



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

REGION VII
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JAN 24 2003

Received
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Director, Division of Environment
Kansas Department of Health & Environment
1000 SW Jackson, Suite 240
Topeka, KS 66612

DIRECTOR OF ENVIRONMENT
DEPT. OF HEALTH & ENVIRONMENT

Dear Dr. Hammerschmidt:

Re: Environmental Protection Agency Review of the Kansas Section 303(d) List of Impaired Waters

The U.S. Environmental Protection Agency (EPA) has completed its review of the Kansas Section 303(d) List of Impaired Waters, submitted by the Kansas Department of Health & Environment (KDHE) on October 1, 2002, for review as required under Section 303(d) of the Clean Water Act (CWA). The list identifies those water quality limited segments (WQLSS) of the State which are impaired and for which Total Maximum Daily Loads (TMDLS) shall be developed. KDHE has identified on its 2002 303(d) list 1,149 impaired waterbody segments. Based on its review, EPA has determined that KDHE's list of water quality limited segments 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 letter, EPA hereby approves Kansas's Section 303(d) list. The statutory and regulatory requirements, and EPA's review of Kansas' compliance with each requirement, are described in detail below.

Statutory and Regulatory Background:

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")*.

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.

Analysis of Kansas' Submission:

1. 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 CWA and 40 CFR 130.7(b)(5). EPA's review is based on its analysis of whether the State reasonably considered existing and readily available information on water quality-related data and information, and reasonably identified waters required to be listed. Kansas' *Methodology for the Evaluation and Development of the 2002 Section 303(d) List of Impaired Waterbodies for Kansas* ("Methodology") indicates that the State appropriately considered data and information from: the State's ambient water monitoring network, CWA section 305(b) report, CWA Section 319 nonpoint assessment, drinking water source water assessment under Section 1453 of the Safe Drinking Water Act, computer modeling, KDHE fish consumption advisories, State or Federal agencies, tribal governments, the public, and academic institutions.

In further identifying WQLSs, KDHE provided for public participation by: requesting comments on the June 5, 2002 document *Draft Methodology for the Evaluation and Development of the 2002 Section 303(d) List of Impaired Waterbodies for Kansas* used in determining impaired waterbodies; requesting data from various agencies and stakeholders; holding public meetings; and providing a 30 day public comment period on the draft list. KDHE also responded to comments received on the draft 303(d) listing methodology and the draft 303(d) list, and submitted those responses to EPA for review as part of the 303(d) list submission.

EPA has reviewed KDHE's description of the data and information it considered, its methodology for identifying waters, and public comments 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 relating to the categories of waters specified in 40 CFR 130.7(b)(5) and reasonably identified waters required to be listed.

2. Situations where the State has not included on the 2002 303(d) list waterbodies previously listed in the 1998 303(d) list.

Federal regulations at 40 CFR 130.7(b)(6)(iv) allow States to demonstrate good cause for not including specific waterbodies on their 303(d) list. The State has demonstrated to EPA's satisfaction good cause for not including on the 2002 list a number of waterbodies which were on the EPA approved 1998 list. As noted below, the greatest number of 1998 listed waterbodies were removed from the 2002 list because TMDLs have since been established for those waterbodies. Other reasons include demonstration that no pollutant is causing impairment, or that water quality standards are now being met. All 1998 listed waterbodies which have been removed from the 2002 list are identified in Enclosures 1 through 5.

It should be noted that, according to the Consent Decree resulting from Kansas Natural Resource Council, Inc., and Sierra Club, v. EPA and the State of Kansas, Intervenor/Defendant, Civil Action File No. 95-2490-JWL, “Kansas is under no obligation to submit TMDLs to EPA nor is EPA under any obligation to establish TMDLs either (a) that are determined not to be needed consistent with Section 303(d) of the CWA and its implementing regulations, ... for WQLSs or pollutants that were on Kansas’ 1996 303(d) list...but were removed from any subsequent Kansas section 303(d) list.”

Finally, KDHE stated in its 2002 *Methodology* that no waterbodies on the 1998 303(d) list will be delisted based on the assessment of data during the generation of the 2002 303(d) list. Rather, the State will complete all the required TMDLs from the 1998 303(d) list prior to any delisting considerations being given to the waterbodies on the 1998 list. However, as noted above, KDHE did remove waterbodies from the 1998 list. These delistings are categorized, as noted in the text below. While EPA concurs with the appropriateness of the removal of these waterbodies from the list, KDHE may choose, in the future, to clarify its terminology in order to minimize any potential for confusion on the part of the public.

Completed TMDLs

By far, waterbodies for which TMDLs have been completed constitute the greatest number of previously listed waters which do not appear on the 2002 303(d) list. TMDLs have since been established by the State and approved by EPA for these waterbodies. These waters are identified in Enclosure 1.

Not Impaired by Pollutants

Several waters which appeared on the 1998 303(d) list are not included on the 2002 list because Kansas has demonstrated that no pollutant is causing the impairment. These waters are identified in Enclosure 2.

NPDES Permits Have Been Issued

Under 40 CFR 130.7(b)(1), States are not required to list impaired waters 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.

