

## **Recommended Framework for EPA Approval Decisions on 2002 State Section 303(d) List Submissions**

### **Introduction**

The Office of General Counsel (OGC) and the Office of Wetlands, Oceans and Watersheds (OWOW) has developed a recommended framework to assist the Regions in the preparation of their approval letters for the States' 2002 Section 303(d) list submissions. Sections A-J below provide example language the Regions may use in developing their decision documents (i.e., approval letters and information to be placed in the administrative record) supporting EPA's action on State Section 303(d) lists. This suggested language for an approval action addresses all required elements of State-submitted lists. The language is applicable to EPA's approval of State lists, but the substantive discussion of various issues may also be used in decision documents to support our disapproval of lists for failure to include certain waters, or because of other list inadequacies. Our goal in providing this guidance was to provide materials that would assist the Regions in preparing their decisions on the State list submissions and to promote national consistency in making those decisions.

In November 2001, EPA issued guidance for integrating the development and submission of 2002 Section 305(b) water quality reports and Section 303(d) lists of impaired waters. See EPA's 2002 Integrated Water Quality Monitoring and Assessment Report Guidance, Nov. 19, 2001. This guidance recommends that states develop an integrated report of the quality of their waters by placing all waters into one of five assessment categories. If a State follows this guidance, Category 5 of the integrated report is the State's Section 303(d) list. The Region should acknowledge that the Region's action is only on Category 5/Section 303(d) list of the integrated report.

On the issue of the adequacy of State processes for public participation, OW's policy is that there should be full and meaningful public participation in the listing process. Regions should therefore review how States provided for public participation to ensure that each State carried out its public participation process consistent with the State's public participation requirements. Regions and States should work together to ensure that there is adequate public participation in the listing process. If the Region believes a State has not provided adequate public participation, the Region should ask the State to provide an additional opportunity for public participation. If the State fails to do so, the Region should provide such additional opportunity. If the Region receives comments during such a process, we recommend the State address the comments by supplementing their list or revising their response to comments. Again, if the State is unwilling or unable to do so, the Region should consider and address the comments. We believe that this

process is a more appropriate way to deal with inadequate public participation in the listing process rather than an outright disapproval of a list based on an inadequate opportunity for public participation.

Finally, we want to provide the following advice concerning how to address comments the State received during its public comment process. If the State received comments on a particular issue that opposes or questions the State's decisions, the Regions should determine whether those comments are adequately addressed in the State's comment response document. The comments and the State's responses should be included in the State's submission to EPA. If the Region agrees with the State's substantive decision, but believes that the State's comment response is inadequate, the Region can work with the State to supplement its' response even after the formal submission is made (but prior to the Region's approval or disapproval action). If the State is unwilling or unable to supplement the State's responses, the Region should address the issue in its decision document or elsewhere in the administrative record. Where the recommended language indicates that the Region needs to provide a case-specific explanation or rationale, the Region's explanation or rationale will become particularly important where public comments have been received.

Regions should consult with Headquarters in situations where their action will deviate from the approaches recommended here. Please contact Michael Haire, at 202-566-1224 or Hazel Groman, at 202-566-1219, in OWOW and Susmita Dubey, at 202-546-5577 in OGC, if you have any questions concerning this guidance.

### **Recommended Framework**

**The recommended framework is organized by subject matter. Each section contains recommended language pertaining to the issues listed below.**

1. **Introductory language** (for use in all letters)  
See Section A
2. **Language describing statutory and regulatory background** (for use in all letters)  
See Section B
3. **Language analyzing State's submission** (for use in all letters, modified for each State list)
  - A. **Language on the State's identification of waters and consideration of existing and readily available water quality-related data and information** (for use in all letters, modified for each State list)

See Section C

- i. **Language to include if the State included waters where it is known that no pollutant is causing impairment** (for use where appropriate)  
See Section D
- ii. **Language to include where the Region requested the State to explain the basis for not listing certain waters** (for use where appropriate)  
See Section E
- iii. **Language to include where the State decides not to list waters on the 2002 list pursuant to 40 CFR 130.7(b)(1)** (for use where appropriate)  
See Section F
- iv. **Language to include if the State did not include waters impaired by nonpoint sources, or where the State listed waters impaired by nonpoint sources but comments were received opposing such listing** (for use where appropriate)  
See Section G

**B. Language on the State's priority ranking and targeting** (for use in all letters)  
See Section H

4. **Language to include if the State included tribal waters on the list** (for use where appropriate)  
See Section I
  5. **Language to include if a schedule has been received** (for use where appropriate)  
See Section J
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**Section A**

**The following is suggested introductory language for Regional approval letters, and generally states that the Region has concluded the State's list meets applicable requirements.**

EPA has conducted a complete review of [State]'s 2002 Section 303(d) list and supporting documentation and information and, based on this review, EPA has determined that [State]'s list of water quality limited segments (WQLSs) still requiring TMDLs meets the requirements of

Section 303(d) of the Clean Water Act ("CWA" or "the Act") and EPA's implementing regulations. Therefore, by this order, EPA hereby APPROVES [State]'s Section 303(d) list. The statutory and regulatory requirements, and EPA's review of [State]'s compliance with each requirement, are described in detail below.

