

# DECISION DOCUMENT FOR THE APPROVAL OF WISCONSIN'S 2020 LIST WITH RESPECT TO SECTION 303(d) OF THE CLEAN WATER ACT

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The U.S. Environmental Protection Agency (EPA) has conducted a complete review of Wisconsin's 2020 Clean Water Act (CWA) Section 303(d) list and supporting documentation and information. Based upon this review, EPA has determined that Wisconsin's list of water quality limited segments (WQLSs) still requiring Total Maximum Daily Loads (TMDLs) meets the requirements of Section 303(d) of the Act and EPA's implementing regulations at 40 C.F.R. § 130.7. Therefore, EPA hereby approves Wisconsin's 2020 Section 303(d) list.

EPA concludes that Wisconsin properly assembled and evaluated existing and readily available data and information, including data and information relating to categories of waters specified at 40 C.F.R. § 130.7(b)(5). EPA concludes that the State submitted a methodology that outlines how it uses readily available data and information to make assessment and impairment decisions. EPA also concludes that Wisconsin provided a rationale for not relying on particular existing and readily available water quality related data and information as a basis for listing waters on the 303(d) list, and that Wisconsin demonstrated good cause for not listing certain WQLSs on its 2018 303(d) list.

EPA's approval of Wisconsin's 2020 303(d) list extends to water bodies identified in Table 1 in the Appendix to this Decision Document, with the exception of those waters that are within Indian Country as defined in 18 U.S.C. § 1151. EPA is taking no action to approve or disapprove the State's list with respect to those waters that are within Indian Country. EPA, or eligible Indian Tribes, as appropriate, will retain responsibilities under Section 303(d) for those waters.

The statutory and regulatory requirements, and EPA's review of Wisconsin's compliance with each requirement, are described below.

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## **I. Statutory and Regulatory Background**

### **A. Identification of Water Quality-Limited Segments (WQLS) for Inclusion on CWA Section 303(d) List**

Section 303(d)(1) of the Act directs states to identify those waters within their 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,<sup>1</sup> 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 state or local authority, and (3) other pollution control requirements required by state, local, or federal authority.<sup>2</sup>

### **B. 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 data and information about the following categories of waters: (1) waters identified as partially meeting or not meeting designated uses, or identified as threatened in the state'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.<sup>3</sup> In addition to these minimum categories, states are required to consider any other existing and readily available data and information. 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.<sup>4</sup> While states are required to evaluate all such water quality-related data and information, states may decide to rely or not rely on particular data or information in determining whether to list particular waters.

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<sup>1</sup> 40 C.F.R. § 130.7(b)(1)(iii).

<sup>2</sup> 40 C.F.R. § 130.7(b)(1).

<sup>3</sup> 40 C.F.R. § 130.7(b)(5).

<sup>4</sup> EPA, *Guidance for Water Quality-Based Decisions: The TMDL Process* (1991) at Appendix C (hereafter, "EPA 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 C.F.R. § 130.7(b)(6) require states to include, as part of their submissions 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.<sup>5</sup>

### **C. 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 C.F.R. § 130.7(b)(4) require states to prioritize waters on their Section 303(d) lists for TMDL development, and to identify those WQLSs targeted for TMDL development in the next two years.<sup>6</sup> In prioritizing and targeting waters, states must, at a minimum, take into account the severity of the pollution and the uses of such waters.<sup>7</sup> 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.<sup>8</sup>

## **II. EPA Analysis of Wisconsin's 2020 List**

### **A. Wisconsin's 2020 303(d) List Submittal**

#### **1. Timeline of List Submittal**

The 2020 303(d) list “submittal” is comprised of the State’s submittal in the Assessment, Total Maximum Daily Load Tracking and Implementation System (ATTAINS) database on September 14, 2020. All of this information is summarized below and was compiled in EPA’s administrative record for this decision:

- Wisconsin 2020 Water Quality Report to Congress;
- Wisconsin 2020 Clean Water Act Report to Congress Executive Summary;
- Final draft 2020 impaired waters list;
- Wisconsin Department of Natural Resources (WDNR) Response to Public Comments on 2020 Draft impaired waters list;
- 2020 Wisconsin Consolidate Assessment and Listing Methodology (WisCALM);
- 2020 Water Quality Assessments Spread sheet pulled from ATTAINS on October 2, 2020;

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<sup>5</sup> 40 C.F.R. § 130.7(b)(6).

