waters on their Section 303(d) lists for TMDL development, and also to identify those WQLSs targeted for TMDL development in the next two years. In prioritizing and targeting waters, States must, at a minimum, take into account the severity of the pollution and the uses to be made of such waters. (See Section 303(d)(1)(A)) As long as these factors are taken into account, the Act provides that States establish priorities. States may consider other factors relevant to prioritizing waters for TMDL development, including immediate programmatic needs such as wasteload allocations for permits, vulnerability of particular waters as aquatic habitats, recreational, economic, and aesthetic importance of particular waters, degree of public interest and support, and State or national policies and priorities. (See 57 FR 33040, 33045 (July 24, 1992), and EPA's 1991 Guidance.)

III. Analysis of Montana's Submission

A. Background

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

Montana's 303(d) submittal to EPA is included in the document "Montana 303(d) List, A compilation of Impaired and Threatened Waterbodies in Need of Water Quality Restoration" (September 23, 2002). Additional supporting information is included in electronic data files of data, maps, photographs, references to relevant documents, and references to electronic information. Further, the State maintains an individual record of assessment for each waterbody for which it has performed an assessment. These records include and identification of the data sources used in the assessment, the factors considered in the impairment decision, and a description of how those factors were used to reach the assessment determination. EPA has done a sample set review of this supplemental information not included in the official submittal.

The Montana year 2002 list submittal includes the following elements:

- P Montana's 303(d) assessment process
- P prioritization for TMDL development
- P public review process and responsiveness summary
- P the list of waterbodies and pollutants that are in need of TMDLs

- P an identification of waters removed from the previous list
- P short term and long term schedules for the development of TMDLs
- P an identification of previously listed waters needing reassessment
- P an identification of MPDES dischargers that may need updated TMDLs at time of their renewal over the next 2 years

Today's approval action extends only to the waterbodies and corresponding pollutants listed above, the prioritization of waterbodies for TMDL development, and the identification of waters targeted for TMDLs over the 2002-2004 biennium and does not extend to other elements in the State's submittal.

The State's list includes a total of 520 waters. Of the 466 waters on the previous year 2000 list, 426 are listed on the year 2002 list exactly as they were on the 2000 list. Thirty-nine waters on the 2000 list remain listed but have some change to the listing information, and one water has been removed from the list. The one waterbody that was dropped from the list (Trout Creek - from West Fork to the mouth [MT76N003_110]) was originally listed in error since the data from a different Trout Creek was attributed to this creek. Without this data, the State lack sufficient credible data to determine its impairment status. The year 2002 list includes 55 waters that were not included on the previous year 2000 list.

Montana properly listed waters with nonpoint sources causing or expected to cause impairment, consistent with Section 303(d) and EPA guidance. Section 303(d) lists are to include all water quality-limited segments (WQLSs) still needing TMDLs, regardless of whether the source of the impairment is a point and/or nonpoint source. EPA's long-standing interpretation is that Section 303(d) applies to waters impacted by point and/or nonpoint sources. This interpretation has been described in EPA guidance. (See EPA's April 1991 Guidance and the August 27, 1997 EPA guidance listed below) In addition, this interpretation of Section 303(d) is described in detail in a May 23, 1997, memorandum from Geoffrey Grubbs, Director of the Assessment and Watershed Protection Division, EPA Office of Water, to the FACA Workgroup on Section 303(d) Listing Criteria¹

. (See Memorandum from Geoffrey H. Grubbs, Director, Assessment and Watershed Protection Division, to FACA Workgroup on Section 303(d) Listing Criteria, "Nonpoint Sources and Section 303(d) Listing Requirements", May 23, 1997) (See also Memorandum from Robert Perciasepe, Assistant Administrator, Office of Water, to Regional Administrators and Regional Water Division Directors, "New Policies for Establishing and Implementing TMDLs," August 8, 1997).

B. Identification of Waters and Consideration of Existing and Readily Available Water Quality-Related Data and Information

EPA has reviewed Montana's description of the data and information it considered for identifying waters on the §303(d) list. EPA concludes that the State properly assembled and evaluated all existing and readily available data and information, including data and information

¹ EPA convened a Federal Advisory Committee Act (FACA) Committee in November 1996. The report of this FACA committee is found in EPA document EPA 100-R-98-006 (July 1998).

relating to the categories of waters specified in 40 CFR 130.7(b)(5). The State's evaluation of data and information in each of these categories is described below.

1) Waters identified by the State in its most recent section 305(b) report as "partially meeting" or "not meeting" designated uses or as "threatened" (§130.7(b)(5)(i)).

