



EPA Partially Approves DEP 303(d) List; Proposes Addition of 61 Waters July 2016

In May, EPA partially approved WVDEP's 2014 303(d) list. EPA approved all of DEP's proposed listings, but determined that West Virginia failed to evaluate existing and readily available information related to WV's applicable narrative water quality criteria as applied to aquatic life. As a result, EPA is proposing to add 61 water quality-limited segments to the list. In its Decision Rationale, EPA notes that DEP has utilized the West Virginia Stream Condition Index (WVSCI), published in 2000, as its listing methodology for assessing whether streams are meeting WQS since the 2002 303(d) list. EPA asserts that progressions in available biological data and science since 2000 support EPA's use of a genus-level macroinvertebrate tool to directly measure aquatic life use. While DEP assembled genus-level data, it did not evaluate that data for purposes of compiling its 2014 list. DEP cited the methodology used by EPA to add waters to WV's 2012 list as one basis for not evaluating genus-level data. Further, EPA objects to DEP's use of the EPA's methodology during the 2012 listing cycle, asserting that EPA's approach was expressly intended for that listing cycle only. EPA is concerned that, by not evaluating this data, information regarding impairment may have been missed.

DEP asserts that its approach to its 2014 303(d) list is justified given the West Virginia's legislative enactment of SB 562 in 2012, which added the following language to the 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 ... 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.



DEP stated in the narrative portion of its 2012 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 47 CSR 2-3.2i.” Consequently, DEP did not evaluate any biological samples for the purpose of including "new" WQLSs that do not achieve the narrative WQC as applied to aquatic life in the 2012 list. DEP retained all biological listings from the 2010 list included in the 2012 list because these listings identify impaired waters using a methodology "that was valid at the time those impairments were determined."

As evidenced by EPA’s partial approval and proposed additions, EPA is not persuaded by DEP’s position. EPA published a notice of the proposed additions for public comment on June 2 and comments were accepted through July 5. More information is available at <https://www.epa.gov/tmdl/supporting-documents-proposed-additions-west-virginias-2014-impaired-waters-list>.