<sup>6</sup> 40 C.F.R. § 130.7(b)(4).

<sup>7</sup> CWA Section 303(d)(1)(A).

<sup>8</sup> 57 *Fed. Reg.* 33040, 33045 (July 24, 1992); *see also* EPA's 1991 Guidance.

- Public Comments on WDNR Draft Impaired Waters 2020.

## 2. Integrating the CWA 305(b) report and CWA 303(d) list

EPA encourages states to submit Integrated Reports to fulfill CWA §§ 305(b) and 303(d) requirements. Wisconsin's CWA 305(b) assessment and 303(d) list categories are set out in Table 1, below. The 2020 impaired waters submittal to EPA included waters in Category 4 and Category 5, and subcategories 5A, 5B, 5C, 5P and 5W. Wisconsin submitted data and information required under §305(b) of the CWA directly to EPA through the Water Quality Exchange network.<sup>9</sup>

**Table 1.** Integrated report categories in the 2020 WisCALM<sup>10</sup>

IR Category	Description
<b>Categories 1 and 2: Healthy Waters.</b>	
Category 1	Attains all uses
Category 2	Attains at least one use; no use impaired
<b>Category 3</b>	
Category 3	Insufficient information for an attainment decision
<b>Category 4: Restoration Waters.</b>	
Category 4A	A State-developed TMDL has been approved by EPA or a TMDL has been established by EPA for any segment-pollutant combination.
Category 4B	Other control measures are expected to result in the attainment of an applicable water quality standards in a reasonable period of time.
Category 4C	The non-attainment of any applicable water quality standard for the segment is the result of pollution and is not caused by a pollutant.
<b>Category 5: Impaired Waters.</b>	
Category 5A	Available information indicates that at least one designated use is not met or is threatened, and/or the anti-degradation policy is not supported, and one or more TMDLs are still needed. This is the default category for impaired waters.
Category 5B	Available information indicates that atmospheric deposition of mercury has caused the impairment and no other sources have been identified.
Category 5C	Available information indicates that non-attainment of water quality standards may be caused by naturally occurring or irreversible human induced conditions.
Category 5P	Available information indicates that the applicable total phosphorus criteria are exceeded; however, biological impairment has not been demonstrated (either because bioassessment shows no impairment or because data are not available).
Category 5W	Pollutant/impairment a low priority for a TMDL because the impaired water is included in a watershed area addressed by at least one of the following WDNR-approved watershed plans: adaptive management plan, adaptive management pilot project, lake management plan, or Clean Water Act Section 319-funded watershed plan (i.e., nine key elements plan).

<sup>9</sup> The Water Quality Exchange (WQX) is a framework that makes it easier for states, tribes, and others to submit and share water quality monitoring data over the Internet. For more information, see <https://www.epa.gov/waterdata/water-quality-data-wqx> (last accessed September 30, 2020).

<sup>10</sup> 2020 WisCALM at 19-20.

## **B. Review of Wisconsin's Consideration of Existing and Readily Available Water Quality-Related Data and Information**

EPA's regulations at 40 C.F.R. § 130.7(b)(5) require that states assemble and evaluate existing and readily available data and information to develop their lists of impaired waters. EPA reviewed WDNR's description of the data and information, its effort to gather available data, and other relevant information. EPA concludes that the WDNR 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 C.F.R. §§130.7(b)(5)(i) – (iv). EPA's review of Wisconsin's consideration of data for these categories of waters is summarized below.

The 2020 submittal identifies five categories of impaired waterbodies that need TMDLs: water bodies that are not meeting water quality standards (Category 5A), water bodies that are impaired due to atmospheric mercury deposition (Category 5B), water bodies that are impaired due to naturally occurring causes or irreversible human induced conditions (Category 5C), water bodies that exceed total phosphorus (TP) criteria, but for which available biological data, such as chlorophyll-*a* or biotic indicators, either do not exist or do not exceed *poor* indicator thresholds (Category 5P), and waters for which Adaptive Management plans (as described in Wis. Admin. Code NR § 217) or alternative watershed management plans are in place to address the impairments (Category 5W).