Montana uses a unified approach to its waterbody assessments in its Clean Water Act Section 303(d), 305(b), and 319 programs. There is true consistency between these programs since the same assessment methodology and results may be used by all three. (The only exception is where the State has not updated its assessment as a result of public comment on its 303(d) list and it has not updated its 305(b) or 319 reports to reflect that change.) In this unified assessment, all waters reported as "partially meeting" or "not meeting" designated uses or as "threatened" are on the 303(d) list, are reported in the Section 305(b) report and are included in the State's 319 assessment.

EPA concludes that Montana properly considered the waters identified in its most recent §305(b) report as "partially supporting," "not supporting," and "fully supported but threatened" in development of its 2002 §303(d) waterbody list.

2) Waters for which dilution calculations or predictive models indicate non-attainment of applicable water quality standards (§130.7(b)(5)(ii)).

Section 303(d) lists include not only those waters that are known not to be attaining standards, but also those waters for which dilution calculations and/or predictive modeling demonstrate that standards may not be attained (even after the application of technology-based effluent limits).

In the course of issuing MPDES permits, DEQ routinely calculates whether technology-based effluent limitations required by CWA Sections 301(b)(1)(A) and 301(b)(1)(B) are stringent enough to implement applicable water quality standards in the receiving waters. These calculations are done by dilution calculations and/or predictive modeling.

Where DEQ's calculations show that technology-based effluent limitations would not be sufficient for this purpose, the DEQ imposes water quality-based effluent limitations ("WQBELs") as appropriate. In many instances, these WQBELs are based on TMDLs developed by the State and subsequently submitted to and approved by EPA as TMDLs under Section 303(d)(1)(C) of the CWA.. DEQ makes these calculations not only when permits are initially issued but also when they are renewed. Appendix D of the State's 303(d) submittal identifies those MPDES permits and corresponding receiving waters that may need TMDLs at some point over the next biennium.

While most of the waters receiving MPDES discharges are among the waters included on the 303(d) list, the simple fact that a water is a receiving water for a MPDES permit does not place it on the Montana 303(d) list. Many of Montana's receiving waters which are assessed as being impaired are not impaired by causes related to the MPDES discharges.

Any data or information associated with an MPDES discharge regarding the water quality status of the receiving water was considered in the assessment of that waterbody.

EPA concludes that Montana properly considered waters for which dilution calculations or predictive models indicate nonattainment of applicable water quality standards in development of its 2000 §303(d) waterbody list.

3) Waters for which water quality problems have been reported by local, state, or federal agencies; members of the public; or academic institutions (§130.7(b)(5)(iii)).

The State solicited and considered data and information from local, state, or federal agencies, members of the public, and academic institutions while preparing the year 2002 §303(d) list. The State utilized mailing, public meetings, and the Internet to make solicitation for data and information. The major organizations included in this solicitation are identified in Appendix A of the State's 303(d) submittal.

The State also searched numerous references, using electronic search tools, to uncover water quality information relevant to the 303(d) listing process. An list of major sources subject to this search are listed in Appendix A.

EPA concludes that Montana properly considered waters for which water quality problems have been reported by local, state, or federal agencies; members of the public; or academic institutions in development of its 2002 §303(d) waterbody list.

4) Waters identified by the State as impaired or threatened in a nonpoint assessment submitted to EPA under section 319 of the CWA or in any updates of the assessment (§130.7(b)(5)(iv)).

Section 319 of the CWA required states to develop a nonpoint source assessment report as well as a nonpoint source management plan. Montana first completed its management plan by 1988 and its assessment of nonpoint sources by 1992. During the mid-1990's, Montana fully integrated its assessment under the 319, 305(b), and 303(d) programs. The assessments reported under each of these programs stem from the same assessment process to assure consistency from one program to the next.

Most recently, the State completed its nonpoint source assessment as described in the report "Montana Nonpoint Source Management Plan: A Watershed Approach" (Montana Department of Environmental Quality, May 2001). This report discusses how the assessment, prioritization, scheduling, and development of NPS plans and TMDLs are fully integrated between the 319 and 303(d) programs.

EPA believes that consolidation of 319 and 303(d) assessments is a reasonable approach to assuring consistency between the two programs.

EPA concludes that Montana properly considered waters identified by the State as

impaired or threatened in a nonpoint assessment submitted to EPA under section 319 of the CWA and any updates of the assessment in development of its 2002 §303(d) waterbody list.

