

U.S. EPA Responses to Comments on the Partial Approval and Partial Disapproval of Washington’s 2014-2018 303(d) List

Summary

On June 8, 2022, EPA partially approved and partially disapproved Washington’s 2014-2018 303(d) List consistent with the requirements at the Clean Water Act (CWA) section 303(d) and EPA’s implementing regulations at 40 CFR 130.7. As required by EPA regulations at 40 CFR 130.7(d)(2), EPA identified 115 water quality limited segments (WQLS) not meeting the state’s water quality standards and added them to Washington’s 303(d) List. EPA accepted public comment on the additions between June 8 and July 15, 2022. EPA took no action on Washington’s 303(d) List with respect to 2100 assessment determinations made and submitted by Ecology prior to EPA’s November 19, 2021, CWA section 303(c) disapproval of water quality standards at WAC 173-201A pertaining to natural and irreversible human conditions.¹

EPA received letters from two commenters during the public comment period: the Washington Department of Ecology (Ecology) and the Natural Resources Department of the Port Gamble S’Klallam Tribe. This document contains a summary of their comments as well as EPA’s responses.

After considering comments received, EPA revised the June 8, 2022 partial approval/partial disapproval action and identified 114 WQLS for inclusion on the Washington 2014-2018 303(d) list. One waterbody/pollutant pair was previously unlisted, and EPA has determined based on Ecology’s comments that it is not required to be placed in Category 5 because there is an EPA-approved total maximum daily load (TMDL) in effect.

Further, after reviewing additional information provided by Ecology during the public comment period, EPA approved several assessment determinations on which it previously took no action. The additional information demonstrated that eight waterbody/pollutant pairs were attaining water quality standards without consideration of natural conditions. Three of these waterbody/pollutant pairs had been listed in Category 5 in the 2012 List and Ecology proposed to delist them in 2014-2018: one due to an error in the original listing and two due to changes in assessment methodology. EPA’s revised action brings the total number of delistings approved by EPA for the 2014-2018 List to 1,186. EPA is taking no action on the remaining 2,092 assessment determinations made and submitted by Ecology prior to EPA’s November 19, 2021, CWA section 303(c) disapproval of water quality standards at WAC 173-201A pertaining to natural and irreversible human conditions. These 2,092 waterbody/pollutant pairs will remain in the categories in which they were approved in the 2012 303(d) list and Water Quality Assessment until Ecology has had an opportunity to reassess them during the next listing cycle in consideration of the applicable water quality standards.

¹ Available at <https://www.epa.gov/wqs-tech/water-quality-standards-regulations-washington>

Enclosure 1: Responses to Comments on EPA’s Partial Approval and Partial Disapproval of Washington’s 2014-2018 303(d) List

A complete list of waters added to the 2014-2018 List can be found in *Enclosure 2: Final Transmittal of Additions to Washington’s 2014-2018 303(d) List*. The waters on which EPA is taking no action can be found in *Enclosure 3: Final Transmittal of Waters Potentially Impacted by EPA Disapproval of Natural Conditions Provisions*.

Comments Received

I. WASHINGTON DEPARTMENT OF ECOLOGY

General Comments Pertaining to Disapprovals

Ecology Comment: “We are disappointed with EPA’s decision regarding the placement of 115 segments back onto the 303(d) List, needing new TMDLs. These segments represent areas that we believe are covered by existing TMDLs. In our Water Quality Listing Policy (Policy), we clearly stated that if we received new data for a waterbody segment that was in an area covered by an existing TMDL, then we would review it according to the Policy. As required by EPA, this Policy was developed through a stakeholder, tribal, and public review process. In that process, EPA did not express concern regarding this procedure. Therefore, our TMDL staff implemented the following procedure to review relevant listings for placement into Category 4A.

Water Quality Assessment Listing Policy on moving a proposed Category 1, 2, 3 or 5 listing to Category 4A:

When Ecology assesses new data for an AU within an approved TMDL boundary, WQA staff will consult with appropriate TMDL staff to determine if the existing TMDL adequately addresses the AU. If the existing TMDL adequately addresses the AU, it will be placed in Category 4A (Has a TMDL). If not, the AU will be placed in the appropriate category based on data results alone.”

