Department of Energy and Environment (DOEE)

2016 Integrated Report

Comment Periods

Friday, February 19 - Monday, March 21, 2016

and

Friday, May 6 - Monday, June 6, 2016

Brown, Lucretia (DOEE)

From: Shulterbrandt, Nicoline (DOEE)
Sent: Thursday, February 25, 2016 1:52 PM
To: Brown, Lucretia (DOEE)
Subject: FW: Start discussions on DC's 2016 IR

Learn the basics of life-saving hands only CPR in 20 minutes. Visit the DC FEMS Hands on Hearts campaign at http://handsonhearts.dc.gov to sign up for existing classes or email hands.onhearts@dc.gov to schedule a class for your office or organization.

From: MacKnight, Evelyn [mailto:MacKnight.Evelyn@epa.gov]
Sent: Thursday, February 25, 2016 1:24 PM
To: Burrell, Collin (DOEE); Searing, Mary (DOEE); Shulterbrandt, Nicoline (DOEE); Bradbury, Sarah (DOEE); Onyullo, George (DOEE)
Cc: Richardson, William; drago, helene; Peck, Michelle
Subject: Start discussions on DC's 2016 IR

Collin,
Thank for your public release of your draft 2016 Integrated Report. EPA has some questions that we would like to discuss with you and your staff ASAP.
Specifically we would like to discuss the follow issues:

1. Movement of 2014 Rock Creek Watershed E. coli category 5 listings to category 4a – do current TMDLs adequately address these impairments and was the public sufficiently notified?
2. Anacostia tribs TSS listings in 4a – are these waters adequately covered in Anacostia TSS TMDL
3. EPA 303(d) Vision: To provide adequate public notice of DOEE's 303(d) Vision Prioritization plans and process, information should have been included in the IR narrative including DDOE's TMDL development plans from now to 2022 and its list of priority waters.
4. Hickey Run priority ranking

In addition, EPA has yet to receive public engagement and prioritization 303(d) Vision write ups from DOEE which were FY15 106 grant commitments. EPA staff are available at the following times to discuss in greater detail:

Tuesday, March 1: 1pm
Wednesday, March 2: 3:30pm
Friday, March 4: 10am, 2pm, 3pm

Thanks.

Evelyn
Associate Director, Office of Standards, Assessment, and TMDLs (3WP30)
Water Protection Division
U.S. EPA Region III
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UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION III
1650 Arch Street
Philadelphia, Pennsylvania 19103-2029

Mr. Collin R. Burrell, Associate Director
Government of the District of Columbia
District Department of Energy and Environment
Natural Resources Administration
Water Quality Division
51 N Street, NE
Washington, D.C. 20002

JUN 0 6 2016

Dear Mr. Burrell:

Thank you for providing the U.S. Environmental Protection Agency (EPA) the opportunity to provide comments on the District of Columbia's (DC) *Draft 2016 Integrated Report to the US Environmental Protection Agency and Congress Pursuant to Sections 3058b) and 303(d) Clean Water Act (P.L. 97-117)*. EPA comments are outlined below by section in the Integrated Report.

Special State Concerns and Recommendations

While adoption of ambient water quality criteria (AWQC) is a process separate from the Integrated Report, we provide the following comments on the discussion presented in the Integrated Report. In 2015 EPA published final updated AWQC for the protection of human health for 94 chemical pollutants. Due to outstanding technical issues, EPA did not update human health criteria for several chemical pollutants including arsenic and other metals. EPA intends to update AWQC for additional pollutants as sufficient information becomes available to address technical issues, such as the bioaccumulation of metals, and some non-lipophilic compounds in a scientifically defensible manner. In the meantime, states should consider adopting the existing criteria recommendations for those compounds that were not addressed in this update. In addition, states or tribes can modify EPA's AWQC to reflect site-specific conditions and inputs, such as body weight, drinking water intake, and fish consumption rates that are protective of specific populations identified by a state or tribe, or adopt different AWQC based on other scientifically defensible methods, so long as what is adopted is at least as protective as the AWQC published by EPA. If the District adopts new AWQC, EPA must approve any new water quality standards adopted by a state before they can be used for Clean Water Act purposes.

Toxic TMDLs Revision

The text states "In 1988, the District listed a number of waterbodies for toxics on its 303(d) list…" however the waterbodies were first listed in 1998. Please correct.

