



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

REGION 6
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MAY 23 2007

John Foster
Texas State Soil & Water Conservation Board
Nonpoint Source Program Team Leader
P.O. Box 658
Temple, TX 76593-0658

Dear Mr. Foster:

On September 28, 2006, I sent a letter to you seeking your input regarding Region 6 states interest to utilize watershed-based plans as an alternative to waterbody/pollutant pair (conventional) TMDLs. Some States believe this is a more viable approach to achieving true watershed restoration more quickly and to meet EPA's Integrated Report Guideline requirements to move a waterbody from Category 5 to Category 4b. After much discussion over the past year with Region 6 States and EPA headquarters regarding States' desire to apply this approach in special instances, I have outlined a process by which Region 6 will base its determination that 4b requirements are satisfied. The process document is enclosed with this letter. In addition, I have also included a response summary of the suggestions and comments received from some of our States regarding this process.

We appreciate the interest of our Region 6 states in seeking alternative approaches to address impaired waterbody listings on the 303(d) list. It reflects well on those States that demonstrate greater interest to plan for watershed restoration success by developing watershed-based plans to more quickly and/or effectively restore water quality to impaired streams. Our feeling is that it makes a lot of sense to use this approach when the pollutant sources within the watershed are primarily nonpoint source, and stakeholder involvement is critical.

We believe having an established process for reviewing watershed-based plans will aid you in the development of State plans and provide you with an understanding of the basis for EPA's decisions for meeting 4b requirements. Further, we are hopeful that this will aid you in determining which waterbodies best fit this approach. We believe that by applying this approach, it is another step in State's efforts to chart a course for success in removing waterbodies from the 303(d) list due to water quality improvements and standards attainment.

I appreciate your assistance in developing this process and look forward to working with you to develop comprehensive watershed-based plans that achieve our watershed restoration goals. If you have any questions let me know, or have your staff contact Brad Lamb at 214/665-6683.

Sincerely,



Miguel I. Flores



Director
Water Quality Protection Division

Enclosure

cc: T.J. Helton

EPA Region 6 Process for Review of Watershed-based Plans in lieu of TMDL's

Overview

Region 6 States requested the option of submitting nonpoint source (NPS) watershed-based plans in lieu of submitting NPS TMDL's. While this option does not appear to be prohibited by current TMDL regulations under 40CFR§130 and TMDL guidance, it does create some challenges for EPA to consider.

For the watershed-based plan to serve in lieu of a TMDL, requirements under Sections 303(d) of the Clean Water Act (CWA) must be met for each segment. This requires that the watershed-based plans be of sufficient merit to allow the State to reclassify a water segment, listed under Section 303(d) of the CWA as impaired (Category 5), to being addressed by the state through pollution control requirements other than TMDLs (Category 4b). The state must indicate, with their submission of a watershed-based plan, that a use impairment caused by a pollutant covered by the plan is being addressed through "other pollution control requirements" and that the state intends to "delist" the impaired segment under Section 303(d) of the CWA.

The key issues regarding this process are two-fold: (1) EPA's criteria for determining whether the watershed plan has clearly met the regulatory mechanism to permit 303(d) reclassification of an impaired waterbody, and (2) taking actions on reviewing and "accepting" the watershed-based plan as meeting the requirements of the regulations, short of approval - as is required for TMDLs.

This paper discusses the national guidance and regulatory mechanisms governing the process of reclassification of waterbodies from Category 5 to 4b, as well as essential elements for acceptable watershed-based plans and the Region 6 review and evaluation process.

National Guidelines and Regulatory Mechanisms

In developing the process described below, Region 6 considered the TMDL regulations, Integrated Report (IR) guidance (Guidance for 2006 Assessment, Listing and Reporting Requirements Pursuant to Sections 303(d), 305(b) and 314 of the CWA, and, 2008 Memorandum on Information Concerning 2008 Reporting and Listing Decisions), and the 2004 National NPS Program Guidelines. In addition, the development of this process to secure watershed plans designed to achieve water quality standards is consistent with the goals outlined in EPA's Strategic Plan, Subobjective: Protect and Improve Water Quality on a Watershed Basis.

