

Responsiveness Summary Concerning EPA's Decisions to Add Waters to Louisiana's 2012 Clean Water Act Section 303(d) List

Administrative Records Cited

1. Federal Register, Thursday May 9, 2013 at Volume 78, Number 90
<https://www.federalregister.gov/articles/2013/05/09/2013-11109/clean-water-act-availability-of-list-decisions>
2. The Advocate, published in Baton Rouge, Louisiana. May 10, 2013
3. EPA Decision Document for Louisiana's 2008 § 303(d) list.
<http://www.epa.gov/region6/water/npdes/tmdl/index.htm#303dlists>
4. EPA Decision Document for Louisiana's 2010 § 303(d) list.
<http://www.epa.gov/region6/water/npdes/tmdl/index.htm#303dlists>
5. EPA Decision Document for Louisiana's 2012 § 303(d) list.
<http://www.epa.gov/region6/water/npdes/tmdl/index.htm#303dlists>
6. US EPA, 2002 Integrated Water Quality Monitoring and Assessment Report Guidance. November 19, 2001.
<http://water.epa.gov/lawsregs/lawsguidance/cwa/tmdl/2001wqma.cfm>
7. US EPA, Guidance for 2006 Assessment, Listing and Report Requirements Pursuant to Section 303(d), 305(b) and 314 of the Clean Water Act. July 29, 2005.
<http://water.epa.gov/lawsregs/lawsguidance/cwa/tmdl/upload/2006irg-report.pdf>
8. Public Comments. Lisa W. Jordan, Counsel for Gulf Restoration Network and Louisiana Environmental Action Network, Tulane Environmental Law Clinic, 6329 Freret Street, New Orleans, LA 70118
9. Exhibits 1 through 5, documentation submitted by Tulane Environmental Law Clinic in support of submitted comments
10. 2012 State of Louisiana Clean Water Act § 303(d)/§ 305(b) Integrated Report.
<http://www.deq.louisiana.gov/portal/DIVISIONS/WaterPermits/WaterQualityStandardsAssessment/WaterQualityInventorySection305b/2012IntegratedReport.aspx>
11. Louisiana Water Quality Management Plan. Volume 1: The Continuing Planning Process
<http://www.deq.louisiana.gov/portal/Portals/0/planning/WQMP%20CPP%202004%20Volume%201%20document.pdf>
12. Louisiana Universities Marine Consortium (LUMCON), Southeast Area Monitoring and Assessment Program (SEAMAP), Louisiana Department of Wildlife and Fisheries (LDWF), EPA Gulf Breeze Laboratory, dissolved oxygen data
13. Louisiana Administrative Code Title 33 Part IX. Subpart 1, Chapter 11. Louisiana Surface Water Quality Standards

Public Participation Activity Conducted

On Thursday, May 9, 2013, EPA Region 6 published a notice in the Federal Register at Volume 78 Number 90, pages 27233-27234 and The Advocate, published in Baton Rouge, Louisiana on May 10, 2013. See Administrative Record Nos. 1 and 2. These public notices requested comments from the public on EPA's proposed (1) disapproval of Louisiana's decisions not to list three coastal segments; and (2) decision to add these coastal segments to Louisiana's 2012 Section § 303(d) list.

Summary of Actions

EPA received a public response from a single party regarding its proposed action to add three coastal segments to the 2012 Louisiana § 303(d) list. The public response consisted of three comments regarding the proposed action and one comment outside of the scope of the request for public comments. See Administrative Record Nos. 1 and 8. This response to comments addresses only those comments regarding EPA’s proposed action to add three coastal waters west of the Mississippi River mouth to the 2012 Louisiana § 303(d) list.

EPA has reviewed the public response regarding the addition of the three coastal segments and finds no new information presented or persuasive argument as to why these segments should not be added as part of the 2012 Louisiana § 303(d) list. Therefore, EPA is taking Final Action on the addition of coastal segments 120806, 070601, and 021102 to the Louisiana 2012 § 303(d) list.

Summary of Public Comments

The following respondent provided four written comments during the advertised public comment period.