On occasion, as part of their Basin TMDL submittal, KDHE asserted that for particular waterbodies included on the Kansas 1998 list, NPDES permit issuance was adequate in lieu of establishing a TMDL. EPA approved Kansas’ decision not to develop a TMDL based on the following: 1) the permitted facility was the sole contributor to the impairment, 2) the WLA calculation demonstrated that water quality standards would be achieved, and 3) that there was a

compliance schedule in the permit that had a specific date by which water quality standards would be achieved. These waterbodies are identified in Enclosure 3.

No Exceedance of Water Quality Standards

The 1998 303(d) list contained several waterbodies where analytical data had yet to be analyzed. In some instances, subsequent data analysis has shown that in some of these waterbodies, the numeric criteria contained in the State's water quality standards has not been exceeded and therefore the 1998 listing was in error. The 2002 list corrects this error by removing those waters from the list. These waters are identified in Enclosure 4.

It should be noted that the State's 1998 303(d) list contained a number of waterbodies which exceeded the State's water quality standards for fecal coliform bacteria (FCB). Since approval of the 1998 303(d) list, the State's water quality standard for this pollutant has changed. Waterbodies which were included on the 1998 list, but for which existing and readily available data and information do not demonstrate exceedance, in accordance with the State's listing methodology, of the current State fecal coliform water quality standard are not required to be listed by Kansas. These waterbodies which were removed from the 1998 list because of this subsequent change in the State's water quality standards are also identified in Enclosure 4.

Waterbodies In Indian Country

In the 1998 303(d) list, KDHE included several waterbodies that are located on Tribal Lands. However, EPA, or eligible Indian Tribes as appropriate, retains responsibilities under Section 303(d) for waters in Tribal Lands. Therefore, KDHE has corrected the 2002 list by removing those waterbodies which were previously erroneously included on the 1998 list. These waterbodies are identified in enclosure 5.

EPA's approval of Kansas' Section 303(d) list extends to all waterbodies on the list with the exception of any waters that may be 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 any such waters at this time. EPA, or eligible Indian Tribes, as appropriate, will retain responsibilities under Section 303(d) for any such waters.

3. 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. Nastri*, 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 v. Nastri*, 291 F.3d. 1123 (9th Cir. 2002). See also EPA's 1991 *Guidance and National Clarifying Guidance for 1998 Section 303(d) Lists*, Aug. 27, 1997.

4. *Priority Ranking and Targeting:*

EPA regulations 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. Kansas' process for determining relative priorities can be found in its listing *Methodology*, particularly Section 7 and Table 16. The results of that prioritization process can be found in the 2002 list, itself. EPA has reviewed the State's priority ranking of listed waters for TMDL development, and concludes that KDHE 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 biological impairments, domestic water supply nitrate impairments, weight of evidence of impairment, and the State's monitoring program.

It should be noted here that in 1996, the Kansas Natural Resource Council and the Sierra Club filed a complaint against the EPA, seeking to compel EPA to establish TMDLs for Kansas. A settlement was reached, and a consent decree approving the settlement was entered on April 13, 1998. The consent decree sets out a schedule for the state to submit a total of 1,693 TMDLs for water quality limited stream segments and lakes in each of the 12 major river basins in Kansas over an eight year period, ending June 30, 2006. However, KDHE has significantly accelerated that schedule. As of December 13, 2002, KDHE had already submitted 1140 TMDLs for EPA review and approval. Following completion of the first round of TMDLs for all basins, KDHE will resume its rotating basin approach for TMDL completion.

EPA has also reviewed KDHE'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. According to KDHE's Continuing Planning Process document, following the completion of all TMDLs required by the Consent Decree, KDHE plans to resume the completion of remaining TMDLs using its rotating basin approach. EPA is not taking any action to approve or disapprove this long-term schedule pursuant to Section 303(d).

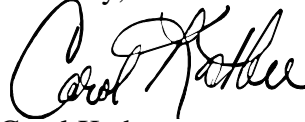
EPA has reviewed the State's submission, and has concluded that the State has adequately prioritized waters still requiring TMDLs as required by 40 CFR 130.7(b)(4).

Finding:

Based on our review of the Kansas 2002 Section 303(d) List of Impaired Waters, and supporting documentation and information, we have determined that Kansas' list of Water Quality Limited Segments (WQLSS) still requiring TMDLs meets the requirements of Section 303(d) of the CWA and EPA's implementing regulations. Therefore, by this letter, EPA is approving Kansas' 2002 Section 303(d) List of Impaired Waters.

We would like to congratulate KDHE on the exceptional work the agency and its staff have done in preparation of the 2002 list. If you have any questions regarding this letter, please contact me at (913) 551-7681, or Greg McCabe, of my staff, at (913) 551-7709.

Sincerely,



Carol Kather
Acting Director
Water, Wetlands, and Pesticides Division

Enclosures

cc: John Meisner, U.S. Fish and Wildlife Service, Manhattan, KS
Hazel Groman, EPA, HQ-OWOW, Washington, DC
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