



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION IX
75 Hawthorne Street
San Francisco, CA 94105-3901

February 7, 2008

Mr. Laurence K. Lau
Deputy Director for Environmental Health
Hawaii Department of Health
P.O. Box 3378
Honolulu, HI 96801-3378

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Dear Mr. Lau:

Subject: Approval of Hawaii's 2006 Section 303(d) List

Dear Mr. Lau:

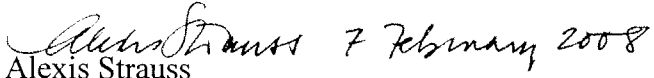
Thank you for submitting Hawaii's 2006 integrated water quality monitoring and assessment report containing the Clean Water Act Section 303(d) list of water quality limited waterbodies. The final submittal and supporting documentation were received on January 18, 2008. Based on review of the final submittal, EPA has determined that Hawaii's 2006 list of water quality limited segments (WQLSs) still requiring TMDLs meets the requirements of Section 303(d) of the Clean Water Act and EPA's implementing regulations. Therefore, EPA hereby approves Hawaii's 2006 Section 303(d) list. The statutory and regulatory requirements, and a summary of EPA's review of Hawaii's compliance with each requirement, are described in the enclosure.

Hawaii's 2006 303(d) list includes 308 WQLSs. Five waterbodies were de-listed, and 56 waterbodies were added to the 303(d) list. The listings were based on an assessment methodology described in the submittal. Priority rankings for all listed waters are established as required by Section 303(d) and its implementing regulations (40 CFR 130.7). Thirty-four waterbodies are targeted for TMDL development in the next two years, based on the importance of the uses to be made of the water, the magnitude of exceedances, and other priority ranking factors. We would like to work with your staff to ensure that the high priority TMDLs are completed and submitted in the next two years.

The public participation process sponsored by Hawaii Department of Health included a solicitation of public comments via e-mail broadcasts and a public notice published December 18, 2006. A 30-day comment period ended on January 19, 2007. Public comments were evaluated, the report revised, and a Response to Comments document published. The State's public participation activities were consistent with federal requirements.

Thank you for your efforts to produce an Integrated Report of Water Quality, including the Section 303(d) water body list for the 2006 listing cycle. If you have questions concerning EPA's decision, feel free to call me at (415) 972-3572 or contact Lynn Suer at (415) 972-3148.

Sincerely,

 7 February 2008
Alexis Strauss
Director
Water Division

Enclosure

Review of Hawaii's 2006 Section 303(d) Water Body List

Enclosure to letter from Alexis Strauss, EPA Region 9 to Laurence Lau, Hawaii Department of Health (DOH)

Date of Original Submittal: September 14, 2007

Date of Supplemental Information from Hawaii DOH: November 15, 2007

Date of Final Transmittal Letter from Hawaii DOH: January 11, 2008

Date of Receipt by EPA: January 18, 2008

Purpose

The purpose of this review document is to describe the rationale for EPA's approval of Hawaii's 2006 Section 303(d) list of water quality limited segments. The following sections identify those key elements to be included in the list submittal based on the Clean Water Act and EPA regulations. See 40 CFR 130.7. EPA reviewed the methodology used by Hawaii DOH in developing the 2006 303(d) list and the State's description of the data and information it considered. EPA's review of Hawaii's 2006 303(d) list is based on EPA's analysis of whether Hawaii DOH reasonably considered existing and readily available water quality-related data and information and reasonably identified waters required to be listed.

Statutory and Regulatory Background

Identification of Water Quality Limited Segments (WQLSs) for Inclusion on Section 303(d) List

Section 303(d)(1) of the Act directs each State and Territory to identify those waters within its jurisdiction for which effluent limitations required by Section 301(b)(1)(A) and (B) are not stringent enough to implement any applicable water quality standard, and to establish a priority ranking for such waters, taking into account the severity of the pollution and the uses to be made of such waters. The Section 303(d) listing requirement applies to waters impaired by point and/or nonpoint sources, pursuant to EPA's long-standing interpretation of Section 303(d).

EPA regulations provide that States do not need to list waters where the following controls are adequate to implement applicable standards: (1) technology-based effluent limitations required by the Act, (2) more stringent effluent limitations required by the State, and (3) other pollution control requirements required by the State, local, or federal authority. See 40 CFR 130.7(b)(1).