Fish Tissue Study

The final paragraph states "…the Class C (protection of human health) designation is not

supported." Class D protects human health. Please correct.

Prioritization Strategy

The prioritization strategy discusses the opportunity for stakeholders to review and comment on a preliminary list called "pre-303(d) list." Has this process been undertaken in the 2016 listing cycle or is this intended for future lists? Additionally, the "Prioritization Analysis Matrix" is discussed as a tool to be shared with stakeholders for TMDL development. When does DC plan to utilize this matrix with stakeholders?

If you have any questions related to these comments, please feel free to contact me or have your staff contact Bill Richardson at 215-814-5675, or Michelle Peck at 215-814-5192.

Sincerely,

Evelyn S. MacKnight

Evelyn S. MacKnight, Associate Director
Office of Standards, Assessment, and TMDLs

Brown, Lucretia (DOEE)

From: Jennifer Chavez <jchavez@earthjustice.org>
Sent: Friday, March 18, 2016 1:00 PM
To: Brown, Lucretia (DOEE)
Subject: RE: Draft 2016 IR - Request for documentation

Lucretia,

Thank you for letting me know.

Sincerely,

Jennifer Chavez

From: Brown, Lucretia (DOEE) [mailto:lucretia.brown@dc.gov]
Sent: Friday, March 18, 2016 12:48 PM
To: Jennifer Chavez
Cc: Brown, Lucretia (DOEE)
Subject: Re: Draft 2016 IR - Request for documentation

Hello Ms. Chavez,

I am currently out of the office. I will be returning on Monday, March 21. I will be able to assist you at that time.

Thank you for your interest in the 2016 Draft Integrated Report.

Lucretia Brown

Sent from my BlackBerry 10 smartphone on the Verizon Wireless 4G LTE network.

From: Jennifer Chavez
Sent: Friday, March 18, 2016 12:37 PM
To: Brown, Lucretia (DOEE)
Subject: Draft 2016 IR - Request for documentation

Dear Ms. Brown,

In connection with the public notice and comment period for the Draft 2016 Integrated Report on Water Quality, I write to request an electronic copy of the documentation for the water quality assessment referenced in the following paragraph from the Draft Integrated Report:

> "The District has adopted water quality standards for dissolved oxygen, water clarity and chlorophyll a in accordance with the Chesapeake Bay Water Quality Criteria Guidance Document published in 2003 (US EPA, 2003) for the Potomac Tidal Fresh and Anacostia Tidal Fresh (Chesapeake Bay Program waterbody name). DDOE WQD worked with the Chesapeake Bay Program to assess the tidal waters in the District using the 2003 guidance document and all the addendums published through 2009. For the 2016 listing year, these segments are in Category 4a because the Chesapeake Bay TMDL was established in December 2010."

Thank you in advance for your assistance.

Best wishes,

Jennifer C. Chavez
Staff Attorney
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1625 Massachusetts Av. NW, Suite 702
Washington, DC 20036
T: 202.667.4500
F: 202.667.2356
earthjustice.org

EARTHJUSTICE

March 21, 2016

Via e-mail to: 2016draftir.doee@dc.gov
Collin Burrell, Associate Director
DOEE Water Quality Division
1200 First Street, NE, 5th Floor
Washington, DC 20002

Re: Comments on the 2016 District of Columbia Draft Integrated Report

Dear Mr. Burrell:

The attached comments are submitted to the District Department of Energy and Environment (DOEE) on behalf of Anacostia Riverkeeper and Potomac Riverkeeper Network.

If you have any questions about these comments or would like to discuss, please do not hesitate to contact me at jchavez@earthjustice.org, or 202-667-4500.

Sincerely,

/s/ Jennifer C. Chavez

Staff Attorney
Earthjustice

Comments on Draft 2016 District of Columbia Integrated Report on Water Quality

Prepared by Bill Painter, for Jennifer Chavez, Earthjustice
March 18, 2016

De facto, illegal change in criterion-frequency of numeric WQC for certain parameters though use of "10% rule" as a water quality interpretation procedure

The 2016 Draft Integrated Report (DIR) improperly excludes from the Clean Water Act section 303(d) list waters that exceed the District's EPA-approved criteria in up to 10% of measured samples. As explained below, this amounts to an un-approved and therefore impermissible change to the District's approved criteria.

