

**ENCLOSURE 1**  
**Review of West Virginia's 2012 Section 303(d)**

**1. Introduction**

Clean Water Act (CWA or Act) Section 303(d), 33 U.S.C. § 1313(d), (Section 303(d)) requires states to identify those waters within their jurisdiction for which effluent limitations required by CWA Section 301(b)(1)(A) and (B), 33 U.S.C. § 1311(b)(1)(A) and (B), are not stringent enough to implement any applicable water quality standard, to establish a priority ranking for such waters, and to submit a listing of such waters to EPA Section 303(d) list for approval or disapproval.

On December 21, 2012, EPA received from the West Virginia Department of Environmental Protection (WVDEP) West Virginia's 2012 Section 303(d) list of water quality limited segments (WQLSs) (West Virginia's 2012 303(d) list), as part of the Integrated Report submitted by WVDEP (submission) to meet the requirements of CWA Sections 303(d), 305(b), and 314; 33 U.S.C. § 1313(d), 1315(b), and 1324. EPA has completed its review of WVDEP's submission. As a result of this review, EPA is partially approving and partially disapproving West Virginia's Section 303(d) list.

This document describes the basis for: (1) EPA's decision to partially approve West Virginia's 2012 Section 303(d) list to the extent that it identifies 1,176 WQLSs requiring a Total Maximum Daily Load (TMDL) identified in West Virginia's 2012 303(d) list; (2) EPA's decision to disapprove West Virginia's 2012 Section 303(d) list to the extent that it omits certain WQLSs requiring a TMDL; and (3) EPA's identification of waters not meeting the state's water quality standards and proposed additions to West Virginia's 303(d) list. EPA's methodology for identifying WQLSs that it proposes to add to West Virginia's 2012 Section 303(d) list is substantially similar to WVDEP's methodology for evaluating biological sampling data in prior Section 303(d) lists and is described in Enclosure 2. The list of waters that EPA proposes to add to West Virginia's 2012 Section 303(d) list is in Enclosure 3.

**2. Statutory and Regulatory Background**

Section 303(d)(1) of the CWA directs the states to identify those waters within their 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's implementing regulations require states to biennially submit a list identifying water quality limited segments still requiring a Total Maximum Daily Load (TMDL) See 40 CFR 130.7(b)(1). 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).

#### ***A. Consideration of Existing and Readily Available Water Quality-Related Data***

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). 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, Appendix C (1991) (EPA's 1991 Guidance). While states are required to evaluate all existing and readily available water quality-related data and information, states may make reasonable decisions 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 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 to not use existing and readily available data discussed in 130.7(b)(5); and (4) any other reasonable information requested by the Region.

## ***B. 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) requires 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. 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 Fed. Reg. 33040, 33045 (July 24, 1992) and EPA's 1991 Guidance.

## **3. Analysis of WVDEP's Submission**

EPA has reviewed the State's submission and has concluded that the State developed its Section 303(d) list in partial compliance with Section 303(d) of the CWA and 40 CFR 130.7. Because the EPA has determined that WVDEP's submission does not include all waters that meet Section 303(d) listing requirements, EPA is partially approving and partially disapproving West Virginia's list submission and proposing to add the additional waters to the final 2012 list. EPA's action is based on its analysis of whether complied with the applicable CWA requirements discussed above. As a result of its review, EPA has determined the following:

- (1) WVDEP appropriately has identified 1,176 WQLSs requiring TMDLs on its 2012 Section 303(d) list. With respect to the WQLSs that are identified on West Virginia's 2012 Section 303(d) list, WVDEP evaluated all existing and readily available water quality-related data and information as to the included waters, provided public notice and adequately responded to comments, and developed an appropriate priority ranking.
- (2) WVDEP failed to evaluate all existing and readily available data and information for certain water bodies of the State when developing West Virginia's 2012 Section 303(d) list. Specifically, based on EPA's review of data assembled by WVDEP in its "Decision Database" that was provided with the submission of WVDEP's final 2012 Integrated Report , WVDEP failed to evaluate existing and readily available information related to West Virginia's applicable narrative water quality criteria (W. Va. CSR § 47-2-3.2(e) & (i)) as applied to the aquatic life uses.

#### **A. Description of WVDEP's Submission**

EPA received WVDEP's final 2012 Integrated Water Quality Monitoring and Assessment Report package combining the Section 303(d) list and Section 305(b) report on December 21, 2012. This package included: (1) a listing rationale narrative describing: (a) an overview of the process for development of the 2012 Integrated Report; (b) the assessment methodologies for the following kinds of data: numerical water quality criteria, biological impairment, fish consumption advisories and excess filamentous algae; and (c) an explanation of the data evaluated in the preparation of the list; (2) a summary of comments and responses that could affect the listing of waters; (3) the 303(d) list with six supplemental tables tracking previously listed waters; (4) spreadsheets containing information on stream segments in each of the five assessment categories; (5) WVDEP's 303(d) Decision Database, an Access database that contains relevant water quality monitoring data including but not limited to biological assessment data and the various lists of waters that comprise WVDEP's Integrated Report; (6) a summary of responses to comment letters received by WVDEP during the public comment period; and (7) a spreadsheet of changes from the draft 2012 Section 303(d) list.