C. Montana's Assessment and Listing Methodology

The State used the same assessment and listing methodology for the year 2002 list as it did for its year 2000 list. The State developed its assessment methodology based largely on EPA guidance addressing State development of the Section 305(b) report, for the State to apply in deciding whether to use certain existing and readily available data and information as a basis for including waters on the list (*e.g.*, what constitutes "sufficient credible" data and information as defined in Montana law). These criteria were developed in accordance with the following provisions from Montana law, which require the Montana DEQ to make its listing decisions based on existing and readily available data and information:

By October 1, 1999, and in consultation with the statewide TMDL advisory group, the department shall use the data management system developed and maintained pursuant to subsection (5) to revise the list and to remove any water body that lacks sufficient credible data to support its listing. . . . [See MCA Section 75-5-702(6).]

Currently available data" is defined as "data that is readily available to the department at the time a decision is made, including information supporting its previous lists of water bodies that are threatened or impaired. [See MCA Section 75-5-103(4).]

After close review, EPA concludes that the listing methodology developed and employed by DEQ in developing its year 2002 Section 303(d) list is consistent with Section 303(d) of the CWA, EPA's regulations, and EPA's guidance and is a reasonable approach to determine waters that should be included on the State's §303(d) list.

In evaluating Montana's listing methodology, EPA compared the State's methodology with its own guidance on assessing waters. EPA has long taken the position that the methods states use to determine whether waters meet standards for purposes of §303(d) lists are the same as the methods to make this same determination for purposes of §305(b) reports. See, for example, the following statement in a 1992 EPA guidance document:

Q: How does EPA define attainment of water quality standards?

The methods used to determine non-attainment of standards for water quality reporting under 305(b) should also be used for identifying waters pursuant to 303(d). These decision criteria and methodologies are provided in Appendix B - "Making Use-Support Determinations" of Guidelines for Preparation of the 1992 State Water Quality Assessments (305(b) Reports). This guidance document addresses the use of monitoring data and evaluative information to decide whether

standards are being met and provides specific criteria for what constitutes an exceedance.²

²This statement comes from the an attachment to the August 13, 1992 memorandum from Geoffrey H. Grubbs to Water Quality Branch Chiefs, Regions I-X and TMDL Coordinators, Regions I-X. It is the answer to the second question in the “Questions and Answers For the EPA/State Workshops Held Winter 1991-2.”

Montana's listing methodology is described in Appendix A of its year 2002 Section 303(d) submittal. Montana's listing methodology for its year 2000 and 2002 Section 303(d) lists followed this approach by substantially relying on EPA's most recent Section 305(b) assessment guidance as a model. In particular, Montana generally followed EPA's most recent 305(b) assessment guidance,³ which provides for evaluating the level of rigor in qualitative and quantitative data, determining which data could be excluded from assessment procedure, which thresholds could be used to determine waterbody impairment conditions, and how to organize and report results.

There are significant similarities between EPA's Section 305(b) guidance and Montana's methodology. For example, the tables in EPA's 1997 guidance concerning the rigor of biological, habitat, toxicological and physical/chemical data (Tables 3-1, 3-2, 3-3, 3-4) use many of the same factors as used in the State's tables for biology, chemistry/toxicity, and habitat/physical evaluation (Tables 1-6 in Appendix A). The factors included in both EPA's guidance and in the State's methodology include such things as temporal and spatial coverage of the data, the age of the data, the quality assurance protocols used to collect the data, and precision associated with the data. Likewise, the numeric thresholds used by the State to determine whether a waterbody was impaired are very similar to the thresholds recommended by EPA in its 1997 guidance. For example, the use impairment thresholds as found in the State's submittal at Tables 9 through 14 Appendix A are very similar to the thresholds recommended by EPA in its 1997 guidance (Section 3-2 of EPA's 1997 guidance).

Because the State followed EPA's Section 305(b) assessment guidance in structuring its methodology for developing its 303(d) list, EPA finds the State's methodology reasonable.

The term "sufficient credible data" is important to Montana's determination. Under Montana law, as amended in 1997, that term is defined as follows:

"Sufficient credible data" is defined as chemical, physical, or biological monitoring data, alone or in combination with narrative information, that supports a finding as to whether a water body is achieving compliance with applicable water quality standards. [See MCA Section 75-5-103(30)]

According to EPA regulations, States must supply a rationale for any decision to not use any existing and readily available data and information. (See 40 C.F.R. Part 130.7(b)(6)(iii).) For Montana, this rationale is basically the test of sufficient credibility. This test of sufficient credibility was patterned after EPA's 1997 Section 305(b) assessment guidance. In assessing whether data met the threshold for being "sufficiently credible" under Montana state law, DEQ considered all data that it had identified as existing and readily available from the searches described above. In evaluating the sufficiency of the data, DEQ ranked the data using factors