EPA's long-standing interpretation is that CWA § 303(d) applies to waters impacted by point and nonpoint sources.<sup>11</sup> Section 303(d) lists are to include all WQLSs still needing TMDLs, regardless of whether the sources of the impairment are point sources, nonpoint sources or a combination of the two. EPA reviewed the State's list and determined that Wisconsin properly listed waters with point and nonpoint sources causing or expected to cause impairment.

Based on its review of existing and readily available data and information, and the assessments made for the 2020 303(d) list, the State has added approximately 167 pollutant/impairments to Category 5 and its subcategories, and delisted approximately 367 waterbody impairments,<sup>12</sup> bringing the total number of pollutant/impairments on the 303(d) list to approximately 1657.

After full review and consideration of the information presented by Wisconsin in its 2020 submittal, EPA is approving all the waters identified in Table 1 of the Appendix to this Decision Document as impaired waters in Wisconsin needing TMDLs except those waters that are in Indian Country. These waterbody pollutant combinations are also recorded in the ATTAINS data

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<sup>11</sup> In *Pronsolino v. Nastri*, the Ninth Circuit Court of Appeals held that Section 303(d) of the CWA authorizes EPA to identify and establish TMDLs for waters impaired by nonpoint sources, 291 F.3d 1123 (9th Cir. 2002). *See also* EPA 1991 Guidance, EPA, *National Clarifying Guidance for 1998 State and Territory Clean Water Act 303(d) Listing Decisions* (August 17, 1997).

<sup>12</sup> Some of the delistings are a change in the impairment, which also effects the number of new listings. EPA tracks these changes as delistings and new listings.

base and will be available to view by the public in EPA's *How's My Waterway* program. See <https://www.epa.gov/waterdata/how-s-my-waterway> (last checked September 30, 2020).

### **C. Review of Wisconsin's rationale to list or not list WQLSs on the 303(d) List**

EPA's regulations at 40 C.F.R. § 130.7(b)(6) require that states provide documentation to support their decisions to list or not list waters including: a description of the methodology used to develop the list (40 C.F.R. § 130.7(b)(6)(i)), a description of data and information used to determine whether to include a WQLS on the 303(d) list (40 C.F.R. § 130.7(b)(6)(ii)), a rationale for a decision to not use any data (40 C.F.R. § 130.7(b)(6)(iii)), and a demonstration of good cause for not including a water on the list (40 C.F.R. § 130.7(b)(6)(iv)).

#### **1. Methodology used to assess waters and develop the list**

While WisCALM is not part of the State's approved water quality standards, integrated reporting guidance provides that EPA should consider the methodologies that are not part of state approved standards to determine whether:

[T]he state conducted an adequate review of all existing and readily available water quality-related information, whether the factors that were used to make listing and removal decisions were reasonable, whether the process for evaluating different kinds of water-quality related data and information is sufficient, and whether the process for resolving jurisdictional disagreements is sufficient. If EPA finds that the state's methodology is inconsistent with its water quality standards, and its application has resulted in an improper section 303(d) list, EPA may disapprove the list ....<sup>13</sup>

##### *a. Summary of WisCALM*

The WisCALM describes a stratified approach to monitoring that WDNR uses to gather information for CWA 305(b) and 303(d) purposes, as well as for other state programs. The WisCALM also contains indicators to assess general waterbody condition and thresholds to assess attainment of designated uses. These indicators include physical, chemical, and biological parameters.

Waters are monitored by WDNR and others to collect water quality data to determine current conditions. Water quality monitoring results and assessment data are stored in state and federal databases and the majority of data are available online to agencies and the public. *General assessments* are known as "305(b) assessments." WDNR biologists review available data and place each waterbody segment into one of three categories: attaining, not attaining, or

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<sup>13</sup> EPA, *Guidance for 2006 Assessment, Listing and Reporting Requirements Pursuant to Section 303(d) and 305(b) of the CWA* at 29-30 (hereafter 2006 IR Guidance).

insufficient information. For biological data, waters are placed in one of four categories: excellent, good, fair and poor, as defined in section 3.1 of the 2020 WisCalm.<sup>14</sup>

The WDNR conducts further assessments to determine if a waterbody is “impaired” or not meeting WQS. Waters that do not meet WQS are placed on Wisconsin’s CWA 303(d) Impaired Waters List.