WVDEP developed an Integrated Report which identifies the assessment status of all of West Virginia's waters combining EPA's Section 303(d) and 305(b) requirements. The Integrated Report compartmentalized the waters of West Virginia into five distinct categories. All stream segments or assessment units fall into one of the following categories:

- Category 1 - Fully supporting all designated uses.
- Category 2 - Fully supporting some designated uses, but insufficient or no information exists to assess the other designated uses.
- Category 3 - Insufficient or no information exists to determine if any of the uses are being met.
- Category 4 - Waters that are impaired or threatened but do not need a Total Maximum Daily Load (TMDL).
  - Category 4a - waters that already have an approved TMDL but are still not meeting standards.
  - Category 4b - waters that have other control mechanisms in place which are reasonably expected to return the water to meeting designated uses.
  - Category 4c - waters that have been determined to be impaired by pollution or other natural factors.
- Category 5 - Waters that have been assessed as impaired and are expected to need a TMDL.

West Virginia's Section 303(d) list of impaired waters is contained in Category 5 of West Virginia's 2012 Integrated Report. WVDEP identified 1,176 WQLSs in Category 5 and utilized the same format as its 2010 Section 303(d) list, consisting of the 303(d) list of impaired waters and six supplemental tables. The format of the 2012 Section 303(d) list follows WVDEP's Watershed Management Framework with five hydrologic groups (A-E). Within each hydrologic group, watersheds are arranged alphabetically and WQLSs are listed alphabetically within their appropriate watershed. The information that follows each WQLS stream includes the stream code, the affected water quality criteria, the source of the impairment (where known), the impaired size (or, by default, the entire length), the reach description, the projected timing of TMDL development and whether or not the stream was on the 2012 list.

Six supplemental tables were provided to track previously listed waters that are not present on the 2012 Section 303(d) list.

“Supplemental Table A - Previously Listed Waters - No TMDL Develop - 2012” is a list of previously listed waters which have been reevaluated and determined not to be impaired and, therefore, not in need of a TMDL. Causes for revision of the impairment status include recent water quality data demonstrating improved water quality condition, revision to the water quality criteria associated with the previous listing, or a modification of the listing methodology. Decisions regarding the need for TMDL development were made in accordance with the requirements of 40 CFR 130.7(b)(1) and the state's listing criteria. In the Integrated Report, these waters have been moved from Category 5 to Category 1, 2, 3, or 4, as appropriate.

“Supplemental Table B - Waters with TMDLs Developed” is a list of previously listed impaired waters for which a TMDL has been developed and approved by EPA. Waters included in this supplement have had a TMDL developed, but water quality improvements are not yet complete and/or documented. Since the Section 303(d) list is a list of WQLSs still requiring TMDLs (see 40 C.F.R. 130.7(b)), EPA's Integrated Water Quality Monitoring and Assessment Report Guidance recommends classification of such waters in a category separate from the 303(d) list. WVDEP developed this supplemental table to track previously listed impaired waters for which TMDLs have been developed. In the Integrated Report, these waters have been listed in Category 4a which includes waters that already have an approved TMDL but are not meeting standards.

“Supplemental Table C - Water Quality Improvements” is a list of previously listed impaired waters with improved water quality due to TMDL implementation or pre-TMDL stream restoration work that resulted in delisting. These waters are included in Category 1 (meeting all uses), provided that impairments for other uses or pollutants are not present.

“Supplemental Table D - Impaired Waters - No TMDL Development Needed” is a list of impaired waters for which either other control mechanisms are in place to control pollutants or the water is impaired by pollution (i.e., flow alterations caused by mining). These are the same waters contained in Category 4b and 4c, respectively.

“Supplemental Table E - Total Aluminum TMDLs Developed” is a list of previously listed impaired waters for which a total aluminum TMDL has been developed and established by EPA. Due to the criteria change from total aluminum to dissolved aluminum, WVDEP placed total aluminum TMDLs onto a separate table from Supplemental Table B. All waters contained on Supplemental Tables B and E are included on Category 4a of the Integrated Report.

“Supplemental Table F – New Listings for 2012” is a list of impaired waters that were not previously included on the 2010 Section 303(d) list.

