



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 8

1595 Wynkoop Street
Denver, CO 80202-1129
Phone 800-227-8917
www.epa.gov/region08

SEP 30 2014

RECEIVED

OCT 06 2014

DEQ
Planning Division

Ref: 8EPR-EP

Tracy Stone-Manning, Director
Montana Department of Environmental Quality
P.O. Box 200901
Helena, Montana 59620-0901

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

Dear Ms. Stone-Manning:

Thank you for your submittal of the Montana Department of Environmental Quality (DEQ)'s 2014 Water Quality Integrated Report (IR). The U.S. Environmental Protection Agency Region 8 has conducted a complete review of the Clean Water Act Section 303(d) waterbody list (Section 303(d) list) and supporting documentation and information. The EPA has determined that Montana's 2014 Section 303(d) list meets the requirements of Section 303(d) of the Clean Water Act (CWA) and the EPA's implementing regulations and approves Montana's 2014 Section 303(d) list.

The EPA's approval of Montana's 2014 Section 303(d) list extends to all waterbodies on the list with the exception of those waters that are within Indian country, as defined in 18 U.S.C. § 1151. The EPA interprets CWA Section 303(d) to require the EPA establishment or approval of section 303(d) lists only for impairments of waters with federally approved water quality standards. For the 2014 IR, several waterbodies in the Tongue and Powder River watersheds remain on the Section 303(d) list as impaired for salinity based on a 2008 interpretation of the numeric EC and SAR criteria. The October 13, 2009 decision by the United States District Court for the District of Wyoming in the *Pennaco Energy Inc. v. U.S. Environmental Protection Agency* (D. Wyo. 06-CV-100-B) litigation vacated the EPA's approval of Montana's water quality standards for EC and SAR. This means that these criteria are no longer effective for CWA purposes. Until such time as standards for EC and SAR are federally-approved, there would be no basis under CWA Section 303(d) to approve waters listed as impaired for salinity based on the EC or SAR criteria. Because the *Pennaco* decision vacated the numeric EC and SAR standards for CWA purposes, any waters listed based on EC and SAR exceedances were excluded from our review and approval.

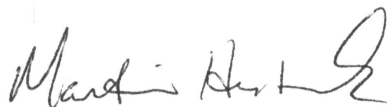
The attachment describes the statutory and regulatory requirements of the CWA Section 303(d) list and a summary of the EPA's review of Montana's compliance with each requirement. The EPA appreciates your work to produce Montana's 2014 Section 303(d) list.



Printed on Recycled Paper

If you have questions, the most knowledgeable EPA staff person is Tina Laidlaw and she may be reached at (406) 457-5016.

Sincerely,



Martin Hestmark
Assistant Regional Administrator
Office of Ecosystems Protection
and Remediation

Attachment

cc: Michael Pipp, DEQ
Mark Bostrom, DEQ
Tina Laidlaw, USEPA 8MO



Printed on Recycled Paper

Review of Montana's 2014 Section 303(d) Waterbody List

*Attachment to letter from Martin Hestmark, Assistant Regional Administrator,
Office of Ecosystems Protection and Remediation, US EPA, Region VIII to
Tracy Stone-Manning, Montana Department of Environmental Quality*

Date of Transmittal Letter from State: May 30, June 10, June 30,
and July 11, 2014

Date of Receipt by EPA: June 2, June 19, June 30,
and July 19, 2014

I. Introduction

Montana Department of Environment Quality (DEQ) submitted their final 2014 Integrated Report (IR) to the Environmental Protection Agency (EPA) in a series of four submittals on May 30, June 10, June 30, and July 11, 2014. Based on our review of the State's CWA Section 303(d) water body list ("Section 303(d) list"), the EPA is approving Montana's 2014 list. The purpose of this review document is to describe the rationale for the EPA's approval.

In March 2011, the EPA issued guidance for integrating the development and submission of 2012 Section 305(b) water quality reports and Section 303(d) lists of impaired waters. This guidance, and previous the EPA guidance, recommends that states develop an Integrated Report of the quality of their waters by placing all waters into one of five assessment categories. By following this guidance, Category 5 of the Integrated Report is the State's Section 303(d) list. The EPA's action in review and approval of this document is only on Category 5 that comprises the Section 303(d) list within the Integrated Report.

