UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 8
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MAY 2 0 2019

Ref: 8WD-CWQ

Karl Rockeman, Director
Division of Water Quality
North Dakota Department
Of Environmental Quality
918 E. Divide Ave, 4th Floor
Bismarck, ND 58501

Re: EPA's action on North Dakota's 2018 Clean Water Act Section 303(d) Waterbody List

Dear Mr. Rockeman:

The EPA received North Dakota Department of Environmental Quality's (NDDEQ) final 2018 Section 303(d) list package on April 30, 2019 through the Assessment, Total Maximum Daily Load (TMDL) Tracking and Implementation System (ATTAINS), which is the EPA's new electronic system to accept and track 303(d) submissions and actions. Specifically, North Dakota's 2018 Category 5 data in ATTAINS represents their 2018 303(d) list of impaired waters. North Dakota also submitted a narrative report in ATTAINS. The NDDEQ also submitted assessment attribute and geographic information system (GIS) data supporting the state's Section 303(d) list of impaired waters for 2018, which EPA received on April 15, 2019. The U.S. Environmental Protection Agency has completed its review of the Section 303(d) list and supporting documentation and information.

Based on our review, the EPA has determined that North Dakota's 2018 Section 303(d) list meets the requirements of Section 303(d) of the CWA and the EPA's implementing regulations found at 40 C.F.R. Part 130, and the EPA approves North Dakota's 2018 Section 303(d) list.

The EPA's approval of North Dakota's 2018 Section 303(d) list extends to waterbodies on the list except for those waters that are within Indian country, as defined at 18 U.S.C. § 1151. Indian country generally includes lands within the exterior boundaries of the following Indian reservations located within the state of North Dakota: Turtle Mountain Band of Chippewa, Spirit Lake Reservation, Standing Rock Reservation, Fort Berthold Reservation; any land held in trust by the United States for an Indian tribe; and any other areas which are "Indian country" within the meaning of 18 U.S.C. § 1151. Today's action is not intended as an action to approve or disapprove the Section 303(d) list's waters within Indian Country. The EPA, or eligible Indian Tribes, as appropriate, will retain CWA Section 303 responsibilities for waters in Indian country.

The EPA appreciates the state's efforts to submit the 2018 303(d) List and 2018 Integrated Report. The Agency commends the North Dakota Department of Environmental Quality for its hard work in completing its public review process, including its response to stakeholder comments for the Integrated Report.

Further details on the EPA's action are provided in the enclosure, which describes the statutory and regulatory requirements of the CWA Section 303(d) list and a summary of the EPA's review of North Dakota's compliance with each requirement. If you have questions about this decision, the most knowledgeable person on my staff is Kris Jensen and she may be reached at (303) 312-6237 or jensen.kris@epa.gov.

Sincerely,

Darcy O'Connor, Director
Water Division

Enclosure

cc: Aaron Larsen, NDDEQ
Joe Gross, NDDEQ

Review of North Dakota's 2018 Section 303(d) Waterbody List

Enclosure to letter from Darcy O'Connor, Assistant Regional Administrator, Office of Water Protection, US EPA, Region 8 to Karl Rockeman, Director, North Dakota Department of Environmental Quality

Date of Transmittal Letter from state:	April 26, 2019
Date of Complete Submission from state:	April 30, 2019
Date of Receipt by the EPA:	April 30, 2019

I. Introduction

The Environmental Protection Agency Region 8 (EPA) received the state of North Dakota's 2018 Clean Water Act (CWA) Section 303(d) list of impaired waters April 30, 2019. The EPA also received North Dakota's 2018 Water Quality Integrated Report and North Dakota's 2018 assessment attribute and geographic information system (GIS) data submittals on April 30 and April 15, 2019, respectively. EPA has transitioned 305(b) and 303(d) reporting to the new ATTAINS, which is an electronic system that holds all water quality assessment decisions for states and territories. ATTAINS transformed and modernized paper reporting into an electronic system, which allows EPA, states, and the public to access, search, and track all water quality assessment decisions. Based on our review of the state's CWA Section 303(d) water body list ("Section 303(d) list") and assessment database, the EPA is approving North Dakota's 2018 list. The purpose of this document is to describe the rationale for the EPA's approval.