***B. Description of the methodology used by WVDEP to develop West Virginia’s 2012 Section 303(d) list***

In West Virginia, the WVDEP’s Division of Water and Waste Management (DWWM) is responsible for the collection and compilation of this information. In preparation for the 303(d) listing process, WVDEP sought water quality information from various state and Federal agencies, colleges and universities, and private individuals, businesses and organizations. News releases and public notices were published in state newspapers and letters were sent to state and Federal agencies known by WVDEP to be generators of water quality data.

WVDEP used West Virginia’s 2010 Section 303(d) list, which was approved by EPA on February 23, 2011 as a starting point. Except for waters identified in Supplemental Tables A, B, or C, waters identified on West Virginia’s 2010 Section 303(d) list were retained on the 2012 Section 303(d) list. WVDEP issued a call for data to be used for purposes of the 2012 Section 303(d) list in which WVDEP sought data generated through June 30, 2011. WVDEP generated the majority of available surface water quality data through the Watershed Assessment Program (WAP) performed within the Watershed Management Framework cycle. Additional data was obtained from state and Federal agencies, local environmental agencies, colleges, and universities, citizen monitoring groups, and private firms. A complete list of data providers is shown on Table 4 of the Integrated Report.

Agency personnel possessing varying areas of expertise compared instream data to applicable water quality criteria and determined the impairment status of state waters. The basis for 303(d) listing decisions relates to the West Virginia water quality standards. In general terms, if water quality standards are not being met, a waterbody is considered impaired, placed on the 303(d) list, and scheduled for TMDL development. The West Virginia water quality standards are codified at 47 CSR 2 - *Requirements Governing Water Quality Standards*, and at 60 CSR 5 - *Antidegradation Implementation Procedures*. For stream water quality assessments, the DEP generally used water quality data generated and analyzed between July 1, 2006 – June 30, 2011 from the State’s 32 major watersheds.

WVDEP released the Draft 2012 Section 303(d) list for public comment on March 15, 2012 through May 19, 2012. Notices of the availability of the Draft 2012 Section 303(d) list were placed in newspapers statewide and promoted via e-mail and the internet. These notices included information on where to obtain the documents and where to send comments. In March 2012, WVDEP provided EPA with its Section 303(d) Decision Database which records

listing decisions for all waterbodies. After review of the Section 303(d) Decision Database, EPA provided comments to WVDEP on June 26, 2012. West Virginia received written comments from several entities including EPA. WVDEP evaluated all comments received and prepared a responsiveness summary detailing WVDEP's actions regarding these comments. In addition, West Virginia responded to each of EPA's comments in their final IR submission letter. With the exception of comments related to biological listings, West Virginia provided adequate response to EPA's comments. EPA will continue to work with WVDEP to address discrepancies in interpretation of West Virginia's lake nutrient criteria. There were not any lake nutrient data (total phosphorus and chlorophyll a) available for the 2012 IR that would have indicated any lake impairments related to nutrients.

**C. *Description of the data and information used to identify waters, including a description of the data and information used by WVDEP as required by Section 130.7(b)(5).***

Pursuant to 40 CFR 130.7(b)(5), states must assemble and evaluate all existing and readily available water quality-related data and information to develop their Section 303(d) lists, including but not limited to, such data and information for the following categories of waters.

1. Section 130.7(b)(5)(i), Waters identified by WVDEP in its most recent Section 305(b) report as “partially meeting” or not meeting designated uses or as threatened.”

West Virginia's 2012 Section 303(d) list was combined with the 305(b) report to form what is now referred to as the Integrated Report. Therefore, the 305(b) report is no longer a standalone document and the data that would have gone into development of such a “stand alone” report was used in the production of the Integrated Report. While WVDEP assembled all existing and readily available information for purposes of the Section 305(b) portion of the Integrated Report, however, WVDEP did not evaluate certain biological data reported in the Integrated Report for the purpose of identifying WQLSs on its 2012 Section 303(d) list. A further discussion is found in Section 4 below.

2. Section 130.7(b)(5)(ii), Waters for which dilution calculations or predictive models indicate nonattainment of applicable water quality standards.

Where predictive modeling indicated that discharges in accordance with existing permit limits would cause violation of water quality criteria, the designated use of the water quality may be classified as “threatened,” thereby subjecting it to 303(d) listing and TMDL development pursuant to Section 130.7(b)(5). WVDEP states that much of the list is based upon limited amounts of water quality monitoring data that may or may not accurately portray the extent of impairment. WVDEP uses the TMDL development process to refine identification of the extent of impairment.

3. Section 130.7(b)(5)(iii), Waters for which water quality problems have been reported by local, state, or Federal agencies; members of the public; or academic institutions.

WVDEP solicited data from entities outside of the WVDEP. WVDEP also encourages volunteer data collection as part of West Virginia Save Our Streams program. Outside data sources other than WVDEP are identified in Table 4 of the Integrated Report. WVDEP provided an explanation of how it considers external data.