Consideration of Existing and Readily Available Water Quality-Related Data and Information

In developing Section 303(d) lists, States are required to assemble and evaluate all existing and readily available water quality related data and information, including, at a minimum, consideration of existing and readily available data and information about the following categories of waters: (a) waters identified as partially meeting or not meeting designated uses, or

as threatened, in the State's most recent Section 305(b) report; (b) waters for which dilution calculations or predictive modeling indicate nonattainment of applicable standards; (c) waters for which water quality problems have been reported by governmental agencies, members of the public, or academic institutions; and (d) waters identified as impaired or threatened in any Section 319 nonpoint assessment submitted to EPA. See 40 CFR 130.7(b)(5). In addition to these minimum categories, States are required to consider any other data and information that is existing and readily available. EPA's 1991 Guidance for Water Quality-Based Decisions describes categories of water quality-related data and information that may be existing and readily available. See Guidance for Water Quality-Based Decisions: The TMDL Process, EPA Office of Water, 1991, Appendix C ("EPA's 1991 Guidance").

In addition to requiring States to assemble and evaluate all existing and readily available water quality related data and information, EPA regulations at 40 CFR 130.7(b)(6) require States to include documentation to support decisions to rely or not rely on particular data and information and decisions to list or not list waters. Such documentation needs to include, at a minimum, the following information: (1) a description of the methodology used to develop the list; (2) a description of the data and information used to identify waters; and (3) any other reasonable information requested by the Region.

Priority Ranking

EPA regulations also codify and interpret the requirement in Section 303(d)(1)(A) of the Act that States establish a priority ranking for listed waters. The regulations at 40 CFR 130.7(b)(4) require States to prioritize waters on their Section 303(d) lists for TMDL development, and also to identify those 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 FR 33040, 33045 (July 24, 1992), and EPA's 1991 Guidance.

Analysis of Hawaii's Submission

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

EPA has reviewed the Hawaii DOH submission, and has concluded that the State developed its Section 303(d) list in compliance with Section 303(d) of the Act and 40 CFR 130.7. EPA's review is based on its analysis of whether the State reasonably considered existing and readily available water quality related data and information and reasonably identified waters required to be listed.

The State considered each of the data and information sources identified in 40 CFR 130.7(b)(5). The State applied a straightforward set of listing criteria that closely follow EPA's 1997 and 2001 assessment methods recommendations. EPA concludes that the listing criteria are consistent with federal listing requirements and that those criteria were applied in a consistent and reasonable manner in compiling the list.

EPA has reviewed Hawaii's 2006 Integrated Report, which provides comprehensive information on waters in Hawaii and fulfills reporting requirements of the Clean Water Act sections 303(d), 305(b), and 314. EPA concludes the State followed EPA's 2006 Integrated Report guidance and properly assembled and evaluated all existing and readily available data and information, including data and information relating to the categories of waters specified in 40 CFR 130.7(b)(5). During the 2004-2006 listing cycle, Hawaii DOH revised the methodology for designating water body segments, such that some waterbody networks were divided into component segments and re-named. EPA carefully compared the 2006 list of water bodies with the 2004 list and has determined that all previously listed water bodies were incorporated into the new list, except those that were specifically de-listed.

The State properly listed waters with nonpoint sources causing or expected to cause impairment, consistent with Section 303(d) and EPA guidance. Section 303(d) lists are to include all WQLSs still needing TMDLs, regardless of whether the source of the impairment is a point and/or nonpoint source. EPA's long-standing interpretation is that Section 303(d) applies to waters impacted by point and/or nonpoint sources. In *Pronsolino v. Marcus*, the District Court for the Northern District of California held that section 303(d) of the Clean Water Act (CWA) authorizes EPA to identify and establish total maximum daily loads (TMDLs) for waters impaired by nonpoint sources. *Pronsolino et al. v. Marcus et al.*, 91 F.Supp.2d 1337, 1347 (N.D.Ca. 2000), *aff'd*, *Pronsolino v. Nastri*, 291 F.3d 1123 (9th Cir 2004). See also EPA's 1991 Guidance and National Clarifying Guidance for 1998 Section 303(d) Lists, Aug. 27, 1997.

Hawaii DOH assembled data and information from the State's water quality monitoring program as well as several other sources of water quality information. The State's 2006 303(d) list contains a total of 215 marine or estuarine segments, 90 freshwater stream segments, one wetland, one saltwater lake and one reservoir. Of the 215 marine/estuarine areas, 39 new water bodies were added, and four water bodies were de-listed for enterococci. Of the 90 freshwater stream segments, 17 were newly listed, primarily for nutrients and turbidity. One freshwater stream, Kolekole stream on the island of Hawaii, was de-listed for total nitrogen, nitrates/nitrites, and total phosphorus.