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## **Section B**

**The following suggested language can be included in all approval letters, describing in detail the applicable requirements that State lists must meet.**

### **Statutory and Regulatory Background**

#### **Identification of 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 40 CFR 130.7(b)(1).

#### **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.

### **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 WQLs 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, 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.

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### **Section C**

**The following suggested language provides a description of how the State submissions met each requirement described in Section B. Where case-specific discussions will need to be drafted by the Region, a notation to this effect is included in bold type.**

#### **Analysis of [State]'s Submission**

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

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.

**[Describe process State went through, e.g., did they start with Section 305(b) report and remove waters where other pollution control requirements exist, or waters with TMDLs already done. Also, should explicitly say that the State considered all data and information regarding 130.7(b)(5) categories, which is the minimum required by the regulations. To the extent the State considered data and information beyond what is listed in 40 CFR 130.7(b)(5), EPA's action letter should note that, and describe what the State considered.]**

EPA has reviewed [State]'s description of the data and information it considered, its methodology for identifying waters, **[and anything else the Region looked at, e.g., if the Region reviewed some or all of actual data the State considered]**. 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 CFR 130.7(b)(5).

In addition, the State provided its rationale for not relying on particular existing and readily available water quality-related data and information as a basis for listing waters.

**[Should describe in general terms which data or information State chose not to rely on, and explain why State's decision was reasonable. The State's submission should contain its rationale for not using such data or information, and the Regions' review should assess whether the State's rationale is reasonable. The Regions should pay close attention to waters that are not listed but were nominated by commenters. For such waters, the State should have a waterbody-specific analysis for not listing. Regions should carefully review situations in which States delist waters without any new data and/or information showing water quality standards are met.]**

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**Section D**

The following language addresses the situation where the State has listed waters where it is

**known that no pollutant is causing or is expected to cause the impairment.**

EPA recognizes that the State included on the 2002 Section 303(d) list some WQLSs beyond those that are required by EPA regulations, e.g., waters where there is no pollutant associated with the impairment. States and territories should consider scheduling these waters for monitoring to confirm that there continues to be no pollutant-caused impairment and to support appropriate water quality management actions to address the cause(s) of the impairment. While EPA is not taking any action to approve or disapprove the State's list due to the inclusion of such waters, neither the State nor EPA has an obligation under current EPA regulations to develop TMDLs for such waters because the waters are not impaired by a pollutant. States have the discretion under Section 303(d), which charges States with the primary responsibility to identify WQLSs for TMDL development, and Section 510, which authorizes States to adopt more stringent pollution controls, to include waters on their Section 303(d) lists that may not be required to be included by current EPA regulations, and EPA's regulations do not compel the Agency to disapprove the State's list because of the inclusion of such waters. EPA guidance also recognizes that States may take a conservative, environmentally protective approach in identifying waters on their Section 303(d) lists. See National Clarifying Guidance for 1998 Section 303(d) Lists, Aug. 27, 1997.

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## **Section E**

**The following language addresses the situation where EPA has requested that the State explain the basis for not listing certain waters, e.g., previously-listed waters or specific waters nominated by commenters. Where comments are received questioning the State's failure to list specific waters, the State needs to provide its rationale in response to such comments, even if EPA has not requested a good cause demonstration.**

The State has also demonstrated, to EPA's satisfaction, good cause for not including [which water(s)] on its list. As provided in 40 CFR 130.7(b)(6)(iv), EPA requested that the State demonstrate good cause for not including this water.

**[Describe State's good cause demonstration here, including explanation of why it is in fact good cause for not listing specific waterbodies, e.g., more recent or accurate data; more sophisticated water quality modeling; flaws in the original analysis that led to the water being listed; changes in conditions e.g., new control equipment or elimination of discharges. If commenters raise particular waters they believe should be listed, make sure the State submission contains a waterbody-specific explanation for why such waters are not listed. If the submission does not contain such a discussion, the Regions should work with the State**

**to ensure the record for the Region's final decision contains an adequate response to the comments.]**

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## **Section F**

**The following language addresses a situation where the State has decided not to list waters pursuant to 40 CFR 130.7(b)(1) because they are expected to meet water quality standards.**

The State's decision not to include **[which waters]** on its 2002 Section 303(d) list is consistent with EPA regulations at 40 CFR 130.7(b)(1). These waters were identified on the State's 1998 [or 2000] Section 303(d) list. Under 40 CFR 130.7(b)(1), States are not required to list WQLSs still requiring TMDLs where effluent limitations required by the CWA, more stringent effluent limitations required by State or local authority, or other pollution control requirements required by State, local, or federal authority, are stringent enough to implement applicable water quality standards. The regulation does not specify the time frame in which these various requirements must implement applicable water quality standards to support a State's decision not to list particular waters.