The EPA reviewed the methodology used by the State in developing the Section 303(d) list and the State's description of the data and information it considered. The EPA's review of Montana's 2014 Section 303(d) list is based on the EPA's 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 2014 list is considered an update of the State's 2012 list, and as such, the Section 303(d) list the EPA is approving today is comprised of 480 assessment units (1,171 waterbody/pollutant combinations) compared with 584 assessment units (1,582 waterbody/pollutant combinations) included on the 2012 list.¹ States may add and take waters off their Section 303(d) lists based on several factors. For the 2014 cycle, Montana removed 496 waterbody/pollutant combinations from its year 2012 list. The majority (307 waterbody/pollutant combinations) were delisted based on the EPA approval of a total maximum daily load (TMDL). See the table on page 6 for more details.

¹ Table 4-1 of the Integrated Report.

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 CWA 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 the EPA's long-standing interpretation of Section 303(d).

The EPA regulations implementing Section 303(d) require states to identify water quality limited segments (WQLSs) that need TMDLs. 40 C.F.R. § 130.7(b). WQLSs² are defined in regulation as segments "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, even after the application of the technology-based effluent limitations required by sections 301(b) and 306 of the Act." 40 C.F.R. § 130.2(j). Thus, 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 CWA; (2) more stringent effluent limitations required by state or local authority; and (3) other pollution control requirements required by state, local, or federal authority. (40 C.F.R. §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 not meeting designated uses, or as threatened, in the State's most recent CWA Section 305(b) report; (2) waters for which dilution calculations or predictive modeling indicate 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 the EPA. (40 C.F.R. §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. The 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, the EPA Office of Water, April 1991.) 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.

² WQLSs may also be referred to as "impaired waterbodies" or "impairments" throughout this document.

In addition to requiring states to assemble and evaluate all existing and readily available water quality-related data and information, the EPA regulations at 40 C.F.R. §130.7(b)(6) require States to include, as part of their submissions to the EPA, documentation to support decisions using or excluding 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; (3) a rationale for any decision not to use any existing and readily available data and information 40 C.F.R. §130.7(b)(5), and (4) any other reasonable information requested by the Region.

C. Priority Ranking

The EPA regulations also codify and interpret the requirement in Section 303(d)(1)(A) of the CWA that states establish a priority ranking for listed waters. The regulations at 40 C.F.R. §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. (CWA Section 303(d)(1)(A)). As long as these factors are taken into account, the CWA 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 Fed. Reg. 33040, 33045 (July 24, 1992)), and EPA's 1991 Guidance).

D. Applicable Water Quality Standards

For purposes of identifying waters for the Section 303(d) list, the terms “water quality standard applicable to such waters” and “applicable water quality standards” refer to those water quality standards established under Section 303 of the Act. On April 27, 2000, the EPA promulgated a rule under which the “applicable standard” for Clean Water Act purposes depends on when the relevant state or tribe promulgated that standard. Standards that states or tribes have promulgated before May 30, 2000, are effective upon promulgation by the states or tribes. Standards that states or tribes promulgated on or after May 30, 2000, become effective only upon EPA approval. (See 40 C.F.R. §131.21(c)).

The EPA's approval of Montana's 2014 Section 303(d) list extends to all waterbodies on the list with the exception of those waters that are within Indian country, as defined in 18 U.S.C. § 1151. The EPA interprets CWA Section 303(d) to require the EPA establishment or approval of section 303(d) lists only for impairments of waters with federally approved water quality standards. For the 2014 IR, several waterbodies in the Tongue and Powder River watersheds remain on the 303(d) list as impaired for salinity based on a 2008 interpretation of the numeric EC and SAR criteria. The October 13, 2009 decision by the United States District Court for the District of Wyoming in the *Pennaco Energy Inc. v. U.S. Environmental Protection Agency* (D. Wyo. 06-CV-100-B) litigation vacated the EPA's approval of Montana's water quality standards for EC and SAR. This

means that these criteria are no longer effective for CWA purposes. Until such time as standards for EC and SAR are federally-approved, there would be no basis under CWA Section 303(d) to approve waters listed as impaired for salinity based on the EC or SAR criteria. Because the *Pennaco* decision vacated the numeric EC and SAR standards for CWA purposes, any waters listed based on EC and SAR exceedances were excluded from our review and approval.

III. Analysis of Montana's Submission

A. Background

In reviewing Montana's submittal, the EPA first reviewed the methodology used by the State to develop their 2014 Section 303(d) list in light of Montana's approved water quality standards, and then reviewed the actual list of waters. The State's Assessment Methodology is referenced on Page 6-1 of the Integrated Report and can be found on the State's Quality Assurance web page³. The 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 CWA and 40 C.F.R. §130.7. The 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 considered all data and information pertaining to the categories under 40 C.F.R. §130.7(b)(5), and properly listed WQLSs under 40 C.F.R. §130.7(b)(1).