WVDEP encouraged comment on its draft lists, and the submission of water quality data, each time the list was public noticed. WVDEP received additional data and information as comments to their Public Notice Draft 2012 Section 303(d) list. WVDEP summarized the comments and any changes that were made to the proposed list based on additional data and information. While WVDEP made some changes based upon public comment, WVDEP did not evaluate certain biological data identified by public comment for the purpose of identifying WQLSs. A further discussion is found in Section 4.

4. Section 130.7(b)(5)(iv), Waters identified by WVDEP as impaired or threatened in a nonpoint assessment submitted to EPA under section 319 of the CWA or in any updates of the assessment.

WVDEP 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 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 CWA authorizes EPA to identify and establish TMDLs for waters impaired by nonpoint sources. Pronsolino et al. V. Marcus et al., 91 F.Supp.2d 1337, 1347 (N.D.Ca. 2000), aff'd, 291 F.3d 1123 (9<sup>th</sup> Cir. 2002), petition for cert. filed, 71 U.S.L.W. 3531 (Feb. 6, 2003) (No. 02-1186). See also EPA's 1991 Guidance and National Clarifying Guidance for 1998 Section 303(d) lists, Aug. 27, 1997.

5. Other data and information used to identify waters (besides items 1-4 discussed above).

EPA has reviewed WVDEP's description of the data, information, and methodology used by WVDEP in the development of their 2012 Section 303(d) list. This includes supplemental data and information that was submitted in response to EPA's comments. Table 4 of the Integrated Report lists sources of data utilized during the listing process. As set forth in detail below, WVDEP assembled all existing and readily available data. However, WVDEP did not evaluate certain existing and readily available information related to West Virginia's applicable narrative water quality criteria set forth at W. Va. CSR § 47-2-3.2(e) & (i).

**D. *A rationale for any decision to not use any existing and readily available data and information for any one of the categories of waters as described in Sections 130.7(b)(5) and 130.7(b)(6)(iii).***

The regulations allow States to determine not to use certain data, and states have availed themselves of this regulation, generally on technical grounds, such as the absence of quality control or inconsistent sampling methods. The decision not to use particular data, however, is distinguished from the requirement in 40 CFR 130.7(b)(5) that states assemble and evaluate all existing and readily available data. WVDEP did not evaluate certain existing and readily available water quality-related data and information for the purpose of identifying WQLSs on its 2012 Section 303(d) list. As set forth in more detail below, WVDEP provided an explanation for not evaluating certain data related to West Virginia's applicable narrative water quality criteria set forth at W. Va. CSR § 47-2-3.2(e) & (i) based upon its interpretation of an instruction by the West Virginia Legislature. As set forth in more detail in Section 4 below, EPA finds that explanation to be inconsistent with the requirements of Section 303(d) and 40 C.F.R. 130.7 and therefore disapproves the 2012 Section 303(d) list to the extent it omits waters that would have been included had the existing and readily available data been evaluated.

Apart from WVDEP's decision not to evaluate certain existing and readily available data related to West Virginia's applicable narrative water quality criteria set forth at W. Va. CSR § 47-2-3.2(e) & (i), WVDEP evaluated data from internal and external sources to ensure that collection and analytical methods, quality assurance/quality control and method detection levels were consistent with approved procedures. With the exception noted herein, all qualified data from available sources were used in the decision making process. EPA finds WVDEP's screening protocol and criteria described in its 2012 Integrated Report rationale narrative to be a reasonable rationale in determining the usage of outside data, with the exception of WVDEP's decision not to evaluate certain existing and readily available data related to West Virginia's applicable narrative water quality criteria set forth at W. Va. CSR § 47-2-3.2(e) & (i) as described further below.

**E. *WVDEP's rationale for delisting waterbodies from the previous 303(d) list.***

WVDEP has identified in "Supplemental Table A" waterbodies that were included in previous 303(d) lists but removed from the 2012 Section 303(d) list. WVDEP has demonstrated, to EPA's satisfaction, its rationale for these delistings. A water may be delisted for the following reasons: more recent or accurate data; more sophisticated water quality modeling; flaws in the original analysis that led to the water being listed in the categories in section 130.7(b)(5); or changes in conditions (i.e., new control equipment, elimination of discharges).

In its final 2012 Section 303(d) list, WVDEP delisted waterbodies due to new water quality analyses demonstrating compliance with water quality standards, revisions to water quality criteria associated with the previous listing, listing previously in error, or, in the case of three streams, a biological listing in which the sample was collected in a manner not consistent with the underlying methodology.

For each previously listed segment removed from the 2012 Section 303(d) list, WVDEP provided EPA with a basis for removing the previously listed segment. EPA reviewed WVDEP's rationale, agrees with them, and therefore approves the delisting determinations listed in "Supplemental Table A".