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List of Abbreviations

CFR – Code of Federal Regulation
CPP – Continuing Planning Process
CWA – Clean Water Act
GRN – Gulf Restoration Network
LDEQ – Louisiana Department of Environmental Quality
LDWF – Louisiana Department of Wildlife and Fisheries
LEAN – Louisiana Environmental Action Network
LUMCON – Louisiana Universities Marine Consortium
SEAMAP – Southeast Area Monitoring and Assessment Program

1) EPA’s Decision to List Subsegments 120806, 070601 and 021102 of Louisiana’s Coastal Waters as Impaired for Dissolved Oxygen is Correct.

Public Comment

Lisa W. Jordan, Counsel for GRN and LEAN, Tulane Environmental Law Clinic, 6329 Freret Street, New Orleans, LA 70118. See Administrative Record No. 8

As is well known, and as was a central topic of GRN’s comments on Louisiana’s 2008, 2010, and 2012 Integrated Reports, a hypoxic zone (“Dead Zone”) forms in the nearshore and

other waters of the Gulf of Mexico each summer. Hypoxia occurs when DO levels reach 2mg/L or below. Therefore, the Dead Zone, as well as surrounding waters, has shown DO levels that have fallen well below the 5 mg/L as required by Louisiana regulations (La. Admin. Code tit. 33, pt. IX, §1113.C.3.c). Scientists such as Dr. Nancy Rabalais, Executive Director of the Louisiana Universities Marine Consortium (LUMCON), as well as Louisiana state agencies such as the Department of Wildlife and Fisheries, have documented that this low DO occurs in nearshore waters.

Data in the administrative record clearly shows that DO in all three subsegments consistently fell below the numeric criterion during the summer months. EPA-supplied data, particularly when considered in conjunction with the LUMCON data, demonstrates that all nearshore subsegments of the Gulf of Mexico are impaired for DO. First, it is important to note, when addressing DO levels in the Gulf, that the water quality standard (5.0 mg/L), not necessarily hypoxia, should be the level at which impairments should be assessed in Louisiana's waters within the 3-mile limit (nearshore waters). EPA's data includes LUMCON Data, EPA GED Data, and SEAMAP long-term trawl data. Each of these data sets show low levels of DO, which is consistent with long-term measurements of the hypoxic zone in the Gulf of Mexico. Not only do they show that DO levels reach unacceptably low levels, they also show that the situation has not improved over time, despite the existence of the Hypoxia Taskforce, and Hypoxia Action Plan.

Recent data continues to reflect this impairment. LUMCON's press release from 2011 regarding the Dead Zone is included as Exhibit 1. It includes maps of the Dead Zone, was compiled from data collected in 2011, and is also available at:

<http://www.gulfhypoxia.net/Research/Shelfwide%20Cruises/2011/PressRelease2011.pdf>

LUMCON data from 2010, attached as Exhibit 2, also shows that all of the sampling points used that year within the 3-mile limit had extremely low oxygen levels. The ongoing hypoxia monitoring by the experts at LUMCON and other institutions should be included in each Integrated Report. The 2010 and 2011 LUMCON data underscores the fact that the nearshore waters are impaired. The long term data from the yearly hypoxia measurement cruises demonstrates that this is a persistent problem that cannot be solved by the Hypoxia Taskforce, or other reliance on voluntary measures.

LDEQ's sudden about-face on the impaired nature of these three subsegments has no support. LDEQ now states that insufficient data exists to classify these subsegments, and has delisted them for dissolved oxygen impairment in its 2012 Integrated Report and reclassified them as IRC 3. This has been done while all three subsegments consistently fall below the numeric criterion for DO during the summer months.

However, as part of LDEQ's 2008 and 2010 303(d) lists, LDEQ listed subsegments 120806, 070601 and 021102 of Louisiana's coastal waters as in violation of the numeric criteria for dissolved oxygen. LDEQ recognized them as impaired, but listed them as IRC 4b, erroneously arguing that a TMDL was not needed to resolve the impairment. The EPA required that LDEQ reclassify them as IRC 5 in both the 2008 and 2010 lists.