³"Guidelines for Preparation of the Comprehensive State Water Quality Assessments (305(b) Reports) and Electronic Updates: Supplement," September 1997, EPA-841-B-97-002B. Unless otherwise indicated, any reference to EPA's "Section 305(b) assessment guidance," "1997 guidance," "1997 Section 305(b) assessment guidance" will mean this document.

included in EPA's assessment guidance for the purpose of evaluating the rigor of data. (See EPA's 1997 Section 305(b) assessment guidance.) The assemblage of data and information for any given waterbody was ranked for its sufficiency according to the procedure identified in Figure 2, Appendix A, of Part A of the State's submittal. Again, this constitutes the State's rationale for using or not using any particular data or information in its listing decision.

The factors used to evaluate data and information for sufficiency included temporal and spatial coverage of the data, age of the data, quality assurance protocols used to collect the data, and precision associated with the data. For example, Montana took into account age of data as one of the factors it considered in deciding whether to list waters. In some cases, historical data by itself was not used as a basis for listing, such as locations where land use practices have changed since the data was collected. In other cases, historical data was used as a basis for listing, such as situations where the state concluded that the data had been collected using good quality control and there was no indication that conditions had changed since the data was collected. Thus, no single factor was used to list or remove previously-listed waters. Instead, these factors were considered together using the State's methodology for scoring data and information, described in more detail in the State's list submission. These factors are consistent with EPA's guidance on evaluating data and information for waterbody assessments.

This evaluation of data sufficiency was performed on a waterbody-by-waterbody basis. The State's documented results of the waterbody-by-waterbody evaluation by including for each waterbody file a description of the data and information available for the waterbody, the sources of the data and information, and results of the data ranking.

EPA acknowledges that states may re-evaluate the waters on their 303(d) lists. In a 1997 memorandum, EPA stated that ". . . Regions and states should keep in mind that waterbodies may be added or subtracted over time as new lists are developed."⁴ Accordingly, in an August 27, 1997 memorandum, EPA identified several conditions that allow states to remove previously-listed waters from §303(d) lists. In addition to de-listing a waterbody when a TMDL has been established for it, states may delist a waterbody when:

- 1) the waterbody is meeting all applicable water quality standards or is expected to meet these standards in a reasonable time frame (*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.⁵

⁴ Page 4, August 8, 1997 memorandum from Robert Perciasepe, Assistant Administrator for Water, US EPA, regarding "New Policies for Establishing and Implementing TMDLs."

⁵ August 27, 1997 memorandum from Robert H. Wayland III, Director, Office Wetlands, Oceans, and Watershed, Office of Water, EPA Headquarters, to Water Division Directors, Regions I - X, and Directors, Great Water Body Programs, and Water Quality Branch chiefs, Regions I - X, regarding "National Clarifying Guidance For 2000 State and Territory Section 303(d) Listing Decisions."

Further, the existing EPA regulations require states, at the request of the Regional Administrator, to demonstrate good cause for not including waterbodies on their lists. Good cause includes, but is not limited to, more recent and accurate data, more sophisticated water quality modeling, flaws in the original analysis that led to the waterbody being listed, or changes in conditions, *e.g.*, new control equipment, or elimination of discharges. (See 40 C.F.R. 130.7(b)(6)(iv).)

Appendix B of the State's submittal provides an identification of the changes to the year 2000 list that were made for the year 2002 list. In particular, this appendix identifies the change in use support status for certain waters (*e.g.* some waters are considered to be fully supporting their drinking water use for the year 2002 list because the standards for that use are now shown to be met), a slight change in the pollutant descriptions (*e.g.*, "turbidity" replaced by "siltation"), and an identification of a waterbody that was delisted because of an error in the original listing (Trout Creek - from West Fork to the mouth [MT76N003__110]).

Having reviewed Montana's submission and supporting documentation, EPA has concluded that Montana has acted reasonably and within the discretion that current EPA regulations allow in de-listing waterbodies.

Finally, it is important to emphasize that a U.S. District Court has required TMDLs to be established no later than May 5, 2007 for all waters on Montana's 1996 Section 303(d) list, unless these waters are shown to be meeting standards.⁶ Compliance with all applicable court orders will be paramount.