WVDEP has also identified on "Supplemental Table B" those waterbodies where a TMDL has been completed. Consequently, these waterbodies are not included on the 303(d) list.

WVDEP's "Supplemental Table C" proposed to delist 14 waters due to water quality improvement sufficient to achieve applicable water quality standards. WVDEP provided EPA with water quality data demonstrating attainment with applicable water quality standards. Data were included in a copy of WVDEP's Integrated Report Decision Database that was supplied to EPA as part of the WVDEP's Final Integrated Report package.

In its draft 2012 Section 303(d) list, WVDEP proposed to delist twelve WQLSs previously listed for biological impairment utilizing the West Virginia Stream Condition Index (WVSCI) because new biological scores indicated lack of impairment. In its comments on the draft Section 303(d) list, EPA noted that WVDEP was acting inconsistently by using new biological (WVSCI) scores to delist previously listed waters, but declining to evaluate new biological samples for the purpose of adding waters to the Section 303(d) list. In response to EPA's comment, WVDEP determined in its final 2012 Section 303 (d) lists not to delist those twelve waters. For a further discussion of the status of these waters, see Section 7 below.

**F. *Any other reasonable information requested by the Regional Administrator described in Section 130.7(b)(6)(iv).***

WVDEP provided any additional information requested by EPA Region III staff.

**G. *Identification of the pollutants causing or expected to cause a violation of the applicable water quality standards described in Section 130.7(b)(4).***

WVDEP identified the pollutants that were causing or expected to cause a violation of the applicable water quality standards for those pollutants for which a numeric water quality criterion was violated, such as fecal coliform. For WQLSs identified on West Virginia's 2010 Section 303(d) list as violating West Virginia's narrative water quality criteria as applied to the aquatic life uses and carried forward on the Section 2012 303(d) list, West Virginia rarely identified the pollutants causing the impairment. Therefore, many WQLSs were identified based upon failure to achieve the narrative water quality criteria as applied to the aquatic life uses

without identifying a pollutant. WVDEP anticipates that the cause of biological impairments will be determined during TMDL development. However, EPA notes that in certain instances where TMDL development identified an impairing parameter (such as ionic toxicity) and the WQLS was retained on the list, the impairing parameter is not identified on the 2012 Section 303(d) list. EPA recommends that where TMDL development defers an impairing parameter, the 303(d) listing should identify the parameter on the corresponding Section 303(d) listing.

#### ***H. Priority Ranking and Targeting***

Within the 2012 Section 303(d) list, WVDEP has provided TMDL development dates and a detailed discussion of both the priority ranking and schedule development in its 2012 Section 303(d) list rationale. This discussion includes a description of WVDEP's five-year Watershed Management Framework cycle for its five hydrologic groups (A-E). EPA reviewed WVDEP's priority ranking of listed waters for TMDL development, and concludes that, as to the WQLSs included on the 2012 Section 303(d) list, WVDEP satisfied the requirement to submit a priority ranking taking into account the severity of pollution and the uses to be made of such waters. Scheduling, however, takes into account additional relevant factors, such as programmatic considerations (i.e., efficient allocation of resources, Watershed Management Framework cycles, and coordination with other programs or states) and technical considerations (i.e., data availability, problem complexity, availability of technical tools). Another factor WVDEP has considered in the past in prioritizing its listed waters is the schedule in the consent decree resolving Ohio Valley Environmental Coalition, Inc., et al. v. Carol Browner, et al., No. 2:95-0529 (S.D.W.VA.) entered on July 9, 1997, which establishes dates for EPA to ensure TMDL development for all waters and pollutants listed on West Virginia's 1996 Section 303(d) list. All water-pollutant combinations identified for TMDL development by the Consent Decree have either had TMDLs established or have approved determinations that no TMDL is necessary.

In addition, WVDEP has identified WQLSs targeted for TMDL development in the next two years. High priority has been placed on these stream segments. For other impairments where the timing of TMDL development is less certain, multiple year entries were indicated that represent the opportunity for TMDL development per the Watershed Management Framework cycle.

#### **4. Basis for EPA's Decision to Add Waters to West Virginia's 2010 303(d) list**

EPA is disapproving in part West Virginia's 2012 Section 303(d) list to the extent that WVDEP omitted WQLSs because it did not evaluate all readily available data and information and is proposing to add 255 WQLSs to West Virginia's 2012 Section 303(d) list. EPA's determination to add WQLSs is based on data assembled by WVDEP. EPA will open a public comment period on these proposed additions to West Virginia's 303(d) list and will, if appropriate, revise the list of added waters and pollutants following consideration of any comments received. The general basis for EPA's partial disapproval and for adding waters and pollutants is discussed below.