In previous guidance, the EPA recommended that states develop an Integrated Report of the quality of their waters by placing all waters into one of five assessment categories. (See the EPA's Guidance for 2006 Assessment, Listing and Reporting Requirements Pursuant to Sections 303(d), 305(b) and 314 of the Clean Water Act, July 21, 2005.) By following this guidance, Category 5 of the Integrated Report is the State's Section 303(d) list. The EPA's action in review and approval of this document is only on Category 5 that comprises the Section 303(d) list within the Integrated Report.

The State's list was submitted to the EPA Region 8 enclosed with correspondence dated June 2, 2014 from Tracy Stone-Manning, Director, Montana Department of Environmental Quality, in a document entitled "*Montana 2014 Final Water Quality Integrated Report*".

The year 2014 Integrated Report submitted to the EPA from the Montana DEQ consisted of the following portions that are necessary for the Section 303(d) waterbody list:

- **Waterbodies and corresponding pollutants that make up the State's Section 303(d) list** (See Appendix B: Waters in need of TMDLs [303(d) list] and TMDL schedule).
- **Prioritization of waterbodies for TMDL development** (See Appendix B: Waters in need of TMDLs [303(d) list] and TMDL schedule).

³ <http://deq.mt.gov/wqinfo/QAProgram/default.mcp>

- **Identification of waters targeted for TMDL development over the next biennium** (See Appendix B: Waters in need of TMDLs [303(d) list] and TMDL schedule).

The EPA's approval action of Montana's year 2014 Section 303(d) list extends only to the items listed immediately above.

The 2014 Section 303(d) waters are found in the State's Integrated Report, Appendix B: Waters in need of TMDLs [303(d) list] and TMDL schedule. Appendix B contains the following information for each waterbody: assessment unit identifier, waterbody name and location, cause of impairment ("pollutant"), cycle first listed, TMDL Priority, and TMDL Schedule.

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

The EPA has reviewed Montana's description of the data and information it considered for identifying waters on the Section 303(d) list. The EPA concludes that the State properly assembled and evaluated all existing and readily available data and information, including data and information relating to the categories of waters specified in 40 C.F.R. §130.7(b)(5) and properly identified and listed WQLSs as required by 40 C.F.R. §130.7(b)(1). In particular, the State relied on information from the 2014 Section 305(b) water quality assessments, assessments performed under the CWA Section 319 non-point source program, as well as data and information obtained through an extensive process to solicit information from state, federal and citizen sources. The State's evaluation of data and information in each of these categories is described below.

- *Waters identified by the state in its most recent section 305(b) report as "partially meeting" or "not meeting" designated uses or as "threatened"* (40 C.F.R. §130.7(b)(5)(i)): Montana produced a 2014 Integrated Report consistent with the EPA's guidance regarding combined CWA 305(b) reports and 303(d) lists. The EPA concludes that Montana made listing decisions using all existing and readily available data and information, in development of its 2014 Section 303(d) waterbody list.
- *Waters for which dilution calculations or predictive models indicate non-attainment of applicable water quality standards* (40 C.F.R. §130.7(b)(5)(ii)): Montana assembled and evaluated information from past and anticipated dilution calculations and predictive modeling. The 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 2014 Section 303(d) waterbody list.
- *Waters for which water quality problems have been reported by local, state, or federal agencies; members of the public; or academic institutions* (40 C.F.R. §130.7(b)(5)(iii)): The State solicited data and information in preparation for the 2014 Section 303(d) list. Data and information obtained as a result of this effort were evaluated and considered. The State's submittal identified several entities that contributed data or information and responded to public comments related to assessments for individual waterbodies.

- *Waters identified by the State as impaired or threatened in a nonpoint assessment submitted to the EPA under Section 319 of the CWA or in any updates of the assessment (40 C.F.R. §130.7(b)(5)(iv)):* The State's 2014 Section 303(d) list includes all waters that have data to support nonpoint source pollution impairment. Montana's listing approach and methodologies direct CWA Section 319 activities and resources to the highest priorities. Watershed assessments are often conducted for waterbodies that are already listed in order to collect current data to support TMDL development.

Based upon its review, the EPA concludes that with regard to the waters identified in the State's 2014 Section 303(d) list, the State's process for developing that list meets the requirements of 40 C.F.R. §130.7(b)(i-iv) regarding the consideration of all existing and readily available water quality-related data and information, as well as the requirements of 40 C.F.R. § 130.7(b)(1).