Montana law requires DEQ to monitor and reassess all "de-listed" waters, which will more accurately identify waters that do not meet their designated uses and result in TMDLs for all waters that need them. As provided in MCA Section 75-5-702(6):

By October 1, 1999, and in consultation with the statewide TMDL advisory group, the department shall use the data management system developed and maintained pursuant to subsection (5) to revise the list and to remove any water body that lacks sufficient credible data to support its listing. If the department removes a water body because there is a lack of sufficient credible data to support its listing, the department shall monitor and assess that water body during the next field season or as soon as possible thereafter to determine whether it is a threatened water body or an impaired water body. (emphasis added)

In other words, those waterbodies delisted based on a lack of "sufficient credible data" are

⁶See June 21, 2000, September 21, 2000, and November 7, 2000 orders in Friends of the Wild Swan, et al. v. U.S. Environmental Protection Agency, et al., No. CV-97-35-M-DWM, District of Montana.

to be monitored. If “sufficient credible data” indicates they should be listed, then they will be listed.

D. Priority Ranking

As part of their lists, states must prioritize waters for TMDL development, taking into account the severity of the pollution and the uses to be made of such waters. (See Section 303(d)(1)(A) of the CWA and 40 C.F.R. Section 130.7(b)(4)). As long as states take these required factors into account, the CWA does not require States to prioritize their waters in any specified manner. States may use their discretion in establishing priorities for TMDLs.

As part of its prioritization efforts, Montana established a schedule for developing TMDLs in accordance with the June 21, 2000 and September 21, 2000 orders in Friends of the Wild Swan, et al. v. U.S. Environmental Protection Agency, et al., CV 97-35-M-DWM, U.S. District of Montana, Missoula Division. This schedule sets deadlines by which TMDLs for WQLSs in each Montana watershed will be completed. As required by the court orders, this schedule is based on the waters on Montana’s 1996 list, not its 2000 list. This schedule as well as a schedule for waters not originally included on its year 1996 list are a part of the 2002 303(d) submittal.

The State considers this schedule as an expression of its TMDL development priorities. After the year 2000 listing process, the State concluded that its TMDL development schedule, which generally followed prioritization of listed waters, did not always reconcile exactly with the priorities published in its year 2000 list. For that purpose, the State has elected to use the schedule (a product of court order) as an expression of priorities for TMDL development as part of its year 2002 list. A waterbody-by-waterbody priority ranking is not found in the table of waters on the State’s list. Rather, the priority ranking is expressed through the TMDL development schedule as required by the court. It should also be noted that minor adjustments have been made to the State’s schedule to reflect shifting priorities and the ability to collect the needed data and information for any particular waterbody. The adjustments have changed the due data for certain TMDLs, but has not changed the overall pace associated with TMDL development. EPA and the State have agreed upon these changes. Further, changes to the schedule have been subject to public comment along with the State’s 303(d) list.

EPA concludes that this approach is reasonable since the TMDL schedule was developed taking into consideration the statutory elements related to waterbody prioritization (i.e., the severity of the pollution and the uses to be made of such waters).

The November 1, 2000 schedule (as amended) identifies what TMDLs will be done over the next 7 years (through May 5, 2007). This schedule meets the 40 C.F.R. Part 130.7(b)(4) provision requiring states to identify waters that will be targeted for TMDL development over the next two years (2000-2002 biennium).

J. Endangered Species Act Issues

Consistent with the terms of a consent decree in the lawsuit of Friends of the Wild Swan, et

al., v. U.S. Environmental Protection Agency, et al., Civil Action No. CV99-87-M-LBE, United States District Court for the District of Montana, Missoula Division, EPA has consulted with the U.S. Fish and Wildlife Service on our proposed approval of the State's list. Our biological evaluation that addressed our approval was submitted to the Service in accordance with Section 7 of the Endangered Species Act. In our evaluation, we assessed the effects of our approval on the threatened, endangered, proposed, and candidate species throughout the State. Our conclusion was that our approval of the State's list would not likely have an adverse effect on the species of concern. Any effect of the list approval was seen as either insignificant or beneficial to the species. EPA has received concurrence on its conclusion from the U.S. Fish and Wildlife Service in correspondence dated November 21, 2002.

It has been suggested that all waters that contain or have contained species that have been listed as threatened or endangered under the Endangered Species Act ("T&E species") should be included on Montana's Section 303(d) list. Montana did not decide to list waters solely due to the presence or absence of T&E species. EPA agrees with Montana's decision. As mentioned above, Section 303(d)(1)(A) of the CWA requires only that states identify those waters for which limitations in Sections 301(b)(1)(A) and (b)(1)(B) of the CWA are not stringent enough to implement any applicable water quality standards. In and of itself, the presence or absence of T&E species gives no indication of whether such effluent limits are or are not sufficient to implement these standards. Further, the cause for impairment of any particular waterbody must be evaluated in light of the requirement in Section 303(d)(1)(A).