In December 2017, the EPA issued guidance for integrating the development and submission of 2018 Section 305(b) water quality reports and Section 303(d) lists of impaired waters. This guidance, and previous EPA guidance, recommend 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 North Dakota's 2018 Section 303(d) list is based on the EPA's analysis of whether the state reasonably considered all existing and readily available water quality-related data and information and reasonably identified waters to be listed.

North Dakota's 2018 list is considered an update of the state's 2016 list. The 2018 Section 303(d) list, which the EPA is approving today, is comprised of 224 assessment units (340 waterbody/pollutant combinations), compared with 225 assessment units (355 waterbody/pollutant combinations) included on the 2016 list. States may add and take waters off their Section 303(d) lists based on several factors. For the 2018 cycle, North Dakota removed 27 waterbody/pollutant combinations from its 2016 list.

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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 each state 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, considering 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).

Section 303(d) and EPA's implementing regulations require states to identify water quality limited segments (WQLSs) that still require TMDLs. 40 C.F.R. § 130.7(b). WQLSs[1] 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, EPA guidance[2] identifies examples of other types of data and information that may be existing and readily available. Based on their review of the existing and readily available data and information, states may decide not to rely on particular data or information when making listing decisions.

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1 WQLSs are also referred to as "impaired waterbodies" or "impairments" throughout this document.

2 US EPA. April 1991. *Guidance for Water Quality-Based Decisions: The TMDL Process*. Appendix C. EPA 440/4-91-001.

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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 to list or not to 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) a rationale for any decision not to use any existing and readily available data and information as described in 40 C.F.R. § 130.7(b)(5). The state must also provide "any other reasonable information" concerning a state's Section 303(d) listing decisions, if requested by the Region. 40 C.F.R. § 130.7(b)(6)(iv).

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 to identify those WQLSs targeted for TMDL development in the next two years. In prioritizing and targeting waters, states must, at a minimum, consider the severity of the pollution and the uses to be made of such waters. CWA Section 303(d)(1)(A). States may consider other factors relevant to prioritizing waters for TMDL development, including immediate programmatic needs such as waste load 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 the 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. Pursuant to 40 CFR § 131.21(c), new or revised state and authorized tribal standards submitted to the EPA after May 30, 2000, are not effective for CWA purposes until approved by the EPA. 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 or established water quality standards.

III. Analysis of North Dakota's Submission

A. Background

The state made its 2018 Integrated Report and the 2018 assessment attribute and geographic information system (GIS) data available to the EPA electronically on April 30 and April 15, 2019, respectively. The Integrated Report from North Dakota 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;
- Prioritization of waterbodies for TMDL development; and
- Identification of waters targeted for TMDL development over the next two years.

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Neither the CWA nor the EPA's implementing regulations require that the Agency review *de novo* all the underlying data and information that a state uses to create its Section 303(d) list. Instead, the EPA generally reviews whether the state has complied with the procedural requirements of 40 C.F.R. § 130.7(b) and typically defers to a state's decision to add waters to its list when it has complied with those procedures.

In reviewing North Dakota's submittal, the EPA first reviewed the methodology used by the state to develop its 2018 Section 303(d) list, considering North Dakota's approved water quality standards. North Dakota's final assessment methodology was included as part of North Dakota's Integrated Report submittal. The EPA determined that the state applied its assessment methodology to develop their final Section 303(d) list. The EPA then reviewed the actual list of waters developed by the state.

Upon review of the state's final 2018 submittal, the Agency concludes 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. For those waters that appear on the list, North Dakota considered 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). Because the state complied with the requirements of 40 C.F.R. § 130.7, the EPA is approving North Dakota's 2018 Section 303(d) list.