Thus, LDEQ is on record, interpreting the very same data it now claims is insufficient, as finding that the data supports listing these three subsegments as impaired. In its Response to Comments on its 2010 303(d) list, LDEQ stated: “Subsegments 021102 – Barataria Basin Coastal Waters; 070601 – Mississippi River Basin Coastal Waters; and 120806 – Terrebonne Basin Coastal Waters were listed for the suspected cause of “Oxygen, Dissolved” based on additional data provided for the 2008 IR (and reviewed for the 2010 IR) by USEPA Region 6.” Exhibit 3 (APPENDIX G: Public Comments on the 2010 Integrated Report and Louisiana Department of Environmental Quality’s Response to Comments) at G-5. LDEQ discussed this finding being based on data from LUMCON and SeaMap: “Data from sites along [LUMCON] transects A-D and within the three-mile limit was used in the 2008 IR and reviewed for the 2010 IR. This resulted in the assessments described below and in the 2008 IR” and “Analysis of SEAMAP data results in the same assessment found using the LUMCON and other datasets.” Exhibit 3 at G-5.

In its 2008 303(d) list, LDEQ was equally clear in its assessment that the data showed impairment. It stated that “careful analysis of the additional data supplied by USEPA Region 6, LDWF and SeaMap indicated that multiple areas of low DO occurred at or near the bottom of the Gulf of Mexico within the State three-mile limit during the period 2004-2008.” Exhibit 4 (August 25, 2009, Attachment 1: Response to comments concerning Gulf of Mexico hypoxic zone) at 4. Again, its conclusion was clear: “Therefore, based on the reviewed supplemental data provided and the caveats noted above, LDEQ has determined that the coastal subsegments of: 021102 – Barataria Basin Coastal Bays and Gulf Waters to the State Three-Mile Limit; 070601 – Mississippi Basin Coastal Bays and Gulf Waters to the State Three Mile Limit; and 120806 – Terrebonne Basin Coastal Bays and Gulf Waters to the State Three-Mile Limit are suspected of impairment due to low DO at or near the bottom of the water column.” Exhibit 4 at 4. Thus, though in 2012 LDEQ attempts to distance itself from this data and findings by repeatedly referring to it as the data “used by EPA,” LDEQ itself relied on this same data in 2008 and 2010 to find impairment.

LDEQ now states that the data set is too limited. LDEQ 2012 at 17. It never states what data set it is referring to as insufficient. It then apparently relies on a single year – 2007 – during which it claims the data shows the DO criterion was fully supported. LDEQ 2012 at 17. Once again, LDEQ does not specify to which 2007 data it refers. However, 2007 data would have been included in Louisiana’s 2010 303(d) list findings, yet LDEQ found then that the data showed the subsegments were impaired. Exhibit 3 at G-5. It is notable that LDEQ never stated that its change in position is based on additional data not available during compilation of the 2010 303(d) list. Thus, LDEQ apparently reached an entirely different conclusion based on the same set of data. LDEQ offers no explanation for this reversal.

LDEQ’s additional explanations for delisting these subsegments also fail. None of LDEQ’s explanations constitute good cause, and none qualify legally as a basis for delisting. All are merely excuses for ignoring the data and LDEQ’s prior findings.

LDEQ's failure to provide sufficient documentation and explanation for delisting subsegments 120806, 070601, and 021102 results in its failure to meet the regulatory criteria for delisting. 40 C.F.R. § 130.7(b)(6) requires that "[e]ach State shall provide documentation to the Regional Administrator to support the State's determination to list or not to list its waters as required by §§ 130.7(b)(1) and 130.7(b)(2). This documentation must include a description of the methodology used to develop the list and a description of the data and information used to identify the waters." 40 C.F.R. § 130.7(b)(6)(i) and (ii). Additionally, where EPA requests it, states must "demonstrate good cause for not including a water or waters on the list." *Id.* at § 130.7(b)(6)(iv). LDEQ has demonstrated neither good cause nor documentation to support its finding. EPA's disapproval is correct.

EPA Response

EPA acknowledges and concurs with the comments to add these three segments to the Louisiana § 303(d) list.

2) EPA's Priority Ranking Does Not Properly Take Into Account the Urgency of Action Required to Reduce the Hypoxic Zone.