EPA Response: EPA appreciates that Ecology staff have developed and implemented the Policy for determining if an AU should be moved into Category 4A during the assessment process. EPA’s disapproval of those determinations was based on our finding that there was not sufficient information provided for EPA to determine if an existing TMDL adequately addressed the AU, and therefore to conclude that the removal of those AUs from Category 5 was appropriate. EPA TMDL program staff look forward to engaging with their Ecology counterparts to discuss the information gaps to ensure that sufficient documentation is provided to inform future decision-making.

AU-Specific Comments on EPA Disapprovals

Ecology’s comment letter included a number of specific listing comments in a table format. For completeness, EPA responded to those comments in an excel table, including providing a summary of the outcome based on EPA’s review. The excel table is provided in *Attachment 1: EPA Response to AU-Specific Comments*

General Comments Pertaining to “No Action” Determination on Natural Conditions

Ecology Comment: “Since our 1998 303(d) list, we have used our natural conditions water quality standards to make decisions on the 303(d) list. We have only taken this action when there is sufficient information to determine that natural environmental conditions, rather than anthropogenic sources, are limiting a waterbody from attaining water quality standards. The goal for this decision was preventing the prioritization and development of TMDLs for waters where a TMDL or other pollution control program will not result in attainment of water quality standards. This practice is in agreement with EPA’s 2006 Integrated Report Guidance and a consistent practice among states across the country.”

EPA Response: Certain assessment conclusions made by Ecology in the 2014-2018 Integrated Report (IR) were based on natural conditions provisions that were the CWA-effective water quality standards at the time of the listing action. On February 10, 2014, the Northwest Environmental Advocates filed a complaint in U.S. District Court for the Western District of Washington (Case No. 2:14-cv-0196-RSM) challenging, in part, EPA’s February 11, 2008, CWA section 303(c) approval of the natural conditions provisions. On October 17, 2018, the Court issued an Order Granting a Stay (Dkt. 95) pending EPA’s reconsideration of its prior determinations.

As detailed in EPA’s *Technical Support Document, EPA’s Clean Water Act Action on Revisions to the Washington State Department of Ecology’s Surface Water Quality Standards for Natural Conditions Provisions*,² on November 19, 2021, EPA disapproved revisions to the following sections of WAC 173-201A pursuant to its authority under section 303(c)(3) of the CWA, 33 U.S.C. § 1313(c)(3), and 40 CFR Part 131:

- WAC 173-201A-260(1)(a): Natural and irreversible human conditions
- WAC 173-201A-200(1)(c)(i) and WAC 173-201A-210(1)(c)(i): Allowable human contribution to natural conditions provisions for aquatic life temperature (fresh water and marine water, respectively)
- WAC 173-201A-200(1)(d)(i) and WAC 173-201A-210(1)(d)(i): Allowable human contribution to natural conditions provisions for aquatic life dissolved oxygen (fresh water and marine water, respectively)³

The assessment conclusions made by Ecology in the 2014-2018 IR were based on the previously approved natural condition provisions, which were the CWA-effective water quality standards when the list was developed and at the time of submittal to EPA. Following Ecology’s submittal in September 2021, EPA disapproved the natural conditions criteria thereby making the provisions no longer in effect for CWA purposes, including listing determinations. There were potentially 2,100 water quality assessment determinations made based on the previously effective and subsequently disapproved natural conditions provisions, which includes both assessment determinations that were

² Available at <https://www.epa.gov/wqs-tech/water-quality-standards-regulations-washington>

³ Available at <https://www.epa.gov/wqs-tech/water-quality-standards-regulations-washington>

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new in the 2014-2018 assessment as well as historic determinations previously approved by EPA.

In light of EPA’s November 19, 2021, disapproval of the State’s natural conditions provisions, each of these determinations will need to be revisited by Ecology, including reviewing all existing and readily available water quality data and information, and reassessing the assessment determinations made using the subsequently disapproved water quality standards.