Under WDNR’s current strategy, the State collects baseline information to establish trends and identify problems. The State uses surveys of streams, aquatic invasive species (AIS), and National Aquatic Resource Surveys (NARS) (for coastal conditions and wetlands)). The State also collects reference site information on wadeable streams, macrophytes, and large river macroinvertebrates. WDNR uses this information to understand general water quality conditions and conducts focused monitoring to develop more specific information regarding particular watersheds.<sup>15</sup>

The State uses four levels of biological conditions to represent water’s placement in the overall water quality continuum:

- Excellent - Waters are considered to be fully supporting their assessed designated uses.
- Good or Fair - Waters are considered to be supporting their assessed designated uses.
- Poor - Waters may not support assessed designated use(s) but have insufficient information for a decision at the impairment assessment level.<sup>16</sup>

The State considers a water to be impaired if available data, which meet minimum requirements (data quality and data quantity), indicate that a designated use and/or a numeric or narrative water quality criterion is not met.

WDNR staff use best professional judgment to assess whether data are relevant and appropriate for use in impairment decisions. The State considers the following factors: data quality, frequency and magnitude of exceedances, weather and flow conditions during sample collection, and anthropogenic or natural influences on water quality in the watershed. WDNR provides a rationale if professional judgment results in not relying on some available data in the final impairment decision.

Wisconsin’s water quality standards include designated uses, numeric/narrative criteria, and antidegradation provisions. *See* Wis. Admin. Code NR §§ 102, 103, 104, 105, 207, and 217.

*i. Designated Uses*

Designated uses in Wisconsin include aquatic life (AL), recreation, public health and welfare, and wildlife. The State subcategorizes AL uses: coldwater community, warmwater sport fish

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<sup>14</sup> 2020 WisCALM at 15.

<sup>15</sup> 2020 WisCALM at 1.

<sup>16</sup> 2020 WisCALM at 17.



community, warmwater forage fish community, limited forage fish community, and limited aquatic life community. Designated uses, including the subcategories for AL, are codified in Wis. Admin. Code NR §§ 102 and 104. Waters that are not referenced in code are considered AL waters by default and are assumed to support either a coldwater community or warmwater community depending on water temperature and habitat. In some cases, coldwater fish communities referenced in Wisconsin's *1980 Trout Book*<sup>17</sup> may be codified by reference.

The designated uses are considered in listing decisions by comparing water quality data to narrative or numeric nutrient criteria that are set to protect a designated use. If data for a particular water meet minimum data requirements and quality considerations, and exceed the appropriate water quality criteria, then Wisconsin may add the water to the 303(d) list.

*ii. Numeric and Narrative Criteria*

Narrative criteria describe qualitative conditions to be met in a given waterbody. Wisconsin's narrative criteria are found in Wis. Admin. Code NR § 102.04(1).

Wis. Admin. Code NR § 102 includes numeric surface water quality criteria for conventional parameters such as pathogens, nutrients, and temperature to protect its Fish Aquatic Life and recreation designated uses. The regulations at Wis. Admin. Code NR § 105 include surface water quality criteria for toxic substances (for example, metals and organics) to protect public health and welfare uses, the present and prospective use of all surface waters for public and private water supplies and the propagation of fish and aquatic life and wildlife.

*iii. Antidegradation*

Wisconsin's antidegradation policy provides:

No waters of the state shall be lowered in quality unless it has been affirmatively demonstrated to the Department that such a change is justified as a result of necessary economic and social development, provided that no new or increased effluent interferes with or becomes injurious to any assigned uses made of or presently possible in such waters.<sup>18</sup>

In compiling information for its impaired waters lists, WDNR identifies waters that may be subject to antidegradation.

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<sup>17</sup> WDNR, Wisconsin Trout Streams, Publication 6-3600(80) (1980), updated 2002: <https://dnr.wi.gov/topic/fishing/documents/trout/wisconsintroutstreams.pdf> (last checked 9/30/20).

<sup>18</sup> Wis. Admin. Code § NR 102.05(1).

*b. EPA's review of WisCALM*

EPA reviewed and provided comments on the draft WisCALM, which Wisconsin placed on public notice on January 22, 2019.<sup>19</sup> In its review of the draft WisCALM, EPA expressed concerns about WDNR's threshold levels for assessments.<sup>20</sup> EPA has worked and continues to work with WDNR to resolve these concerns.