Table 3.1 (p84) of the DIR, titled "Threshold For Conventional Pollutants and Pathogens," lays out the data interpretation methods that were used when determining whether or not numeric water quality criteria (WQC) for a certain water quality parameters have been attained; which, in turn, determines whether waterbodies for which a given designated use (DU) has been set as a goal can or cannot support said DU. In addition to "pathogens" data, the specified methodology set forth in Table 3.1 is to be used when dealing with data for DO, turbidity, pH, and temperatures, according to a footnote to Table 3.1.

Table 3.1 explains that a waterbody would be deemed able to fully support the DU to which WQC for these five (5) specified parameters apply if, "For any pollutant[1], standard[2] exceeded[3] in ≤ 10% of measurements." Conversely, a waterbody would be considered to fail to support a DU "if standard exceeded in >10% of measurements."

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[1] Actually, none of the "pollutants" labeled as "conventional pollutants" – DO, pH, turbidity, and temperature – meet the definition of "pollutant" in the Clean Water Act. Rather, they are "response indicators," i.e., water quality parameters that reflect changes in waterbody conditions that result from loadings of "pollutants." Dissolved oxygen is an indicator of effects of a number of pollutants, including but not limited to, BOD, COD, and nutrients. The indicator pH reflects loadings of acidic and basic compounds. Turbidity is an indicator of a waterbody's response to input of sediments, organic material, and other pollutants. Temperature is an indicator of heat inputs to a waterbody.

[2] The word "standard" is apparently being used here with reference to a numeric water quality criterion (WQC), as opposed to a water quality standard (WQS). Along with designated uses and narrative WQC, numeric WQC are the core components of "water quality standards" according to US EPA regulations and guidance. In turn, numeric WQC consist of 3 components: 1) a criterion-magnitude (usually a concentration), 2) a criterion-duration, and a criterion-frequency. More specifically, "standard" seems to be used here with reference to just one of the three elements of a numeric WQC—the criterion-magnitude.

[3] "Exceedance" is most commonly used in EPA documents to mean waterbody conditions worse than those specified by the combination of the 3 elements of a numeric water quality criterion—criterion-magnitude, criterion-duration, and criterion-frequency. Here, "exceedance" seems to be intended to mean any time a single measurement of a water quality parameter surpasses the criterion-magnitude of an applicable numeric WQC. (In the case of pH WQC, the District of Columbia appears to use "exceed" to mean a single pH reading falling outside the pH range specified by DC's numeric WQC for pH). In keeping with terminology used in some EPA documents, "digression" is used in these comments to mean what the District seems to mean when using "exceedance"—a single measurement that is inconsistent with an applicable numeric WQC's criterion-magnitude. "Exceedance" is used in these comments to refer to waterbody conditions worse than those described by the combination of an applicable criterion-magnitude and criterion-frequency.

In order to determine if use of this "10% rule" is appropriate when dealing with a particular numeric WQC, the wording of said WQC in a state's WQS regulations needs to be closely examined. The most relevant numeric WQC in this instance are the following:

1) Dissolved oxygen:
    a. Instantaneous minimum 5.0 mg/L (Feb 1--May 31)
    b. Instantaneous minimum 5.0 mg/L (June 1—January 31)
2) Turbidity:
    a. Increase above ambient (NTU) 20
3) pH:
    a. Greater than 6.0
    b. And less than 8.5
4) Temperature (C):
    a. Maximum 32.2
    b. Maximum change above ambient 2.8
5) E. coli (CFU):
    a. Single Sample Value 410

It is important to note that all the above WQC have clearly articulated criterion-magnitudes. Not all of the WQC have expressly-stated criterion-durations. And, none of the WQC includes mention of an applicable criterion-frequency.

With regard to the criterion-durations, the most precisely stated are those for dissolved oxygen, which are expressed as an "instantaneous minimum" concentrations, in mg/L. Because of the use of "instantaneous," the District has made it clear that a digression (see footnote 3) of one of these WQC has occurred if the concentration of DO goes below the criterion-magnitude/concentration for even a fraction of a second. And, since no criterion-frequency has been mentioned, then a single digression constitutes an exceedance of the DO criterion, which means the DU to which the WQC applies is not fully supported according to Table 3.1 in the draft DC Integrated Report.