C. Waters Removed from the Section 303(d) List

In addition to adding WQLSs that require TMDLs to its Section 303(d) list, a state may also remove waters from its list when such removal is justified. The EPA has identified four reasons that justify the removal of a water from a state's 303(d) list. These are:

1. The state has prepared and the EPA has approved a TMDL for the listed water.
2. The original basis for listing the water was incorrect.
3. New data or information indicates that the applicable water quality standard for the water is being met and its designated uses are fully supported.
4. The state has adopted and the EPA has approved a site-specific water quality standard for the water, and the new water quality standard is being met.

A full accounting of waters removed from the State's 2012 303(d) list is provided on Page 4-12 and in Appendix D of the Integrated Report. The State's removal decisions and stated justifications are summarized below:

Number of Waterbody-Pollutant Combinations Removed from List	
Reason	2014
TMDL completed and approved by the EPA	307
Original basis for listing was incorrect	16
New data or information indicate applicable WQS is being met	173
A site-specific WQS was approved by the EPA and the new standard is being met	0
Other:	
Total	496

In reviewing the State's 2014 Section 303(d) waterbody list, the EPA carefully considered Montana's decision to remove certain waterbody-pollutant combinations from the State's 2012 303(d) list, its justification from those removals, and the methodology it used in making those decisions. The EPA concludes that the removal decisions identified in the Integrated Report are based on all existing and readily available water quality-related data and information, and that the removal decisions are properly justified.

D. Priority Ranking and Schedule for Development of TMDLS for Listed Waters and Pollutants

Pursuant to the listing methodology set out in the State's submittal, Montana prioritized WQLSs for TMDL development based on protecting and restoring native fish such as bull trout and westslope cutthroat, stakeholder interest, significant new pollutant, sources, linkage to discharge permits, data availability, and funding. Montana's TMDL prioritization strategy is fully described in Appendix B of Montana's Integrated Report.

The EPA reviewed the State's priority ranking of listed waters for TMDL development, and concluded that the State properly took into account the severity of pollution and the uses to be made of such waters, as required by 40 C.F.R. 130.7(b)(4), as well as other relevant factors such as imminent human health problems or local support for water quality improvement. In addition, the EPA concluded that the State listed WQLS targeted for TMDL development in the next two years, as required by 40 C.F.R. 130.7(d).

IV. Final Recommendation on Montana's 2014 Section 303(d) List Submittal

After careful review of Montana's final Section 303(d) list submittal package, the EPA has determined that Montana's 2014 Section 303(d) list meets the requirements of Section 303(d) of the Clean Water Act (CWA) and the EPA's implementing regulations and approves Montana's 2014 Section 303(d) list.

V. References

The following list includes documents that were used directly or indirectly as a basis for the EPA's review and approval of the State's Section 303(d) waterbody list. This list is not meant to be an exhaustive list of all records, but to provide the primary documents the Region relied upon in making its decisions to approve the State's list.

40 C.F.R. Part 130 Water Quality Planning and Management

40 C.F.R. Part 131 Water Quality Standards

July 29, 2005, Memorandum from Diane Regas, Director, Office of Wetlands, Oceans, and Watersheds, US EPA to Water Division Directors transmitting the EPA's "Guidance for 2006 Assessment, Listing and Reporting Requirements Pursuant to Sections 303(d), 305(b) and 314 of the Clean Water Act".

October 12, 2006, Memorandum from Diane Regas, Director, Office of Oceans, Wetlands, and Watersheds entitled *Information Concerning 2008 Clean Water Act Sections 303(d), 305(b), and 314 Integrated Reporting and Listing Decisions*.

May 5, 2009, Memorandum from Suzanne Schwartz, Acting Director, Office of Wetlands, Oceans, and Watersheds, entitled *Information Concerning 2010 Clean Water Act Sections 303(d), 305(b), and 314 Integrated Reporting and Listing Decisions*.

March 21, 2011, Memorandum from Denise Keehner, Director, Office of Wetlands, Oceans, and Watersheds, entitled *Information Concerning 2012 Clean Water Act Sections 303(d), 305(b), and 314 Integrated Reporting and Listing Decisions*.

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

July 24, 1992 Federal Register Notice, *40 C.F.R. Parts 122, 123, 130, Revision of Regulation*, 57 FR 33040.

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

September, 1997, Guidance from Office of Water, Headquarters, the 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.

November 5, 1997, Memorandum from Tudor Davies, Director, Office of Science and Technology to Water Management Division Directors entitled "Establishing Site Specific Aquatic Life Criteria Equal to Natural Background."

August 23, 1999, Federal Register Notice. *Proposed Revisions to the Water Quality Management and Planning Regulations*, 64 FR 46012.

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

September 3, 2013, US EPA Memorandum, Information Concerning 2014 Clean Water Act 303(d), 305(b) and 314 Integrated Reporting and Listing Decisions.