## **2. Data and information used to develop the list**

In developing its list, WDNR uses its own monitoring data and information, as well as data submitted by the public, other agencies, and universities. Available water quality information used in making assessments are summarized in impaired waters reports. These reports are available online.<sup>21</sup>

*a. WDNR monitoring data*

WDNR created and manages two databases that support the State's listing process:

The Surface Water Integrated Monitoring System (SWIMS) database contains chemical (water, sediment), physical (flow), and biological (macroinvertebrate, aquatic invasive) data collected for CWA programs. Data in SWIMS are shared through the federal [Water Quality Exchange Network \(WQX\)](#), which is an online federal repository for all states' water monitoring data.<sup>22</sup>

Since 2004, WDNR has also used its "Water Assessment, Tracking and Electronic Reporting System (WATERS)" database, which contains:

- Program Objectives, Goals, Performance Measures, and Success Stories;
- CWA Use Designations and Classifications;
- Outstanding and Exceptional Resource Waters Designations;
- CWA assessment data, including decisions about whether a waterbody is meeting its designated use or is considered "impaired";
- Impaired waters tracking information, including the methodology used for listing, the status of the TMDL development, and restoration implementation work;
- Fisheries Trout Classifications; and
- Watershed planning recommendations, decisions, and related documents.<sup>23</sup>

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<sup>19</sup> See e-mail message from Donna Keclik, EPA, to Ashley Bernek, WDNR, May 20, 2019, transmitting comments on the draft WisCALM.

<sup>20</sup> See EPA Comments for the 2016 WisCALM, at VI.1 at 5, February 17, 2015. See also EPA Comments for the 2020 WisCALM at 1, comment 3, May 20, 2019.

<sup>21</sup> WDNR Impaired Water Search website, <https://dnr.wi.gov/water/impairedSearch.aspx>, last accessed October 1, 2020.

<sup>22</sup> 2020 WisCALM, April 2019 at 13.

<sup>23</sup> *Id.*

WDNR uses data from both systems in its listing process.

*b. Public data*

WDNR held a data solicitation period from January 22, 2019 to March 1, 2019, to gather data from the public, academic institutions, and other relevant agencies. The WDNR requires that data used in assessment and list decisions meet quality control requirements that are specified in WisCALM and specified on WDNR's website during the data solicitation period.<sup>24</sup> If WDNR deems that impairment is likely but the quality assurance/control procedures used for data collection were not adequate, staff will consider collecting additional data to determine whether to list the waterbody in the future.

The WDNR received data submittals from four entities during the data solicitation period:

- Courte Oreille Lake Association (COLA),
- Friends of the La Crosse Marsh,
- Kewaunee CARES,
- Taylor County Land Conservation Department (LCD).

The WDNR indicated that it reviewed all the data submitted and used the data submitted by Kewaunee CARES, Friends of the La Crosse Marsh, and Taylor County LCD in its 2020 list development.<sup>25</sup>

EPA reviewed the information described above that was submitted by the state and concluded that WDNR considered all readily available information for use in 305(b) assessments and 303(d) list decisions. Information included: (1) the public comments received and responses to comments, and (2) a description of the data submitted by the public. Data submitted by COLA was not inconsistent with data WDNR had already considered and showed that Total Phosphorus (TP) had dropped below current listing criteria for the Bay.<sup>26</sup> EPA further concludes that Wisconsin considered and provided a rationale for not relying on particular existing and readily available water quality related data and information as a basis for listing waters as raised in certain comments. EPA concludes that WDNR's data solicitation and work with specific agencies to gather information is consistent with what EPA considers active solicitation in its integrated reporting guidance.<sup>27</sup>

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<sup>24</sup> 2020 WisCALM at 14-16.

<sup>25</sup> Wisconsin Water Quality Report to Congress 2020 at 3-5. Donna Keclik, Conference call notes with Ashley Beranek, WDNR, May 21, 2020.

<sup>26</sup> Donna Keclik, Conference call notes with Ashley Beranek, WDMR, May 21, 2020

<sup>27</sup> EPA 2006 IR guidance at 31.