The cause for the demise or extirpation of any given T&E species is frequently linked to factors that go beyond those factors used for listing waters on a Section 303(d) list. For example, competition between an aquatic T&E species and other more abundant aquatic species is sometimes cited as a reason for the decline of the T&E species. Competition between these species would not constitute a reason for listing a water on a §303(d) list. On the other hand, poor water quality is often cited as a cause for the decline of T&E species and is also a reason for listing waters on a §303(d) list. Where the State of Montana had information on factors such as water quality that relate to the §303(d) listing process, it included those waters on its list. (Many of these waters have T&E species in them.)

Factors that contribute to the demise or extirpation of a given T&E species can be found in determinations of the U.S. Fish and Wildlife Service. For example, the numbers of threatened bull trout have declined in the Columbia River basin because of habitat isolation, loss of migratory corridors, poor water quality, and the introduction of non-native species. (See 63 Fed. Reg. at 31947; June 10, 1998 Federal Register Notice from US Fish and Wildlife Service regarding the determination of Threatened Status for the Klamath River and Columbia River Distinct Population Segments of Bull Trout.) Further, factors affecting bull trout populations include competition and hybridization with other species, fragmentation and isolation of bull trout from habitat changes caused by human activities, and extirpations due to naturally occurring events such as droughts and floods. (See 63 Fed. Reg. at 31668.) In its §303(d) list, Montana identified waterbodies where factors such as habitat, flow, and water quality contribute to impairment of aquatic life, including bull trout and other T&E species. The State did not list a waterbody where there was no sufficient credible information showing that aquatic life uses (including T&E species

uses) were impaired for the specific waterbody, including impairments caused by habitat, flow, and water quality. Factors such as hybridization, species competition, and loss of migratory corridors are not seen as a basis to list waters on a Clean Water Act §303(d) waterbody list.

F. References

EPA used the following documents directly or indirectly as a basis for its review of the State's §303(d) waterbody list. This list is not meant to be an exhaustive list of all records reviewed, but it includes the primary documents upon which EPA relied.

40 CFR Part 130 Water Quality Planning and Management

40 CFR Part 131 Water Quality Standards

December 28, 1978 Federal Register Notice, *Total Maximum Daily Loads Under Clean Water Act*, finalizing EPA's identification of pollutants suitable for TMDL calculations, 43 Fed. Reg. 60662.

January 11, 1985 Federal Register Notice, *40 CFR Parts 35 and 130, Water Quality Planning and Management: Final Rule*, 50 Fed. Reg. 1774

April 1991, "Guidance for Water Quality-Based Decisions: The TMDL Process," EPA 440/4-91-001.

July 24, 1992 Federal Register Notice, *40 CFR Parts 122, 123, 130*, revision of regulation, 57 Fed. Reg. 33040

August 13, 1992 memorandum from Geoffrey Grubbs, Director, Assessment and Watershed Protection Division, Office of Water, EPA Headquarters, to EPA Water Quality Branch Chiefs, Regions I - X and TMDL Coordinators, Regions I - X, regarding "Supplemental Guidance on Section 303(d) Implementation."

October 30, 1992 memorandum from Geoffrey Grubbs, Director, Assessment and Watershed Protection Division, Office of Water, EPA Headquarters, to Water Quality Branch Chiefs, Regions I - X, regarding "Approval of 303(d) Lists, Promulgation Schedules/Procedures, Public Participation."

November 26, 1993 memorandum from Geoffrey Grubbs, Director, Assessment and Watershed Protection Division, Office of Water, EPA Headquarters, to Water Quality Branch Chiefs, Regions I - X, and TMDL Coordinators, Regions I - X, regarding "Guidance for 1994 Section 303(d) Lists."

August 27, 1997 memorandum from Robert H. Wayland III, Director, Office Wetlands, Oceans, and Watershed, Office of Water, EPA Headquarters, to Water Division Directors, Regions I - X, and Directors, Great Water Body Programs, and Water Quality Branch chiefs, Regions I - X, regarding "National Clarifying Guidance For 2000 State and Territory Section 303(d) Listing

Decisions."

September, 1997 guidance from Office of Water, Headquarters, US EPA regarding Guidelines for Preparation of the Comprehensive State Water Quality Assessments (305(b) Reports) and Electronic Updates: Supplement, EPA-841-B-97-002B

April 24, 1998 draft final report from the TMDL Federal Advisory Committee to US EPA entitled TMDL Federal Advisory Committee Report prepared with assistance from Ross & Associates Environmental Consulting, Ltd.

April 27, 2000 65 Federal Register 24641 EPA Review and Approval of State and Tribal Water Quality Standards.