As noted on page 54 of the 2006 IR Guidance, EPA recognizes that "alternative pollution control measures may obviate the need for a TMDL." Segments may be removed from Category 5 (the 303(d) list) to Category 4b if "...other pollution control requirements (e.g. best management practices (BMPs)) required by local, State or Federal authority are stringent enough to implement applicable water quality standards within a reasonable period of time." The IR guidance acknowledges that the most effective method for achieving water quality standards for some water quality impaired segments may be through controls (e.g. BMPs/management measures) developed and implemented without TMDLs. States will be required to provide the rationale to support their conclusion "that other pollution control requirements are sufficiently stringent to

achieve applicable water quality standards in a reasonable period of time.”

The 2006 IR Guidance states that “EPA will evaluate on a case-by-case basis a state’s decisions to exclude certain segment/pollutant combinations from Category 5 (the section 303(d) list) based on the 4b alternative.”

Segments are not required to be included on the section 303(d) list if technology-based effluent limitations required by the Act, more stringent effluent limitations required by state, local, or federal authority, or “other pollution control requirements (*e.g.*, best management practices) required by local, State or Federal authority” are stringent enough to implement applicable water quality standards (*see 40 CFR 130.7(b)(1)*) within a reasonable period of time. The 2006 IR Guidance states “If the Agency determines that the controls are not, in fact, “requirements,” or that they will not result in attainment of applicable water quality standards within a reasonable time, then EPA may disapprove the state’s [omission] of the segment at issue on the section 303(d) list (*i.e.*, Category 5) and add the segment to the list.” If the plan lacks controls (BMPs/management measures) necessary to bring the impaired segments in attainment with the applicable water quality standards within a reasonable time period, the impaired segments must remain on the 303(d) list. The Region will work closely with the States to ensure that Category 4b demonstrations are adequate to support the decision not to include these impaired waters on the State’s 303(d) list.

The 2008 Integrated Report and Listing Decisions Memo from Diane Regas (October 12, 2006) states that “the demonstration should describe the basis for concluding that the pollution controls are requirements or why other types of controls already in place may be sufficient. It further recognizes that the “level of rigor necessary to support the State’s demonstration will vary depending on the complexity of the impairments and corresponding implementation strategies.” Depending on the specific situation, “other pollution control requirements” may be requirements other than those based on statutory or regulatory provisions, as long as some combination of the factors listed above are present and will lead to achievement of water quality standards within a reasonable period of time.

Elements of an Acceptable Watershed-Based Plan

The watershed-based plan requirements must be sufficient to ensure the implementation of controls, either through voluntary or regulatory controls - including enforceable measures as needed, will achieve attainment of applicable water quality standards within a reasonable timeframe.

The 2006 IR Guidance further states “In evaluating whether a particular set of pollution controls are in fact “requirements” as specified in EPA’s regulation, the Agency will consider a number of factors including:

1. The authority (local, state, federal) under which the controls are required and will be implemented with respect to sources contributing to the water quality impairment [*also see CWA 319(b)(2)(B)...including as appropriate...regulatory programs for enforcement...*] (examples may include: self-executing state or local regulations, permits,

and contracts and grant/funding agreements that require implementation of necessary controls)[also, see CWA Section 319(b)(2)(D)...laws of the state provide adequate authorities to implement such program...];

2. Existing commitments made by the sources to implementation of the controls (including an analysis of the amount of actual implementation that has already occurred);
3. The availability of dedicated funding for the implementation of the controls;
4. Other relevant factors as determined by EPA depending on case-specific circumstances. Depending on the specific situation, "other pollution control requirements" may be requirements other than those based on statutory or regulatory provisions, as long as some combination of the factors listed above are present and will lead to achievement of WQS within a reasonable period of time."

The watershed-based plan must address the six 4b elements outlined in the 2006 IR Guidelines, as well as be consistent with national NPS Program Guidelines outlining the nine elements of an acceptable watershed-based plan to address NPS. The elements outlined in the two guidance documents are fundamental to a sound planning process. The 2006 4(b) elements and the NPS guideline elements, as shown in the table below, reflect the similarities of the required elements of a watershed-based plan.