### **3. Demonstration of good cause for not including WQLSs or pollutants on the list**

A state may remove a waterbody from the 303(d) list for good cause. Good cause includes, but is not limited to, the availability of more recent or accurate data, or more sophisticated water quality monitoring, flaws in the original analysis, or changes in conditions (40 C.F.R. § 130.7(b)(6)(iv)). EPA's *Guidance for 2006 Assessment, Listing and Reporting Requirements Pursuant to Sections 303(d), 305(b) and 314 of the CWA*, elaborates on what constitutes good cause for delisting.<sup>28</sup> Additionally, according to EPA guidance, once a pollutant/impairment combination for a water has an approved TMDL, that pollutant/impairment combination can be placed in Category 4A. Category 4A includes waters that are still impaired but have an approved TMDL addressing the pollutant causing the impairment in question.

EPA has reviewed the information provided by WDNR in its 2020 submittal and agrees that the impairments that were proposed to be delisted were appropriately delisted from Wisconsin's 2018 303(d) list and not included on the Wisconsin's 2020 list. Wisconsin proposed to remove waters where additional data and/or information supported that:

- a water now meets water quality standards;
- the historical reasons for listing were inaccurate;
- a TMDL has been approved by EPA that addresses the listed cause of impairment(s) (Category 4A);
- a waterbody has an alternative restoration plan accepted by EPA (Category 4B).<sup>29</sup>

#### ***D. Review of Wisconsin's Priority Ranking***

Once readily available data have been gathered and assessed, the WQLSs that are included on the 303(d) list must be assigned a priority ranking for TMDL development. The State makes its TMDL prioritization decisions based on *Wisconsin's Water Quality Restoration and Protection Prioritization Framework* document.<sup>30</sup> Wisconsin's prioritization for TMDLs currently focuses on two pollutants, total phosphorus (TP) and total suspended solids (TSS) the state indicated that these are two of the most commonly identified pollutants on the Wisconsin's impaired waters list.

WDNR used the ranking levels of high, medium and low as identified in the ATTAINS database.

For TMDLs currently in development, the State assigns a high priority. Medium priority is given to waters with TP or TSS listings that are in geographic areas identified as

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<sup>28</sup> EPA 2006 IR guidance at 58-59.

<sup>29</sup> 2020 WisCALM at 70.

<sup>30</sup> See Wisconsin's *Water Quality Restoration and Protection Prioritization Framework* <https://dnr.wi.gov/water/egadSearch.aspx>, found under document search (last accessed September 30, 2020).

vulnerable based on the Healthy Waters Assessment (HWA).<sup>31</sup> These areas have poor predicted ecological health or high phosphorus yields and instream concentrations. Additional waters labeled medium priority are those in the top phosphorus priority areas identified in the State's Nutrient Reduction Strategy.<sup>32</sup>

The WDNR assigns a low ranking to those TMDLs where impairment is the result of other factors than TP or TSS, but some listings for TP in category 5P may be included in this ranking if the water is outside the areas identified in the HWA or Nutrient Strategy.<sup>33</sup>

Wisconsin submitted its Prioritization Framework with its 2016 303(d) list submittal.<sup>34</sup> The State's Prioritization Framework identifies watersheds where TMDLs will be developed through 2022. Wisconsin is currently ahead of schedule on their TMDL development in the prioritization frame. EPA agrees that, as to the WQLSs included on the 2020 Section 303(d) list, WDNR has satisfied the requirement to submit a priority ranking consistent with EPA's regulations.

## **E. Public Participation**

EPA regulations require states to involve the public and other stakeholders in the development of the 303(d) list as part of the states' Continuing Planning Process (CPP).<sup>35</sup> WDNR provided notice to the public on its initial draft 2018 303(d) list from November 15, 2017 to December 29, 2017, and received comments from a total of 153 individuals and organizations, including EPA. Wisconsin provided to EPA a copy of comments received and a summary of Wisconsin's responses through the ATTAINS data base, and also posted a copy on the State's website.<sup>36</sup>

The WDNR received comments both for and against delisting Musky Bay (WBIC 2390800).

The State received comments that the close connection between Musky Bay and LOC further justified continued listing of the Bay, even if the original listing parameters in the Bay had been met. The WDNR listed Musky Bay in 2014. The State considered the comments submitted by the commenters and explained how the parameters originally used for listing the Bay had been met. The WDNR explained that delisting was appropriate because "Musky Bay is now attaining not only phosphorus and aquatic plant thresholds, for which it was previously listed as impaired,

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<sup>31</sup> See Wisconsin Healthy Waters Assessment, <https://dnr.wisconsin.gov/topic/Watersheds/HWA.html> (last accessed September 30, 2020).