April 28, 2000 memorandum from Robert H. Wayland, III (Director, Office of Wetlands, Oceans, and Watersheds) to Water Division Directors, Regions 1 - 10 entitled "EPA Review of 2000 Section 303(d) lists."

May 20, 2002 memorandum from Charles H. Sutfin, Director, Assessment and Watershed Protection Division, US EPA to Water Quality Branch Chiefs, TMDL Coordinators, Monitoring Coordinators, and ORC TMDL Attorneys (Regions I - X) regarding "EPA Review of 2002 Section 303(d) Lists and Guidelines for Reviewing TMDLs under Existing Regulations issued in 1992"

November 21, 2002 letter from R. Mark Wilson, Field Supervisor, Montana Field Office, U.S. Fish and Wildlife Service to Nathaniel J. Miullo, Chief, Water Quality Unit, Region VIII, U.S. Environmental Protection Agency

August 13, 1992 memorandum from Geoffrey Grubbs, Director, Assessment and Watershed Protection Division, Office of Water, EPA Headquarters, to EPA Water Quality Branch Chiefs, Regions I - X and TMDL Coordinators, Regions I - X, regarding "Supplemental Guidance on Section 303(d) Implementation."

October 30, 1992 memorandum from Geoffrey Grubbs, Director, Assessment and Watershed Protection Division, Office of Water, EPA Headquarters, to Water Quality Branch Chiefs, Regions I - X, regarding "Approval of 303(d) Lists, Promulgation Schedules/Procedures, Public Participation."

May 1993 Guidelines for the 1994 State Water Quality Assessments (305(b) Reports), US EPA Office of Water, EPA-841-B-93-004.

November 26, 1993 memorandum from Geoffrey Grubbs, Director, Assessment and Watershed Protection Division, Office of Water, US EPA, to Water Quality Branch Chiefs, US EPA Regions I - X, and TMDL Coordinators, US EPA Regions I - X, regarding "Guidance for 1994 Section 303(d) Lists."

June 1994 Montana 305(b) Report, Water Quality Division, Montana Department of Health and Environmental Sciences, with cover sheet entitled "Montana Water Quality 1994."

August 9, 1996 memorandum from Robert Perciasepe, Assistant Administrator for Water, US EPA, to Regional Administrators, US EPA Regions I-X, and Division Directors Responsible for TMDL Programs, US EPA Regions I-X, regarding "EPA Action on 1996 Lists, Priority Rankings and TMDL Targeting Plans Submitted by States Under Section 303(d) of the Clean Water Act."

April 15, 1997 letter from Steve Kelly, Director, Friends of the Wild Swan, to Christian J. Levine, Montana Department of Environmental Quality, regarding Swan Lake water quality issues.

May 23, 1997 memorandum from Geoffrey H. Grubbs, Director, Assessment and Watershed Protection Division, US EPA, to FACA Workgroup on Section 303(d) Listing Criteria, regarding "Nonpoint Sources and Section 303(d) Listing Requirements."

July 22 and 23, 1997 agenda and presentation notes from TMDL workshop in Denver, Colorado, for EPA Region VIII States and Tribes.

August 8, 1997 memorandum from Robert Perciasepe, Assistant Administrator, Office of Water, US EPA, to US EPA Regional Administrators and US EPA Regional Water Division Directors, regarding "New Policies for Establishing and Implementing TMDLs."

August 27, 1997 memorandum from Robert H. Wayland III, Director, Office Wetlands, Oceans, and Watershed, Office of Water, EPA Headquarters, to Water Division Directors, Regions I - X, and Directors, Great Water Body Programs, and Water Quality Branch chiefs, Regions I - X, regarding "National Clarifying Guidance For 2000 State and Territory Section 303(d) Listing Decisions."

September, 1997 guidance from Office of Water, Headquarters, US EPA regarding Guidelines for Preparation of the Comprehensive State Water Quality Assessments (305(b) Reports) and Electronic Updates: Supplement, EPA-841-B-97-002B

September 12, 1997 letter from Carol L. Campbell, Director, Ecosystems Protection Program, Office of Ecosystems Protection and Remediation, US EPA Region VIII, to Mark Simonich, Director, Montana Department of Environmental Quality, regarding "Transmittal of TMDL Guidance."

December 17, 1997 notes from Bruce Zander, US EPA Region VIII, from Montana TMDL State Advisory Meeting (Helena, MT) including notes regarding Section 303(d) waterbody list development approaches used in other states as described by Don Essig (Idaho) and Sarah Johnson (Colorado).