West Virginia's narrative water quality criteria (W. Va. CSR § 47-2-3.2(e) & (i)) provide:

3.2. No sewage, industrial wastes or other wastes present in any of the waters of the state shall cause therein or materially contribute to any of the following conditions thereof:

\* \* \*

3.2.e. Materials in concentrations which are harmful, hazardous or toxic to man, animal or aquatic life;

\* \* \*

[and] 3.2.i. Any other condition, including radiological exposure, which adversely alters the integrity of the waters of the State including wetlands; no significant adverse impact to the chemical, physical, hydrologic, or biological components of aquatic ecosystems shall be allowed.

Starting with its 1998 Section 303(d) list through its 2010 Section 303(d) list, WVDEP has considered the health of the macroinvertebrate community as its primary means of directly measuring whether the narrative water quality criteria as applied to the aquatic life uses are being satisfied.<sup>1</sup> Beginning with its 2002 Section 303(d) list and continuing through its 2010 Section 303(d) list, WVDEP utilized the West Virginia Stream Condition Index (WVSCI) as its methodology for assessing whether streams are achieving West Virginia's narrative criteria as applied to the aquatic life uses. WVSCI consists of six benthic community metrics combined into a single multimetric index. It was developed by Tetra Tech, Inc. in 2000 using WVDEP and EPA data collected from riffle habitats in wadeable streams. Generally, all metric values were converted to a standard 0 (worst) to 100 (best) point scale. The six standardized metric scores were then averaged for each benthic sample site to come up with a final index score ranging from 0.0 to 100.0. Using the distribution of scores from all sites that are considered reference sites, a threshold score of 68.0, representing the 5<sup>th</sup> percentile of reference sites, was identified by WVDEP as the lowest WVSCI score that was considered as fully supportive of the narrative water quality criteria as applied to the aquatic life uses.<sup>2</sup> This means that 95% of all reference sites had a higher score. Setting a threshold as a percentile of the reference population corresponds to setting the acceptable significance of a hypothesis test ( $\alpha$ ), or the acceptable type 1 error rate (false positive), as the reference percentile. In its 2002 through 2010 Section 303(d) lists, WVDEP had incorporated a "gray zone" of 60.6-68.0 into its assessment methodology purportedly to account for uncertainty.<sup>3</sup>

<sup>1</sup> West Virginia also assesses ambient levels of various parameters against numeric water quality criteria established to protect the aquatic life uses.

<sup>2</sup> As a general matter, the reference sites will have experienced some alteration and thus represent some degree of departure from truly natural conditions. To account for this, many states (Virginia for example) use 10<sup>th</sup> percentile of reference, or even the 25<sup>th</sup> percentile of reference. EPA agreed with WVDEP's use of the 5<sup>th</sup> percentile of reference because of the high quality and general confidence in West Virginia's reference samples as representative of something closer to natural conditions.

<sup>3</sup> As part of its approval of the 2008 and 2010 Section 303(d) lists, EPA informed WVDEP that its use of the "gray

In 2012, shortly before West Virginia's draft 2012 Section 303(d) list was published for public comment, the West Virginia Legislature enacted SB 562, which added the following language to West Virginia Code § 22-11-7b:

(f) The secretary shall propose rules measuring compliance with the biologic component of West Virginia's narrative water quality standard [which] requires evaluation of the holistic health of the aquatic ecosystem and a determination that the stream: (i) Supports a balanced aquatic community that is diverse in species composition; (ii) contains appropriate trophic levels of fish, in streams that have flows sufficient to support fish populations; and (iii) the aquatic community is composed of benthic invertebrate assemblages sufficient to perform the biological functions necessary to support fish communities within the assessed reach, or, if the assessed reach has insufficient flows to support a fish community, in those downstream reaches where fish are present. The secretary shall propose rules for legislative approval in accordance with the provisions of article three, chapter twenty-nine-a of this code that implement the provisions of this subsection. Rules promulgated pursuant to this subsection may not establish measurements for biologic components of West Virginia's narrative water quality standards that would establish standards less protective than requirements that exist at the time of enactment of the amendments to this subsection by the Legislature during the 2012 regular session.

WVDEP stated in the narrative portion of its 2012 Section 303(d) list submission that it interprets SB 562 as "a mandate to secure prior Legislative approval of the assessment methodology under which DEP will make impairment decisions pursuant to the narrative criterion at 47 CSR 2-3.2i." Based on that interpretation, WVDEP did not evaluate any samples for the purpose of including "new" WQLSs that do not achieve the narrative water quality criteria as applied to the aquatic life uses in the 2012 Section 303(d) list. WVDEP retained on the 2012 Section 303(d) list all biological listings (not identified in Supplemental Tables A, B, or C for other reasons) from the 2010 Section 303(d) list because it considered those listings as identifications of impaired waters using a methodology "that was valid at the time those impairments were determined."