2006 IR Guidance	NPS Program Guidance
1) A statement of the problem causing the impairment	1) Identify causes and sources needed to be controlled to achieve estimated load reductions, and the estimated extent to which they are present in the watershed 2) An estimate of load reductions expected)
2) Description of the implementation strategy and controls necessary to achieve water quality standards, including the point and nonpoint source loadings, that when implemented, will assure attainment of all applicable water quality standards	3) Description of NPS management measures needed to achieve loads reductions, an identification of critical areas to achieve greatest reduction 4) Estimate of technical and financial assistance needed to implement plan 5) Information and education component for improving understanding of the need for management measures that control nonpoint sources)
3) An estimate of the time frame to meet water quality standards	8) Criteria to determine whether load reductions are being achieved and progress is being made to attain standards, and if not, whether plan needs to be revised, or if TMDL needs to be revised)

4) Reasonable schedule for implementation of control measures	6) Schedule for implementing management measures that is reasonably expeditious)
5) Description of, and schedule for, monitoring milestones for tracking and reporting progress to EPA on implementation of BMPs	7) Interim, measurable milestones for determining whether NPS management measures or other control actions are being implemented 9) Monitoring component to evaluate implementation efforts measured against #8)
6) A commitment to revise, if necessary, the implementation strategy if it is determined that progress in meeting water quality standards is not satisfactory	See 8) above

Process for Review of Watershed-Based Plans in lieu of TMDLs

The significance and complexity of whether a watershed-based plan can adequately address the required components of national guidelines to substitute the need for developing a TMDL will necessitate close coordination between several program areas within the EPA Region 6 Water Quality Protection Division. In particular, the Watersheds/Nonpoint Source, Monitoring and Assessment, and TMDL programs will jointly and comprehensively evaluate watershed-based plans to determine if it is acceptable to move a water body from Category 5 to category 4(b) in lieu of a TMDL, as per the 2006 Integrated Report Guidelines.

This review process to evaluate the State's reclassification of the waterbody will require in-depth review of the watershed-based plan to determine if it meets the requirements of both the 319 - NPS Program, and the TMDL and Monitoring programs (as stipulated above). The determination will be jointly agreed upon by the three programs, essentially committing a vote of confidence that the watershed-based plan will meet all water quality goals. Historically, Region 6 has taken the position that we do not "approve" watershed plans under the 319 program. However, it will be necessary for Region 6 to make a determination on a reclassification based on the content of the watershed-based plan. If the plan does not provide a sound basis for achieving water quality standards, the reclassification will not be accepted.

Approval of a reclassification from Category 5 to Category 4b would reflect both the acceptance of a watershed-based plan, as agreed upon by the key programs affected, and the receipt of information from the State documenting plan implementation. The lead program is the Watersheds/NPS Team (in the Ecosystems Protection Branch, Watershed Management Section). In the case where a watershed-based plan does not fulfill the requirements of the IR and NPS Program Guidelines, sufficiently detailed comments suggesting how the plan could be modified will be sent to the State by the Division Director. The water body should remain on the 303(d) lists until it is determined that State modifications are adequate.

The Region's review process will require:

- Review of the Watershed-based Plan will be performed by the Watersheds/NPS Team of the Watershed Management Section, in coordination with the State and Tribal Program Section.
- The Monitoring and Assessment Team of the Watershed Management Section will review the plans, with emphasis on assessing attainment of water quality standards and monitoring design. This includes schedules for implementation of control measures and applicability of controls to water quality standards attainment.
- The TMDL Team of the NPDES Permits Branch will also review the plan, with emphasis on the monitoring and modeling data submitted to support the point source loads, non-point source loads and the load reductions estimated to occur from BMPs to achieve applicable water quality standards.

All reviews will be coordinated by the Watersheds/NPS Team. With the submission of future section 303(d) lists, the State should provide documentation of progress made toward attainment of all applicable water quality standards for each waterbody that remains in Category 4b. Any more frequent formal or informal updates provided by the State would be useful and appreciated. The documentation will include an updated schedule and status of implementation of control measures described in the watershed-based plan, any additional measures that may be necessary to achieve standards attainment, and the anticipated date of standards attainment. Inadequate documentation or a faltering schedule may indicate the need to place waterbodies on the section 303(d) list, and require completion of TMDLs within 8 to 13 years from the date of the original 303(d) listing.

EPA intends to coordinate closely with the States and is receptive to providing assistance as needed prior to and during the development of the watershed-based plans.