Unfortunately, Table 3.1 makes it clear that, in assembling its draft Integrated Report, the District has included on its 303(d) list (waters not meeting applicable WQS) only those waterbodies or portions of waterbodies in which the instantaneous DO concentration has gone below the criterion-magnitude more than 10% of the time. By using the "greater than 10% of measurements" data interpretation rule to determine if a DO criterion has not been met – and, therefore aquatic life use is not supported – the District has changed the criterion-frequency for these DO WQC from "zero" to "10% of the time." This constitutes a de facto illegal modification of the criterion-frequency for the two DO WQC cited in these comments.

In order to use the "10% of measurements" rule in a manner consistent with Section 303(d) of the CWA and the attendant EPA regulations, the District would first need to modify, through formal rulemaking, these DO WQC so as to read "instantaneous minimum of __mg/L no more than 10% of the time." And, before such revised WQC could be used in assembly of DC's 303(d) list, the WQC would need to have been approved by US EPA. Meanwhile, DC's 2016 303(d) list needs to be revised to include all waterbodies in which the DO concentration went

below that specified DO criterion/magnitude-concentration for even an instant, ever. Consequently, if the measured DO concentration in any grab sample from a given waterbody is below 5.0 mg/L, that waterbody must go on the DC 303(d) list.

If a state intends to specify a criterion-duration greater than an instant/second they need to: 1) articulate a term indicating some characteristic of sets of one or more data points, such as "average," "mean," "geometric mean," "median," "75th percentile," and 2) indicate a time interval within which each such set must fall—a minute, 30 minutes, an hour, 24 hours, 7 days, 14 days, 30 days, 90 days, 365 days, etc.

Without inclusion of both of these two elements in the wording of a numeric WQC, said criterion must be considered to have a criterion-duration of an instant (i.e., a second or less).

The problems associated with indiscriminate use of a "10% of measurements" rule in 303(d) list assembly were pointed out in EPA guidance issued a decade ago. In Section IV.G of the 2006 Integrated 303(d)/305(b) Reporting Guidance, EPA said.

> "Past EPA guidance (1997 305(b) and 2000 CALM) recommended making non attainment decisions, for 'conventional pollutants' — TSS, pH, BOD, fecal coliform bacteria, and oil and grease— when more than '10% of measurements exceed the water quality criterion.' (However, EPA guidance has not encouraged use of the '10% rule' with other pollutants, including toxics.) Use of his rule when addressing conventional pollutants, is appropriate if its application is consistent with the manner in which applicable WQC are expressed. An example of a WQC for which an assessment based on the ten percent rule would be appropriate is the EPA acute WQC for fecal coliform bacteria, applicable to protection of water contact recreational use. This 1976-issued WQC was expressed as, '...no more than ten percent of the samples exceeding 400 CFU per 100 ml, during a 30-day period.' Here, the assessment methodology is clearly reflective of the WQC.
>
> **On the other hand, use of the ten percent rule for interpreting water quality data is usually not consistent with WQC expressed** either **as: 1) instantaneous maxima not to be surpassed at any time**, or 2) average concentrations over specified times. **In the case of "instantaneous maxima (or minima) never to occur" criteria use of the ten percent rule typically leads to the belief that segment conditions are equal or better than specified by the WQC, when they in fact are considerably worse.** (That is, pollutant concentrations are above the criterion-concentration a far greater proportion of the time than specified by the WQC.) Conversely, use of this decision rule in concert with WQC expressed as average concentrations over specific times can lead to concluding that segment conditions are worse than WQC, when in fact they are not."
>
> Memorandum of Diane Regas, EPA OWOW, *Guidance for 2006 Assessment, Listing and Reporting Requirements Pursuant to Sections 303(d), 305(b) and 314 of the Clean Water Act* (July 29, 20050) (emphasis added, internal citations omitted).