Monitoring should be scheduled for these waters to verify that the water quality standard is attained as expected in a reasonable time frame. Where standards will not be attained through implementation of the requirements listed in 40 CFR 130.7(b)(1) in a reasonable time, it is appropriate for the water to be placed on the Section 303(d) list to ensure that implementation of the required controls and progress towards compliance with applicable standards is tracked. If it is determined that the water is, in fact, meeting applicable standards when the next Section 303(d) list is developed, it would be appropriate for the State to remove the water from the list at that time.

**The following language is suggested where the Region is approving the State's decision not to list waters pursuant to 40 CFR 130.7(b)(1)(iii):**

The State has demonstrated that there are other pollution control requirements required by State, local, or federal authority that will result in attainment of water quality standards for **[which pollutants]** within a reasonable time. **[Describe how State's submission demonstrates other pollution control requirements, e.g., by referencing State/local/federal regulation that imposes requirements.]** The State's submission also demonstrates that these requirements will result in attainment of applicable water quality standards for **[which pollutants]** within a reasonable time. **[describe how State's submission does this]**

**The following language is suggested where the Region is approving the State's decision**



**not to list waters pursuant to 40 CFR 130.7(b)(1)(ii):**

The State has demonstrated that there are effluent limitations required by State or local authority, which are more stringent than technology-based effluent limitations, required by the Clean Water Act, and that these more stringent effluent limitations will result in attainment of water quality standards for **[which pollutants]** within a reasonable time. **[Describe how the State's submission demonstrates this.]** The State's submission also demonstrates that these requirements will result in attainment of applicable water quality standards for **[which pollutants]** within a reasonable time. **[describe how the State's submission does this]**

**[The rationale for excluding a waterbody from the Section 303(d) list should be specific to the water quality problem for that waterbody. Additionally, the Regions should request the following information in reviewing the decision not to list a water pursuant to 40 CFR130.7(b)(1):**

- 1. A description of the various requirements and the authorities that require them;**
- 2. An estimate of the reductions that will occur;**
- 3. A schedule of when the required measures will be implemented;**
- 4. An estimate of when the WQS will be attained; and**
- 5. A plan to monitor the time of attainment of the WQS.**

**A determination of what is a reasonable time frame should be made on a case-by-case basis using such information as identified above in numbers 1-5.]**

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## **Section G**

**The following language supports a State's listing of waters impaired by nonpoint sources.**

The State 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 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. In *Pronsolino v. Marcus*, the District Court for the Northern District of California held that section 303(d) of the Clean Water Act (CWA) authorizes EPA to identify and establish total maximum daily loads (TMDLs) for waters impaired by nonpoint sources. *Pronsolino et al. v. Marcus et al.*, 91 F.Supp.2d 1337, 1347 (N.D.Ca. 2000). See also EPA's 1991 Guidance and National Clarifying Guidance for 1998 Section 303(d) Lists, Aug. 27, 1997. **[The Regions should consult with Headquarters in situations where the State has gotten comments opposing listing of waters impaired by**

nonpoint sources.]

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## Section H

The following suggested language provides a description of how the State submissions meet the priority ranking requirement in the Act and EPA's regulations.

### Priority Ranking and Targeting

EPA also reviewed the State's priority ranking of listed waters for TMDL development, and concludes that the State properly took into account the severity of pollution and the uses to be made of such waters, as well as other relevant factors such as **[list here any other factors the State considered in prioritization (or generally describe prioritization process) and explain why consideration of those additional factors (or use of a particular process) is appropriate.]** In addition, EPA reviewed the State's identification of WQLSs targeted for TMDL development in the next two years, and concludes that the targeted waters are appropriate for TMDL development in this time frame.

**[Describe reasons why short-term targeting is appropriate, and summarize targeted waters here, e.g., the State has selected some waters where TMDL development will be relatively simple (for example, where only point sources) and some waters where TMDL development will be more complex (for example, where point and nonpoint sources, or nonpoint sources only). In general, EPA would defer to the State's targeting of waters, but Regions should explain why the State's choice of waters for TMDL development in the next two years is appropriate, especially where comments were received questioning targeted waters. Also, note that EPA guidance advises States to select some simple and some complex TMDLs for short-term targeting.]**

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## Section I

The following language is suggested for situations where the State list may include waters in Indian country.

EPA's approval of [State]'s 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. Section 1151. EPA is taking no action to approve or disapprove the State's list with respect to those waters at

this time. EPA, or eligible Indian Tribes, as appropriate, will retain responsibilities under Section 303(d) for those waters.

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### **Section J**

**The following language is suggested for recognizing a State's submission of a long-term schedule for TMDL development.**

EPA has received [State]'s long-term schedule for TMDL development for all waters on the State's 2002 Section 303(d) list. As a policy matter, EPA has requested that States provide such schedules. See Memorandum from Robert Perciasepe, Assistant Administrator for Water, to Regional Administrators and Regional Water Division Directors, "New Policies for Developing and Implementing TMDLs", August 8, 1997. EPA is not taking any action to approve or disapprove this schedule pursuant to Section 303(d).