

Review of CNMI's 2014 Section 303(d) Water Body List

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Purpose

The purpose of this review document is to describe the rationale for EPA's approval of the 2014 Commonwealth of the Northern Mariana Islands (CNMI) Section 303(d) water quality limited waters list. 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 the Territory in developing the 303(d) list and the Territory's description of the data and information it considered. EPA's review of CNMI's 303(d) list is based on EPA's analysis of whether the Territory 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 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 Territories 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 Territory or local authority, and (3) other pollution control requirements required by Territory, 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, Territories 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: (1) waters identified as partially meeting or not meeting designated uses, or as threatened, in the Territory's most recent Section 305(b) report; (2) waters for which dilution calculations or predictive modeling indicate nonattainment of applicable standards; (3) waters for which water quality problems have been reported by governmental agencies, members of the

public, or academic institutions; and (4) 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, Territories are required to consider any other data and information that is existing and readily available. EPA's 2006 Guidance describes categories of water quality-related data and information that may be existing and readily available. See Guidance for 2006 Assessment, Listing, and Reporting Requirements Pursuant to Sections 303(d), 305(b) and 314 of the Clean Water Act, EPA Office of Water, 2005, Section V ("EPA's 2006 Guidance"). EPA's 2006 Guidance is supplemented by EPA's informational memorandums from 2008, 2010, 2012, and 2014, which reiterate and clarify previous guidance. While Territories are required to evaluate all existing and readily available water quality-related data and information, Territories may decide to rely or not rely on particular data or information in determining whether to list particular waters.

In addition to requiring Territories 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 Territories to include, as part of their submittals to EPA, 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 Territories establish a priority ranking for listed waters. The regulations at 40 CFR §130.7(b)(4) require Territories to prioritize waters on their Section 303(d) lists for TMDL development, and also to identify those water quality-limited segments (WQLSs) targeted for TMDL development in the next two years. In prioritizing and targeting waters, Territories 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 Territories establish priorities. Territories may consider other factors relevant to prioritizing waters for TMDL development, including immediate programmatic needs, vulnerability of particular waters as aquatic habitat, recreational, economic, and aesthetic importance of particular waters, degree of public interest and support, and Territory or national policies and priorities. See 57 FR 33040, 33045 (July 24, 1992) and EPA's 2006 Guidance with subsequent supplements in 2008, 2010, 2012, and 2014.

Analysis of CNMI's Submittal

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

EPA has reviewed the Territory's submittal and has concluded that the Territory 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 Territory reasonably considered existing and readily available water quality-related data and information and reasonably identified waters required to be listed.

CNMI assembled data and information from the Territory's water quality monitoring program as well as several other water quality assessment reports prepared by other researchers (Integrated 305(b) and 303(d) Water Quality Assessment Report, pp. 10-16). The Territory considered each of the data and information sources identified in 40 CFR §130.7(b)(5). The Territory applied a straightforward set of listing criteria that closely follow EPA's 1997 and 2002 assessment methods recommendations (Integrated 305(b) and 303(d) Water Quality Assessment Report, pp. 16-21). EPA concludes the Territory followed EPA's 2006 Integrated Report guidance, and subsequent supplements, 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). EPA also finds 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.

The Territory 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. *See Pronsolino et al. v. Marcus et al.*, 91 F.Supp.2d 1337, 1347 (N.D.Ca. 2000), *Pronsolino v. Nastri*, 291 F.3d 1123 (9th Cir 2006). *See also* EPA's 2006 Guidance and National Clarifying Guidance for 1998 Section 303(d) Lists, Aug. 27, 1997.

Priority Ranking and Targeting

EPA also reviewed the Territory's priority ranking of listed waters for TMDL development, and concludes that the Territory properly took into account the severity of pollution and the uses to be made of such waters, as well as other relevant factors. In addition, EPA reviewed the Territory's identification of high priority WQLSs targeted for TMDL development, and concludes that the targeted water segments are appropriate for TMDL development in the near future (Integrated 305(b) and 303(d) Water Quality Assessment Report, Appendix III, Tables I-1, I-2, and I-3). Eight waterbodies are targeted as high priority for TMDL development.

Good Cause for Delisting

No waterbody segments from the 2012 303(d) list were removed for the 2014 303(d) list. Although three coastal waters previously listed as impaired for recreational use are now meeting microbiological criteria, another impairment within each watershed prevents these waterbodies from being delisted. Coastal waterbody segments 4, 18A, and 20A now protect the recreational

use, but these waterbodies are still impaired for aquatic life. Consequently, these three waterbodies are still listed as impaired despite the improved protection of recreational uses.

Administrative Record Supporting This Action

In support of this decision to approve the Territory's listing decisions, EPA carefully reviewed the materials submitted by the Territory with its 303(d) listing decision. The administrative record supporting EPA's decision is comprised of the integrated assessment report and supporting documentation submitted by the Territory, associated federal regulations, EPA guidance concerning preparation of Section 303(d) lists, and the decision letter and supporting staff report. EPA determined that the materials provided by the Territory with its submittal provided sufficient documentation to support our analysis and findings that the Territory listing decisions meet the requirements of the Clean Water Act and associated federal regulations. We are aware that the Territory 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 submittal. It was unnecessary for EPA to consider all of the materials considered by the Territory in order to determine that, based on the materials submitted to EPA by the Territory, the Territory complied with the applicable federal listing requirements. Moreover, federal regulations do not require the Territory to submit all data and information considered as part of the listing submittal.

References

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

Submittal letter for 2014 CNMI integrated water quality assessment report containing the CWA section 303(d) list of water quality-limited water bodies, from Frank Rabauliman to Janet Hashimoto, August 4, 2014.

Email from Clarissa Bearden to Sara Roser, September 9, 2014.

December 28, 1978 Federal Register Notice, *Total Maximum Daily Loads Under Clean Water Act*, finalizing 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.

40 CFR Part 130 Water Quality Planning and Management.

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.

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

Guidance for 2004 Assessment, Listing and Reporting Requirements Pursuant to Sections 303(d) and 305(b) of the Clean Water Act, Diane Regas, EPA Office of Wetlands, Oceans, and Watersheds, July 21, 2003.

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

Information Concerning 2008 Clean Water Act Sections 303(d), 305(b), and 314 Integrated Reporting and Listing Decisions, Diane Regas, EPA Office of Wetlands, Oceans, and Watersheds, October 12, 2006.

Information Concerning 2010 Clean Water Act Sections 303(d), 305(b), and 314 Integrated Reporting and Listing Decisions, Suzanne Schwartz, Office of Wetlands, Oceans, and Watersheds, May 5, 2009.

Information Concerning 2012 Clean Water Act Sections 303(d), 305(b), and 314 Integrated Reporting and Listing Decisions, Denise Keehner, Office of Wetlands, Oceans, and Watersheds, March 21, 2011.

Information Concerning 2014 Clean Water Act Sections 303(d), 305(b), and 314 Integrated Reporting and Listing Decisions, Denise Keehner, Office of Wetlands, Oceans, and Watersheds, September 3, 2013.