AU-Specific Comments Pertaining to “No Action” Determination on Natural Conditions

Ecology Comment: Ecology provided EPA with additional information for the following Listing IDs documenting that water quality standards are being attained without considering natural conditions as the reason for attainment and have been placed in Category 1. Ecology requested that EPA not defer action on their assessment determinations:

- 9682
- 19858
- 35261
- 38280

EPA Response: EPA agrees that there are data and information supporting attainment without consideration of natural conditions. Accordingly, EPA approved the State’s assessment of these waters and did not include them in the “no action” group.

Ecology Comment: Ecology provided EPA with additional information for the following Listing IDs which had been proposed for delisting, documenting that the delisting determination had been made due to changes in assessment methodology or due to an error in the original listing and that natural conditions had not been considered. Ecology requested that EPA approve the delistings to the appropriate category for the following:

- 48066 (change in methodology; placed in Category 2)
- 70856 (error in the original listing; placed in Category 3)
- 70889 (change in methodology; placed in Category 2)

EPA Response: EPA agrees that Ecology provided a reasonable rationale for delisting these AUs and has approved their removal from Category 5 to the categories listed above.

Ecology Comment: Ecology provided EPA with additional information for Listing ID 79008 documenting that water quality standards are being attained without considering natural conditions as the reason for attainment and it has been placed in Category 2. Ecology requested that EPA not defer on this assessment determination.

EPA Response: EPA agrees that there are data and information supporting attainment without consideration of natural conditions. Accordingly, EPA approved the state’s assessment of this water and did not include it in the “no action” group.

II. PORT GAMBLE S’KLALLAM TRIBE—NATURAL RESOURCES DEPARTMENT

Port Gamble S’Klallam Tribe Comment: “The Tribe generally supports EPA’s determination and is aware of no information contradicting EPA’s conclusion that the 115 water bodies that the State placed in Category 4 are actually in an EPA-approved Total Maximum Daily Load (“TMDL”) and therefore should be in Category 5.”

EPA Response: Thank you for your interest in the water quality status of Washington’s waters and engagement during the public comment process. EPA appreciates your comments and support of the partial approval/partial disapproval action. Based on the comments received from the Washington Department of Ecology during the public comment period, EPA has revised the June 8, 2022 partial approval/partial disapproval action and identified a total of 114 water quality limited segments/pollutant pairs (WQLS) for inclusion on the Washington 2014-2018 303(d) list of impaired waters. One WQLS was previously unlisted, and EPA has determined that it is not required to be placed in Category 5 (i.e. the 303(d) list) because there is an EPA-approved total maximum daily load (TMDL) in effect.

Port Gamble S’Klallam Tribe Comment: “The Tribe takes this opportunity to emphasize the importance of protecting all waters within its Treaty-protected usual and accustomed fishing area (“U&A”) at levels sufficient to support Treaty-protected resources and the health and safety of its members. It is important that water quality limited segments requiring more than minimum technology-based treatment or controls to meet or maintain water quality segments are identified and included on the 303(d) list, as EPA is requiring here. However, it is also critically important that EPA use the full breadth of its authority to ensure that subsequent measures to address the point and nonpoint sources of pollution that are threatening and impairing these waters are sufficient to improve and then take those water quality limited segments back off of the list. We have seen a proliferation of 303(d) listings over the years, but not enough attention or dedication of funding and resources has been devoted to the development of TMDLs and/or such activities as source tracking, impact confirmation, and imposition of measures to reduce or eliminate pollution from the sources to ensure that water quality improves sufficiently to meet WQS, so that the water bodies can then be removed from the list. In other words, it is not enough merely to list the water body segments as water quality limited (or even to develop a TMDL), but sufficient and expeditious actions, including enforcement actions, must be taken to allow for their removal from the list.”

EPA Response: Thank you for sharing your concerns regarding the water quality status of Washington’s waters, actions being taken to protect or restore those waters, and the importance of the waters on Treaty-protected resources and the health and traditional lifeways of Tribal members. Regional Administrator Casey Sixkiller is in receipt of your letter. He and EPA Region 10 staff look forward to future engagements with the Port Gamble S’Klallam Tribe as we focus agency efforts to improve the water quality of Treaty-protected resources in Washington.