WVDEP did assemble and report on the Section 305(b) portion of its Integrated Report all existing and readily available data on biological scores. In the Probabilistic Data Summary of the Section 305(b) portion of its Integrated Report, WVDEP reported results of samples collected and analyzed using both WVSCI, which assesses the benthic macroinvertebrate community at the family level, and a genus-level metric called the Genus Level Index of Most Probable Stream Status ("GLIMPSS").

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zone" is statistically unsupportable. A more detailed discussion of the "gray zone" and other EPA comments on WVDEP's methodology made in connection with earlier Section 303(d) lists is provided in Enclosure 2

In past years, WVDEP evaluated the WVSCI data assembled and reported on the Section 305(b) portion of its Integrated Report this information to identify WQLSs for inclusion on the Section 303(d) list. A review of the database information submitted by WVDEP with the 2012 Section 303(d) list reveals dozens of waters that have WVSCI scores below 68 and would have been listed using WVDEP's methodology on prior years' Section 303(d) lists. While past years' listings have been retained, WVDEP (based on its interpretation of SB 562) did not evaluate the biological data reported on the Section 305(b) portion of its Integrated Report for the purpose of identifying WQLSs to be added to (as opposed to retained on) the 2012 Section 303(d) list. In other words, based on its interpretation of SB 562, WVDEP has declined to evaluate all existing and readily available data with respect to West Virginia's narrative water quality criteria. In addition, WVDEP has notified EPA that it will not be submitting identification of waters with respect to the narrative water quality criteria for aquatic life uses until such time as a new methodology is developed and embodied in legislative rulemaking. While WVDEP has informally provided timetables for development of a new methodology, it is possible that such a methodology will not be in place in time for development of West Virginia's 2014 Section 303(d) list.

WVDEP has interpreted SB 562 as a legislative instruction to indefinitely cease assessing waters against West Virginia's narrative water quality criteria as applied to the aquatic life uses pending future development of a new assessment methodology, and EPA acknowledges that is WVDEP's interpretation as a matter of state law. Nevertheless, even assuming that SB 562 as a matter of state law precludes WVDEP from assessing state waters against West Virginia's narrative water quality criteria as applied to the aquatic life uses, SB 562 is a state law that does not override federal requirements. SB 562 does not obviate the federal requirement that WVDEP must assemble *and evaluate* all existing and readily available data (40 C.F.R. 130.7(b)(5)); identify *all* waterbodies that fail to meet currently applicable water quality standards (33 U.S.C. 1313(d)(1)(A)); and submit a biennial list of such waters to EPA for approval (40 C.F.R. 130.7(d)(1)). *Cf. Sierra Club, Inc. v. Leavitt*, 488 F.3d 904, 913-14 (11<sup>th</sup> Cir. 2007) (state cannot avoid obligation to assemble and evaluate all existing and readily available data through state law limiting age of data that can be considered).

Recognizing WVDEP's view that it is unable to carry out the requirement set forth in 40 CFR 130.7(b)(5) to assemble and evaluate all existing and readily available water quality information, EPA has an obligation to take action to ensure that the federal requirement is satisfied. Since the state law, in this case SB 562, does not override the federal requirement, EPA is taking action to partially disapprove West Virginia's 2012 Section 303(d) list to the extent that it omits water quality segments for which biological data were not evaluated by WVDEP. As set forth in Enclosure 2, EPA proposes to identify WQLSs to be added to the Section 303(d) list using as its starting point a methodology that WVDEP has acknowledged was a "valid" method for assessing whether waters are achieving West Virginia's narrative criteria as applied to the aquatic life uses.

It is important to note that EPA's action is limited to its partial disapproval of the omission of certain WQLSs from West Virginia's 2012 Section 303(d) list caused by WVDEP's failure to evaluate certain existing and readily available data. It is unnecessary for purposes of this action for EPA to take any position as to whether SB 562 does or does not constitute a change in West Virginia's water quality standards that must be submitted to and approved by EPA before becoming effective for purposes of Federal law. See 33 U.S.C. § 1313(c); 40 C.F.R. § 131.21. In identifying WQLSs for purposes of the Section 303(d) list, WVDEP and EPA must consider the currently applicable water quality standards. See 40 CFR 130.7(b)(3); 131.21. Regardless of whether or not SB 562 or any regulation that may be promulgated as a result of SB 562 ultimately is interpreted as constituting a change in West Virginia's water quality standards, it has not been approved as such by EPA at this time and therefore would not be a currently applicable water quality standard for purposes of federal law. 33 U.S.C. § 1313(c); 40 C.F.R. § 131.21. Thus, for purposes of the Section 303(d) list, existing and readily available information must be considered with respect to W. Va. CSR § 47-2-3.2(e) & (i).