Priority Ranking and Targeting

EPA also reviewed the State's priority ranking of listed waters for TMDL development, and concludes that the State properly took into account the severity of pollution and the uses to be made of such waters, as well as other relevant factors such as the fit of TMDL work with other assessment, planning and pollution control activities planned by the State and the degree of

public concern about the water body. In addition, EPA reviewed the State's identification of 34 surface WQLSs targeted for TMDL development in the next two years, and concludes that the targeted waters are appropriate for TMDL development in this time frame.

Administrative Record Supporting This Action

In support of this decision to approve Hawaii DOH's listing decisions, EPA carefully reviewed the materials submitted by the State with its 303(d) listing decision. The administrative record supporting EPA's decision is comprised of the materials submitted by the State, copies of Section 303(d), associated federal regulations, and EPA guidance concerning preparation of Section 303(d) lists, and this decision letter and supporting report. EPA determined that the materials provided by the State with its submittal provided sufficient documentation to support our analysis and findings that the State listing decisions meet the requirements of the Clean Water Act and associated federal regulations. We are aware that the State compiled and considered additional materials (e.g. raw data and water quality analysis reports) as part of its list development process that were not included in the materials submitted to EPA. EPA did not consider these additional materials as part of its review of the listing submission. It was unnecessary for EPA to consider all of the materials considered by the State in order to determine that, based on the materials submitted to EPA by the State, the State complied with the applicable federal listing requirements. Moreover, federal regulations do not require the State to submit all data and information considered as part of the listing submission.

References

The following documents were used directly or indirectly as a basis for EPA's review of the State's 303(d) water body list. This list is not meant to be an exhaustive list of all records reviewed, but to provide the primary documents the Region relied upon in making its decisions to approve the State's list.

December 28, 1978 Federal Register Notice, *Total Maximum Daily Loads under Clean Water Act*, finalizes EPA's identification of pollutants suitable for TMDL calculations, 43 Fed. Reg. 60662.

January 11, 1985 Federal Register Notice, *40 CFR Parts 35 and 130, Water Quality Planning and Management: Final Rule*, 50 Fed. Reg. 1774

April 1991, "Guidance for Water Quality-Based Decisions: The TMDL Process," EPA 440/4-91-001.

July 24, 1992 Federal Register Notice, *40 CFR Parts 122, 123, 130*, revision of regulation, 57 Fed. Reg. 33040

August 13, 1992 memorandum from Geoffrey Grubbs, Director, Assessment and Watershed Protection Division, Office of Water, EPA Headquarters, to EPA Water Quality Branch

Chiefs, Regions I - X and TMDL Coordinators, Regions I - X, regarding "Supplemental Guidance on Section 303(d) Implementation."

October 30, 1992 memorandum from Geoffrey Grubbs, Director, Assessment and Watershed Protection Division, Office of Water, EPA Headquarters, to Water Quality Branch Chiefs, Regions I - X, regarding "Approval of 303(d) Lists, Promulgation Schedules/Procedures, Public Participation."

40 CFR Part 130 Water Quality Planning and Management

November 26, 1993 memorandum from Geoffrey Grubbs, Director, Assessment and Watershed Protection Division, Office of Water, EPA Headquarters, to Water Quality Branch Chiefs, Regions I - X, and TMDL Coordinators, Regions I - X, regarding "Guidance for 1994 Section 303(d) Lists."

August 27, 1997 memorandum from Robert H. Wayland III, Director, Office Wetlands, Oceans, and Watershed, Office of Water, EPA Headquarters, to Water Division Directors, Regions I - X, and Directors, Great Water Body Programs, and Water Quality Branch chiefs, Regions I - X, regarding "National Clarifying Guidance For 1998 State and Territory Section 303(d) Listing Decisions."

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

July, 2002 Consolidated Assessment and Listing Methodology, EPA Office of Water,

July 29, 2005 Guidance for 2006 Assessment, Listing and Reporting Requirements Pursuant to Sections 303(d) and 305(b) and 314 of the Clean Water Act. [2006 Integrated Report Guidance] Diane Regas, EPA Office of Wetlands, Oceans and Watersheds.