Literature reference:

1. Guidance for 2006 Assessment, Listing, and Reporting Requirements Pursuant to Sections 303(d), 305(b) and 314 of the Clean Water Act.

[Federal Register: August 12, 2005 (Volume 70, Number 155)] [Notices] [Page 47200-47201]

2. Memorandum - Information Concerning 2008 CWA Sections 303(d), 305(b), and 314 Integrated Reporting and Listing Decisions, Diane Regas, October 12, 2006.

3. 40 CFR 130.6 and 130.7.

4. 2004 National Nonpoint Source Program Guidelines, Federal Register: October 23, 2003 (Volume 68, Number 205)] [Notices] [Page 60653-60674]

**Response to State Comments
EPA Region 6 Process for
Review of Watershed-based Plans in lieu of TMDL's**

The Texas Commission on Environmental Quality (TCEQ) and the Oklahoma Secretary of Environment (OSE) responded to request for comments (Philip Crocker email request dated March 28, 2006 to TCEQ and Oklahoma Department of Environmental Quality (ODEQ) for preliminary request for State review, and Miguel Flores' letter dated September 28, 2006 to all Region 6 States) of Region 6' draft process policy for moving 303(d) listed waterbodies to category 4(b). Moving a waterbody from Category 5 (requiring a TMDL) to Category 4(b) can be considered on a case-by-case basis where a State provides the rationale which supports their conclusion that "other pollution control requirements" are sufficient to achieve applicable water quality standards in a reasonable period of time, without a TMDL.

TCEQ responded to EPA Region 6' initial request for comments dated March 28, 2006, and OSE responded to the Region's later request for comments on the same policy in a letter dated November 6, 2006. No other Region 6 State responded to the requests.

TCEQ and OSE shared similar concerns regarding the draft policy paper. Below is a summary, and our response, of the most significant comments shared by both States.

1. Comments reflect the States concerns of whether nonpoint source actions in a watershed can be considered enforceable. In particular, a watershed may be without point sources, and have no enforcement mechanisms in place to assure that controls can be applied to remedy the loadings to the impaired stream from nonpoint sources. States generally support the opportunity to develop watershed-based plans (Texas refers to these as watershed protection plans (WPP)) in lieu of TMDLs, but are concerned that, meeting 4b requirements could jeopardize the "voluntary" approach of achieving best management practices needed to improve water quality.
2. States are concerned that a watershed plan developed to reclassify a water body to 4b would require technical information equivalent to that of a TMDL. They suggest that this would impact the time and financial requirements for these projects.

EPA response to comments 1 and 2: Region 6 interprets agency guidelines and criteria, for both the Nonpoint Source Program and the 4b component of the TMDL program, as being designed to achieve water quality standards in a reasonable time frame. As such, watershed plans developed to meet program guidelines will be reviewed by the Region based on the potential for the planned actions to achieve water quality standards. Current baseline water quality must be known in order to establish a mechanism designed to achieve standards. States would also need to identify the method used to determine how practices will be targeted and applied to achieve necessary load reductions - and ultimately achieve load reductions in the stream sufficient to meet water quality standards. There is some flexibility in the guidance on what constitutes enforceable mechanisms. In general, Region 6 would like some reasonable assurances that mechanisms will be implemented to achieve the water quality goals.

3. Both States referenced the need to exclude point source implementation strategies due to the policy focusing on nonpoint source watershed plans.

Program guidelines for NPS and 4b point out the need to understand the role of point sources within a watershed. The IR guidelines directly reference this in one of the six elements, and the NPS guidelines reference this through the need to develop a watershed plan based on completion of NPS TMDLs. Naturally, a NPS TMDL - as such (WLA+LA=TMDL) - considers the role, if any, that a point source contributes to the impairment of the stream. We understand where it could be narrowly interpreted that point source issues should not be discussed in the document as it focuses primarily on nonpoint sources. However, in determining whether load contributions in a watershed are linked to nonpoint sources, and to determine reductions needed to achieve water quality standards, it would *not* be practical to exclude useful existing data from point sources in order to achieve full understanding of loading dynamics of the watershed. Therefore, relevant load contributions from point sources, if present, must be considered in a watershed plan designed to achieve water quality standards. In addition, a blended approach, combining TMDLs (which could address point source loads) and watershed-based planning to address nonpoint sources may be an effective strategy.