January 27, 1998 presentation notes from Bruce Zander, US EPA, Region VIII from the Region VIII 305(b) Coordinators' Meeting entitled "Relationship Between Section 303(d) & Section 305(b)."

February 4, 1998 letter from Max H. Dodson, Assistant Regional Administrator, Office of Ecosystems Protection and Remediation, US EPA, Region VIII to Region VIII Water Quality Directors (including the Director of the Montana DEQ) regarding "303(d) Listing Requirements; Expiring Permits."

March 5, 1998 notes from Bruce Zander, US EPA Region VIII, from Montana TMDL State Advisory meeting (Helena, MT).

April 6, 1998 FAX memorandum from Stu Lehman, Planning, Prevention and Assistance Division, Montana Department of Environmental Quality, to Bruce Zander, US EPA Region VIII, regarding transmittal of undated correspondence from Jeff Juel, Ecology Center, on behalf of the parties, to Stuart Lehman, TMDL Coordinator, Department of Environmental Quality, regarding "Comments on 1998 Draft Montana List of Waterbodies in Need of Total Maximum Daily Load (TMDL) Development."

April 24, 1998 draft final report from the TMDL Federal Advisory Committee to US EPA entitled TMDL Federal Advisory Committee Report prepared with assistance from Ross & Associates Environmental Consulting, Ltd.

May 27, 1998 letter from Mark Simonich, Director, Montana Department of Environmental Quality, to Bill Yellowtail, Regional Administrator, US EPA Region VIII, regarding the "Transmittal of 1998 Montana Section 303(d) List."

June 10, 1998 letter from Gary Ingman, Chief, Monitoring & Data Management Bureau, Montana Department of Environmental Quality, to Bruce Zander, Ecosystems Protection Program, US EPA Region VIII, regarding MPDES pollutants of concern (Appendix A waters) and waterbodies removed or partially removed from the Montana 1996 Section 303(d) waterbody list.

June 23, 1998 letter from Max H. Dodson, Assistant Regional Administrator, Office of Ecosystems Protection and Remediation, US EPA Region VIII, to Mark Simonich, Director, Montana Department of Environmental Quality, regarding "Section 303(d) Total Maximum Daily Load (TMDL) Waterbody List."

August 23, 1999 Federal Register Notice, *40 C.F.R. Part 130 / Proposed Revisions to the Water Quality Management and Planning Regulations / Proposed Rule*, 64 Fed. Reg. 46012.

April 27, 2000 Federal Register notice, *40 C.F.R. Part 131, EPA Review and Approval of State and Tribal Water Quality Standards Final Rule*, 65 Fed. Reg. 24641.

April 28, 2000 memorandum from Robert H. Wayland, III, Director, Office of Wetlands, Oceans, and Watersheds, US EPA, to Water Division Directors, US EPA Regions 1 - 10, entitled "EPA Review of 2000 Section 303(d) lists."

May 2000 Draft report Nonpoint Source Management Plan Water Quality Planning using a

Watershed Approach, Volume 1: Goals, Objectives; Montana DEQ

April 2000 Draft report Framework and Nonpoint Source Management Plan Water Quality Planning using a Watershed Approach; Volume 2: Watershed Planning and Coordination Profiles; Montana DEQ

December 1, 2000 letter from Mark A. Simonich, Director, Montana Department of Environmental Quality, to Bill Yellowtail, Regional Administrator, US EPA Region VIII, submitting Montana's year 2000 Section 303(d) list.

May 20, 2002 memorandum from Charles H. Sutfin, Director, Assessment and Watershed Protection Division, US EPA to Water Quality Branch Chiefs, TMDL Coordinators, Monitoring Coordinators, and ORC TMDL Attorneys (Regions I - X) regarding "EPA Review of 2002 Section 303(d) Lists and Guidelines for Reviewing TMDLs under Existing Regulations issued in 1992"

September 24, 2002 letter from Jan P. Sensibaugh, Director, Montana Department of Environmental Quality to Robert Roberts, Regional Administrator, Region VIII, USEPA transmitting Montana's Year 2002 Section 303(d) list for review.

October 28, 2002 letter from Nathaniel J. Miullo, Chief Water Quality Unit, US EPA Region VIII, to Mark Wilson, Field Supervisor, US Fish and Wildlife Service, Helena, Montana regarding "Request for Concurrence on Section 7 (ESA) Findings, Montana's Year 2002 Section 303(d) Waterbody List"

November 21, 2002 letter from R. Mark Wilson, Field Supervisor, US Fish and Wildlife Service, Helena, Montana providing concurrence on Montana's Year 2002 Section 303(d) Waterbody List.