It is also important to note that EPA's action should not be considered as pre-judging any future assessment methodology that may be developed by WVDEP pursuant to SB 562. If and when WVDEP develops an assessment methodology and such methodology is incorporated into West Virginia's regulations and applied in connection with future Section 303(d) lists, EPA will consider WVDEP's evaluation of existing and readily available information at that time. EPA recognizes that WVDEP has been directed to develop a new methodology and, as explained in more detail in Enclosure 2, it is for this reason that EPA has chosen to utilize substantially the same methodology (WVSCI) used by WVDEP for prior Section 303(d) lists.

## **5. EPA's List Development Process**

As required by 40 CFR 130.7(d)(2), EPA has begun the process of listing waters that must be added to West Virginia's Section 303(d) list. In so doing, EPA has developed a proposed list of impaired waters, using data provided by WVDEP. EPA's list development process is described in Enclosure 2. The list of waters that EPA proposes to add to West Virginia's Section 303(d) list is in Enclosure 3.

EPA will issue a notice in the Federal Register of our proposed action within 30 days of this disapproval. There will be a 30 day public comment period. Upon completion of the public comment period, EPA will review all comments and make changes to the proposed list accordingly.

EPA began the list development process by retrieving data from WVDEP's "Decision Database," that was provided with the submission of WVDEP's final 2012 Integrated Report. The Decision Database is an Access database that contains relevant water quality monitoring data including but not limited to biological assessment data. The database also includes the various lists of waters that comprise WVDEP's Integrated Report. Because the basis of EPA's partial disapproval of the 2012 Section 303(d) list is WVDEP's failure to evaluate certain information against West Virginia's narrative water quality criteria as applied to the aquatic life uses, EPA limited itself to data that was readily available to and assembled by WVDEP, but had

not been evaluated previously in connection with the 2010 or other past approved Section 303(d) lists. Phrased differently, EPA did not consider samples that were collected prior to July 1, 2009 because those samples were evaluated as part of West Virginia's 2010 Section 303(d) list, which was approved by EPA on February 8, 2011. It is not EPA's purpose to re-visit evaluations that form part of past approved Section 303(d) lists or to re-visit EPA's approval of those past lists.

When determining whether to add waters to West Virginia's Section 303(d) list, EPA used West Virginia's narrative water quality criteria (W. Va. CSR § 47-2-3.2(e) & (i)) as applied to the aquatic life uses, and WVDEP's bioassessment listing methodology for its 2010 Section 303(d) list (i.e., WVSCI), with the exception that EPA did not incorporate the WVSCI "gray zone" utilized by WVDEP in 2010 because West Virginia's use of the "gray zone" is statistically unsupported. A more detailed explanation of how EPA arrived at its list of waters to be added to West Virginia's Section 303(d) list is provided in Enclosure 2.

#### **6. EPA Will Propose Additional Listings**

As discussed above, when EPA disapproves a state's list, EPA must identify waters in the state that do not meet water quality standards. Based on the analyses discussed above, EPA is proposing to add waters to West Virginia's Section 303(d) list. Based on EPA's list development process, EPA is proposing to add 255 WQLSs to West Virginia's Section 303(d) list. The list of WQLSs EPA is proposing to add to West Virginia's 2012 Section 303(d) list is included in Enclosure 3.

#### **7. Upon finalization of the list, WVDEP may submit a mid-cycle request to remove from the Section 303(d) list the twelve waters that WVDEP had proposed to de-list in its draft Section 303(d) list based upon WVSCI scores greater than 68**

As noted above, in its draft 2012 Section 303(d) list, WVDEP proposed to remove from the Section 303(d) list twelve WQLSs previously listed for biological impairment utilizing WVSCI because new WVSCI scores indicated lack of impairment. In EPA's comments on the draft Section 303(d) list, EPA noted that WVDEP was acting inconsistently by using new biological (WVSCI) scores to remove previously listed waters, but declining to evaluate new biological samples for the purpose of adding waters to the Section 303(d) list. In response to EPA's comment, WVDEP determined in its final 2012 Section 303(d) list not to remove those twelve waters.

In light of EPA's action and proposal to add waters to the Section 303(d) list by evaluating water quality data using WVSCI, EPA believes it would be appropriate for WVDEP to evaluate the biological scores of the twelve WQLSs identified in its draft 2012 Section 303(d) list and to submit to EPA for review and approval a mid-cycle (i.e., prior to the 2014 Section 303(d) list) request to remove from the Section 303(d) list WQLSs where a new WVSCI score demonstrates lack of impairment.

## **8. Coordination with the U.S. Fish and Wildlife Service**

During West Virginia's public comment period, EPA sent a copy of West Virginia's Draft 2012 Section 303(d) list in electronic correspondence on May, 30, 2012, to the U.S. Fish and Wildlife Service (FWS). EPA requested comments from FWS regarding the draft list. No comments from FWS were received.