Clearly, the use of the "10% of measurement rule" in developing 303(d) list is not appropriate with the DC WQC for DO cited earlier in these comments, given that they are expressed as instantaneous minima. As for the WQC for the other 4 parameters mentioned in Table 3.1 of DC's draft IR for 2016, regardless of whether terms such as "instantaneous" or "never to surpass" are included in the wording of a criterion," they all strongly imply a criterion-duration of an instant. For instance, the first of the temperature WQC mentioned above is worded much like the just-discussed DO WQC, "Temperature (C): Maximum 32.2." This wording gives no indication of meaning that the stated 32.2 criterion-maximum is an average value. Not only is the word "average" not mentioned, but also there is nothing to suggest a specific period over which measured temperatures should be averaged. Consequently, this WQC for temperature must be treated as an instantaneous maximum value, which means use of the "10% of measurements" rule is not acceptable. Likewise, the "10% measurements rule" should not be use for the temperature criterion expressed as a "maximum change above ambient." (As noted previously, neither of these temperature WQC contains an explicit or implicit criterion-frequency, these instantaneous maximum values cannot be surpassed, ever.)

The turbidity criterion is stated as an "increase above ambient." The two pH criteria are expressed as "greater than __" and "less than __," respectively. Though "instantaneous" does not appear in any of these three WQC, there is absolutely nothing in the way they are worded that suggests that the criterion-magnitudes in the pH WQC should be treated as average, rather than instantaneous, values. Consequently, use of a "10% of measurements rule is not acceptable when dealing with pH data.

Finally, there is the "single sample value" of 410 MPN/100ml for E. coli included in Table 3.1. Given that it only takes a second to collect a single grab sample of water, one must conclude that the criterion-magnitude is meant to be an instantaneous value. Hence, the "10% of measurements rule" may not be used when dealing with this WQC for E. coli.

Consistent with the above discussion, any waterbody that had a %-exceedance rate of anything above zero and below 10% must be added to the 2016 303(d) list.

Possible Improper Use of a Rigid, Across-the-Board Minimum Data Set Size Cutoff To Exclude Waters From Being Assessed With Regard to Certain WQC

In Table 1.1 (p. 12) of its draft 2016 Integrated Report, the District reports that it did not make a support/non-support decision for "swimming" on any of the 38.4 miles of rivers and streams in its jurisdiction. Rather, it indicated that there was "insufficient information" on 33.5 miles and that 4.9 miles were "not assessed."[4] Given that one of the E. coli WQC that DC says it uses to make support/non-support determinations for "swimming" is a "Single Sample Value," then the fact that DC says it was unable to make such a determination for any of its rivers and streams

[4] The definitions the District used for "insufficient information" and "not assessed" is not clear. It would seem that if DC had determined that, for a given waterbody, it had "insufficient information," and therefore, had concluded that it could not make a reliable use support/use non-support decision, that it would be reasonable to say that said waterbody had not "assessed" with regard to its swimming designated use. Could it be that DC is using "not assessed" to mean "not monitored"? The meaning of these two terms should be clarified in the final 2016 IR regard to this point.

implies that DC collected not one single grab sample and analyzed it for E. coli concentration. This is hard to believe, and would represent a troubling failure of the city to make even a minimal effort to determine whether any of its rivers and streams had E. coli levels high enough to protect the health of those persons using these waters for "swimming" (primary contact recreation). Another possibility is that DC did generate E. coli data, but concluded that none of the data met necessary QA/QC protocols. This too is very hard to believe.

Rather, the most likely cause for this failure to make swimmable use support status determinations for any DC rivers or streams is that DC employed a rigid minimum data set requirement. This theory is supported by the fact that the criterion-duration for the chronic DC WQC for E. coli reads "(Geometric Mean (Maximum 30 day geometric mean for 5 samples)."

EPA addressed the issue of minimum data set requirements in Section IV.D.C of its 2006 303(d)/305(b) Integrated Reporting guidance[5] as follows:

> "EPA encourages the collection of adequate data to make well-grounded attainment determinations. EPA has not established, required, nor encouraged the establishment of rigid minimum sample set size requirements in the WQS attainment status determination process. EPA is particularly concerned with application of such thresholds state-wide, without regard to key factors like the manner in which applicable WQC are expressed, variability in segment-specific conditions, and fluctuations in rates of pollutant loading. Rather if employed, target sample set sizes should not be applied in an assessment methodology as absolute exclusionary rules, and even the smallest data sets should be evaluated and, in appropriate circumstances, used. While it may be appropriate to identify target sample sizes as a methodology is developed, states should not exclude from further consideration data sets that do so solely because they not meet a target sample size. A methodology may provide for an initial sample size screen, but should also provide for a further assessment of sample sets that do not meet the target sample size.
> (EPA suggests that states avoid setting target sample set sizes higher than the amount of data available at most sites.)
>
> Assessments based on larger sample sets are more likely to yield accurate conclusions than assessments based on smaller sample sets. For example, smaller sample sets are more prone to lead to erroneously concluding that at a WQC has not been exceeded, because they result in a lower probability of detecting WQSs exceedances that have actually occurred. (EPA, *Consolidated Assessment and Listing Methodology – Toward a Compendium of Best Practices* (CALM) July 2002, pp. 4-9).
>
> Any target sample set size thresholds must be consistent with the state's EPA-approved water quality standards. Hence, when making an determination based on comparison of ambient data and other information to a numeric WQC expressed as an "average" concentration over a specified period of time, a statement of a desired number of samples may be appropriate. Still, the methodology should provide decision rules for concluding nonattainment in cases where the target data quantity expectations are not met, but the

[5] Available at: https://www.epa.gov/sites/production/files/2015-10/documents/2006irg-report.pdf and on file with the author.

available data and information indicate a reasonable likelihood of a WQC exceedance (e.g., available samples with major digressions from the criterion concentration, corroborating evidence from independent lines of evidence such as biosurveys or incidence of waterborne disease, indications that conditions in the waterbody and loadings of the pollutant into the waterbody have remained fairly stable over the period in question).

Even a very small set of samples may be sufficient to indicate impairment, particularly when the duration/averaging periods of relevant WQC are quite short (an hour or less). For example, one grab sample meeting QA/QC specifications with a concentration higher than the criterion - concentration for a toxic compound could well be grounds for concluding that a WQC expressed as a concentration not be surpassed at any time had been exceeded. A single sample with a concentration that digressed from (was above) the criterion-concentration would be a particularly strong indicator of exceedance of such a criterion if it was the only sample that had been collected. In such a situation, the rate of digression in the sample set (in this instance a set of one) was 100%. This means that, if the timing of the sample was picked randomly, the chances are good that if additional samples had been taken over the period of concern, the vast majority of those would also have had concentrations above the criterion-concentration."

In addition to the common-sense reasons for not using rigid data set size cutoffs laid out in the just-quoted EPA guidance pertaining to 303(d) listing and 305(b) reporting, there is a legal reason for not treating the 5 samples/measurements over 30 days data set target as legally binding upon the 303(d) listing program is that this language in DC's WQ Standards was "approved" by EPA under the authority vested in it under Section 303(c) of the federal Clean Water Act, which deals with establishment of water quality standards. Relevant EPA regulations define a Water Quality Standard as follows: "A water quality standards defines the water quality goals for a waterbody, or portion thereof, by designating the use or uses to be made of the water and by setting criteria necessary to protect the uses." (CWA Sec. 303(c)(2)(A). That is, WQS set forth the <u>desired</u> condition of categories of waterbodies, and specific waterbodies.

On the other hand, it is Section 303(d) of the Act that deals with state development, and EPA approval/disapproval, of state 303(d) lists, which are required by the CWA to consist of waters failing to meet any applicable WQS. As such, 303(d) lists/305(b) reports set forth what is known about the <u>actual condition</u> of particular waterbodies and portions thereof, in contrast to WQS, which articulates the condition that the public wishes waterbodies to attain.

Also it is important to know that, currently, when EPA approves or disapprove a state's (or in this case the District's) water quality standards, that approval or disapproval applies only to the WQS itself and not to the jurisdiction's methodology for making determinations about a water body's WQS attainment status.[6] Rather, EPA exercises its authority to disapprove some element(s) of a jurisdiction's 303(d) list of waters, and to add waters to the list if the state or the District fails to add said waters after EPA has indicated it believes those water bodies belong on

[6] In 2000, EPA formally proposed make 303(d) assessment methodologies expressly subject to EPA approval/disapproval. For several reasons, those regulations were never finalized.

the jurisdiction's 303(d) list. In this way, through its authority to act on 303(d) lists themselves, EPA *indirectly* addresses what it sees as inappropriate state WQS assessment methods. In contrast, EPA's approval of a particular WQS cannot be read as an approval of the jurisdiction's related methodology for assessing waters.