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

The EPA has reviewed North Dakota's description of the data and information 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). The state relied on information from the 2018 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)): North Dakota produced its 2018 Integrated Report consistent with the EPA's guidance regarding combined CWA 305(b) reports and 303(d) lists. The EPA concludes that North Dakota made listing decisions using existing and readily available data and information, in development of its 2018 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)): North Dakota assembled and evaluated information from past and anticipated dilution calculations and predictive modeling. The EPA concludes that North Dakota properly considered waters for which dilution calculations or predictive models indicate nonattainment of applicable water quality standards in development of its 2018 Section 303(d) waterbody list.

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• *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 its 2018 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 2018 Section 303(d) list includes all waters that have data to support nonpoint source pollution impairment. North Dakota'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 to collect current data to support TMDL development.

Based on its review, the EPA concludes that with regards to the waters identified in the state's 2018 Section 303(d) lists, the state's process for developing those lists meets the requirements of 40 C.F.R. § 130.7(b)(5)(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 303(d) list, a state may also remove waters from its list when such removal is appropriate.

A full accounting of waters removed from the state's 2016 303(d) list is provided in the electronic data that North Dakota DEQ submitted to the EPA and on Pages VI-46 through 51 of their Integrated Report. The state's removal decisions and stated justifications for its 2018 303(d) list are summarized below:

Number of Waterbody-Pollutant Combinations Removed from List	
Reason	**2018**
TMDL approved or established by the EPA	9
Applicable WQS attained according to new assessment method	0
Applicable WQS attained but reason for recovery unspecified	0
Applicable WQS attained because original basis for listing was incorrect	1
Applicable WQS attained based on new data	16
Applicable WQS attained due to restoration activities	1
Refinement of terminology of listing cause	0
WQS no longer applicable	0
Total	27

In reviewing the state's 2018 Section 303(d) waterbody lists, the EPA carefully considered North Dakota's decision to remove certain waterbody-pollutant combinations from the state's 2016 303(d) list, its justification for those removals, and the methodology it used in making those decisions. The EPA

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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 appropriate.

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, North Dakota prioritized WQLSs for TMDL development into three Priority Areas (High Priority: Watersheds with TMDL completion anticipated within the next two years; Medium Priority: Watersheds where TMDL completion is anticipated by 2022; Low Priority: All other watersheds that require TMDLs or waters that have TMDL alternative restoration approach(s) in place). North Dakota's TMDL prioritization strategy is fully described in Appendix A of North Dakota's Integrated Report.

The EPA reviewed the state's priority ranking of listed waters for TMDL development and concludes that the state properly considered 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 concerns or local support for water quality improvement. In addition, the EPA concludes that the state identified WQLS targeted for TMDL development in the next two years, as required by 40 C.F.R. § 130.7(d).

IV. Final Decision on North Dakota's 2018 Section 303(d) List Submittal

After careful review of North Dakota's final Section 303(d) list submittal package, the EPA has determined that North Dakota's 2018 Section 303(d) list meets the requirements of Section 303(d) of the Clean Water Act (CWA) and the EPA's implementing regulations. As a result, the EPA approves North Dakota's 2018 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 EPA 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

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."

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

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, *EPA Review and Approval of state and Tribal Water Quality Standards*, 65 FR 24641

July 29, 2005, Memorandum from Diane Regas, Director, Office of Wetlands, Oceans, and Watersheds, US EPA to Water Division Directors transmitting 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.*

September 3, 2013, Memorandum from Denise Keehner, Director, Office of Wetlands, Oceans, and Watersheds, entitled *Information Concerning 2014 Clean Water Act Sections 303(d), 305(b), and 314 Integrated Reporting and Listing Decisions.*

August 13, 2015, Memorandum from Benita Best-Wong, Director, Office of Wetlands, Oceans, and Watersheds, entitled *Information Concerning 2016 Clean Water Act Sections 303(d), 305(b), and 314 Integrated Reporting and Listing Decisions.*

December 22, 2017, Memorandum from John Goodin, Acting Director, Office of Wetlands, Oceans, and Watersheds, entitled *Information Concerning 2018 Clean Water Act Sections 303(d), 305(b), and 314 Integrated Reporting and Listing Decisions.*

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