<sup>32</sup> Wisconsin Nutrient Reduction Strategy, *see* <https://dnr.wisconsin.gov/topic/SurfaceWater/NutrientStrategy.html#:~:text=Wisconsin's%20Nutrient%20Reduction%20Strategy%20was,the%20biological%20%22dead%20zone%22%20in> (last checked September 30, 2020).

Medium priority is associated with Level 2 Priority in the State's framework document.

<sup>33</sup> 2020 WisCALM at 73-74.

<sup>34</sup> *Wisconsin's Water Quality Restoration and Protection Prioritization Framework*, *see* <https://dnr.wi.gov/water/wsSWIMSDocument.ashx?documentSeqNo=113522370>. (last checked October 2, 2020)

<sup>35</sup> 40 C.F.R. § 130.7(a).

<sup>36</sup> WDNR, Surface Water Quality Assessment Process, <https://dnr.wi.gov/topic/surfacewater/assessments.html> (last checked September 30, 2020).

but also chlorophyll *a*.”<sup>37</sup> While commenters suggested that WQS for the Bay should be revised to be more stringent, the State explained that its assessment was made against the currently federally approved water quality criteria. *See* 40 C.F.R. § 130.7(b)(3).

EPA reviewed the comments received by the State, together with WDNR’s responses, and concludes that WDNR considered and responded to public comments on its 2020 list.

### ***F. Waters with no known pollutant causing the impairment***

Under Section 303(d) of the CWA, states are required to develop TMDLs for pollutants causing impairments of listed waters. Since the Section 303(d) list is a list of waters “still requiring TMDLs,” states are not required to include waters where they determine that no pollutant is causing the impairment. However, the State does list for waters where the pollutant may be unknown. One such example is the listing for Musky Bay where the State currently has not identified a pollutant parameter that is causing the waterbody’s periodic low dissolved oxygen levels.

### ***G. EPA Tribal Consultation***

Under its tribal consultation process, EPA consults with federally-recognized tribes on a government-to-government basis where EPA decisions may impact tribal interests. EPA contacted federally recognized tribes within Region 5 to provide the opportunity to consult with EPA on its decision on the final Wisconsin 2020 303(d) list. EPA sent invitations to tribal leaders via email and relevant staff on September 15.<sup>38</sup> The invitation letter was also placed in the Tribal Consultation Tracking System. EPA received five responses but no requests for consultation. One tribe requested a copy of the public notice list from Wisconsin. EPA provided the list and the State’s methodology by email on September 21, 2020.<sup>39</sup> A second tribe requested a map of the waters that WDNR added within the Lake Michigan watershed. EPA provided a table of newly listed waters and impairments along with a link to the State’s impaired waters search tool at <https://dnr.wi.gov/water/impaired Search.aspx>. The tribe also requested a meeting to discuss questions on process and water listing in Lake Michigan watershed. The conference call was held on September 30, 2020. The third tribe contacted EPA after the close of consultation. The tribe communicated concerns involving two waterbodies not on the State’s 2020 list. Although the tribe did not provide its concerns to WDNR during the State’s development of the List, tribal representatives expressed their aim to engage in further discussions with WDNR during the development of the State’s 2022 list.<sup>40</sup> EPA also received

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<sup>37</sup> WDNR Response to Comments 2020 at 11-12.

<sup>38</sup> Letter from Tera L Fong, EPA, to Tribal chairpersons of the 37 tribes in Region 5, September 14, 2020.

<sup>39</sup> See email chain between Ryan Siggelkow, Forest County Potawatomi Community and Donna Keclik, EPA September 21, 2020.

<sup>40</sup> See email chain between Melis Arik, Bad River Band of Lake Superior Chippewa and Donna Keclik, EPA October 2, 2020 and Phone conversation record October 1, 2020.

inquiries from two tribes requesting clarification whether certain waters on the State's list were located in Indian country. EPA responded to both indicating that EPA does not approve waters on the list that are in Indian Country. These waters are not on the approved portion of the list.<sup>41</sup>

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<sup>41</sup> See email chain between James L. Snitgen, Oneida Tribe, and Donna Keelik, EPA, October 5, 2020; and email chain between Donna Keelik, EPA, and Linda Nguyen. Red Cliff Band of Lake Superior Chippewa, EPA, October 7, 2020.