



UNITED STATES ENVIRONMENTAL PROTECTION
AGENCY
REGION 8
999 18TH STREET - SUITE 300
DENVER, CO 80202-2466

Ref: 8EPR-EP

Mr. Art Compton, Division Administrator
Planning, Prevention, and Assistance Division
Montana Department of Environmental Quality
P.O. Box 200901
Helena, MT 59620-0901

Re: TMDL for Big Creek
Yellowstone Basin

Dear Mr. Compton:

Thank you for your submittal of the Big Creek flow TMDL dated December 18, 2000. We have reviewed the full package and concur with the findings of the analysis. We offer our support in implementation of the provisions as described in the submittal. We also believe that implementation of the provisions as described in the submittal will have a high likelihood of success in achieving the stated goals.

EPA is not taking formal action pursuant to Section 303(d)(2) of the Clean Water Act to approve or disapprove this TMDL. It is EPA's position that TMDLs are required by the Clean Water Act only for pollutants that are causing or contributing to the impairment of a water quality limited segment (WQLS). Section 303(d)(1) of the Act requires States to identify water quality limited segments, and to establish TMDLs for such waters for "those pollutants" EPA identifies as suitable for such calculation. The Act in turn defines "pollutants" to include various materials discharged into water. See § 509(6). We interpret the definition of "pollutant" in the Act as excluding flow alterations, such as those causing the impairment of Big Creek, since flow alterations are not covered by the list of materials in this definition. Therefore, since TMDLs are required only for pollutants, and flow alteration is not a pollutant, no TMDL for low flow is required for Big Creek under the Act or EPA regulations.¹ The Act requires EPA to approve or disapprove those TMDLs established under § 303(d)(1)(C) and submitted to the Agency. We interpret this obligation as applying only to those TMDLs required to be established by States and submitted to

¹ EPA regulations codify the requirement to establish TMDLs only for pollutants causing impairments on listed waters. See 40 C.F.R. 130.7(c)(1)(ii) ("TMDLs shall be established for all pollutants preventing or expected to prevent attainment of water quality standards as identified pursuant to paragraph (b)(1) of this section."). This¹ This interpretation is also described in EPA guidance, which clarifies that TMDLs are required only for pollutants. See "National Clarifying Guidance for 1998 State and Territory Clean Water Act Section 303(d) Listing Decisions," which is an attachment to an August 27, 1997 guidance memorandum by Robert H. Wayland III, Director, Office of Wetlands, Oceans and Watersheds. Page 4 of the attachment states, "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."



EPA.²

We believe that the flow management plan for Big Creek that you have submitted is a reasonable approach to addressing flow in this waterway. However, the Act does not require Montana to establish a TMDL in this instance because there is no pollutant causing or contributing to the impairment. Since EPA's obligation under the Act is to approve or disapprove only those TMDLs established under § 303(d)(1)(C), we do not believe we are required to take action on this submission.

Moreover, EPA does not consider this TMDL necessary to comply with the orders issued by the U.S. District Court for the District of Montana in Friends of the Wild Swan, et al. v. U.S. Environmental Protection Agency, et al., CV 97-35-M-DWM (June 21, 2000, as amended Sept. 21, 2000, D.Mont.). The Court's June 21st order requires that EPA "shall approve or establish TMDLs for WQLSs identified on Montana's 1996 list submitted under section 303(d) of the Clean Water Act" by May 5, 2007. Id. at 9; see also 130 F.Supp.2d at 1203. This submission is not a "necessary TMDL," since, as described above, the Act does not require States to establish TMDLs where there is no pollutant causing or contributing to a waterbody's impairment. Therefore, the Court's order does not require EPA or Montana to establish a TMDL for low flow for Big Creek.

Again, we would like to acknowledge the good work on the Big Creek plan. Although we are not taking official action under section 303(d), we wish to concur with the elements of the plan and support the State in its implementation.

For further questions on this issue, feel free to call Bruce Zander, Region VIII's TMDL Coordinator, at 303-312-6846.

Sincerely,

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

² EPA must also approve or disapprove total maximum daily thermal loads established under §§ 303(d)(1)(D), which are not relevant to this discussion.