

Handout for 2013 National 303(d) Program Meeting

Examples of Section 303(d) Program Nexus with New Program Vision Protection Goal

Examples of new and/or emerging opportunities to incorporate protection concepts into the CWA Section 303(d) program are provided below.

Assessment/Listing

- Develop monitoring strategies to identify healthy waters
- Communicate status and location of healthy waters through the integrated report (e.g., Categories 1 and 2)
- Identify TMDL development priority and schedule for unimpaired waters
- Address antidegradation provisions in water quality standards (WQS) [see regulatory provision (130.7(b)(3)) following]
- Address downstream protection provisions in applicable WQSs [see WQS statutory and regulatory provisions following]
- Support States with relevant technical resources such as recovery potential tool and healthy waters initiative web portal.

TMDL Development

- Develop TMDLs for unimpaired waters [see regulatory provision (130.7(e)) following]
- Develop watershed-scale TMDLs that address both impaired and unimpaired waters
- Address antidegradation provisions in WQS
- Develop TMDLs that address downstream protection provisions in applicable WQSs
- Use watershed characterization step of the TMDL development process to help identify healthy waters.
- Support States with relevant technical resources such as recovery potential tool and healthy waters initiative web portal.

CWA Section 303(d) Program regulatory citation regarding “antidegradation”

- *40 CFR 130.7(b)(3): For the purposes of listing waters under § 130.7(b), the term “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, including numeric criteria, narrative criteria, waterbody uses, and antidegradation requirements.*

CWA Section 303(d) Program regulatory citation regarding “protection/information” TMDLs

- *40 CFR 130.7(e): For the specific purpose of developing information and as resources allow, each State shall identify all segments within its boundaries which it has not identified under paragraph (b) of this section and estimate for such waters the TMDLs with seasonal variations and margins of safety, for those pollutants which the Regional Administrator identifies under section 304(a)(2) as suitable for such calculation and for thermal discharges, at a level that would assure protection and propagation of a balanced indigenous population of fish, shellfish and wildlife. However, there is no requirement for such loads to be submitted to EPA for approval, and establishing TMDLs for those waters identified in paragraph (b) of this section shall be given higher priority.*

Water Quality Standards Statute and Regulatory Citations Regarding Downstream Protection:

- *CWA Section 510: Except as expressly provided in this Act, nothing in this Act shall (1) preclude or deny the right of any State or political subdivision thereof or interstate agency to adopt or enforce (A) any standard or limitation respecting discharges of pollutants, or (B) any requirement respecting control or abatement of pollution; except that if an effluent limitation, or other limitation, effluent standard, prohibition, pretreatment standard, or standard of performance is in effect under this Act, such State or political subdivision or interstate agency may not adopt or enforce any effluent limitation, or other limitation, effluent standard, prohibition, pretreatment standard, or standard of performance which is less stringent than the effluent limitation, or other limitation, effluent standard prohibition, pretreatment standard, or standard of performance under this Act; or (2) be construed as impairing or in any manner affecting any right or jurisdiction of the States with respect to the waters (including boundary waters) of such States.*
- *CWA Section 518(e)...The Administrator shall, in promulgating such regulations, consult affected States sharing common water bodies and provide a mechanism for the resolution of any unreasonable consequences that may arise as a result of differing water quality standards that may be set by States and Indian tribes located on common bodies of water. Such mechanism shall provide for explicit consideration of relevant factors including, but not limited to, the effects of differing water quality permit requirements on upstream and downstream dischargers, economic impacts, and present and historical uses and quality of the waters subject to such standards. Such mechanism*

should provide for the avoidance of such unreasonable consequences in a manner consistent with the objective of this Act.

- *40 CFR 131.2 Under the Water Quality Standards General Provisions, a water quality standard defines the water quality goals of a water body, or portion thereof, by designating the use or uses to be made of the water and by setting criteria necessary to protect the uses. Thus, in accordance with the regulatory language, permitting authorities are responsible for protecting water bodies and segments of water bodies by upholding appropriate water quality standards to protect downstream uses.*
- *40 CFR 131.10(b) In designating uses of a water body and the appropriate criteria for those uses, the State shall take into consideration the water quality standards provide for the attainment and maintenance of the water quality standards of downstream waters.*
- *Current WQS Policy Interpretation of 131.10(b): The regulations do not compel upstream states to adopt the same criteria and uses as the downstream states, nor do they suggest that this is the only way a state can meet the requirements of § 131.10(b). The water quality program is structured to provide states with flexibility to determine the best way to meet their obligations under § 131.10(b).*
- *40 C.F.R. §131.7: (a) Where disputes between States and Indian Tribes arise as a result of differing water quality standards on common bodies of water, the lead EPA Regional Administrator, ...shall be responsible for acting in accordance with the provisions of this section. (b) The Regional Administrator shall attempt to resolve such disputes where:(1) The difference in water quality standards results in unreasonable consequences; (2) The dispute is between a State ... and a Tribe which EPA has determined is eligible to the same extent as a State for purposes of water quality standards; (3) A reasonable effort to resolve the dispute without EPA involvement has been made; (4) The requested relief is consistent with the provisions of the Clean Water Act and other relevant law; (5) The differing State and Tribal water quality standards have been adopted pursuant to State and Tribal law and approved by EPA; and (6) A valid written request has been submitted by either the Tribe or the State...*