Public Comment

Lisa W. Jordan, Counsel for GRN and LEAN, Tulane Environmental Law Clinic, 6329 Freret Street, New Orleans, LA 70118. See Administrative Record No. 8

EPA properly assigned the subsegments at issue a priority ranking pursuant to CWA § 303(d), 33 U.S.C. § 1313(d). Congress intended for all waters on the 303(d) list to have a priority ranking based upon the severity of the pollution. *Id.* Therefore, EPA properly determined that, in placing the subsegments on Louisiana's 303(d) list, a priority ranking was necessary.

However, in assigning a priority ranking for TMDL development, EPA assigned all three subsegments the lowest ranking, setting the timeframe for developing a TMDL at 8-13 years. Congress discussed the priority ranking of waters in section 303(d)(1)(A) of the Clean Water Act, 33 U.S.C. § 1313(d)(1)(A). And EPA guidance supplements this language. Section 303(d)(1)(A) of the Clean Water Act requires that States take into account the designated use of the waters and the severity of the pollution in establishing priority rankings. EPA supplemented these requirements with various guidance, which EPA relied upon in making its determination of priority ranking for these subsegments. EPA Decision Document at 6. However, EPA did not properly rank the waters based upon these factors.

EPA should rank the Gulf coastal water subsegments higher based upon the severity of the pollution there. Hypoxic conditions can persist for several months of the year, and make the marine environment unsuitable for aquatic life. LUMCON, *What is Hypoxia?* <http://www.gulfhypoxia.net/Overview/>. Once waters reach hypoxic levels, they have fallen far below the lower limit of DO necessary to support aquatic life as determined by Louisiana. This represents severe pollution impacting a designated use, and the data proves that it is still growing. The priority ranking assigned by EPA will allow the problem to grow even worse

before beginning to address it, which will make the solution that much harder to achieve.

Additionally, in its 1991 guidance, EPA provides that States should consider economic factors and the degree of public support when setting a priority ranking. These factors require a higher ranking than the one EPA proposes to establish, which is the lowest ranking possible.

The coastal waters of Louisiana and the aquatic life that inhabit them are a vital economic resource for Louisiana, its coastal communities, and the nation as a whole. EPA itself has recognized this. *See* <http://www.epa.gov/gmpo/about/facts.html>. Low levels of DO create large areas where trawlers are unable to catch anything significant. The LUMCON 2007 press release stated that areas with low DO were noticeable by the lack of any trawlers in the area. The seafood industry represents a multi-billion dollar industry and is the livelihood of many Louisiana residents. The low levels of DO reduce the total area which can be fished and trawled, thereby reducing the ability of the local communities to earn a living. The importance of these waters to the livelihood of the people of Louisiana requires a higher priority ranking than the one EPA issued.

There is also currently strong public support for the restoration and preservation of these waters. Over the years hundreds, if not thousands of letters, postcards, and emails have been sent to EPA stating the importance of reducing nitrogen and phosphorous pollution and reducing the size of the Dead Zone. Because the waters are an important part of the local economy, there is a tremendous amount of public support and interest in making sure that the waters remain a viable resource. These are high profile areas, and the current priority ranking of 8-13 years does not reflect the public's desire to get them cleaned up.

Taking the severity of pollution, the economic consideration, and the public support for the area into account, EPA should set a higher priority ranking than the 8-13 year priority ranking.

EPA Response

No change has been made to the priority ranking as a result of comments received. The State of Louisiana chose to combine the 2012 CWA § 305(b) report and § 303(d) list into a single report following EPA's listing guidance, *Guidance for the 2002 Integrated Assessment and Reporting on the Quality of States' Waters* (i.e., Integrated Report). *See* Administrative Record No. 6 and 40 CFR 130.7(d)(1). The Integrated Report includes five categories as established in EPA guidance with Category 5 the 2012 Louisiana § 303(d) list of impaired and threatened waters requiring a TMDL. Category 5 is the only portion of the Integrated Report on which EPA takes approval and/or disapproval action. *See* Administrative Record No. 6. EPA neither approves nor disapproves the States' priority ranking submittal and is under no obligation per 40 CFR 130.7(b)(4) or the CWA to include a priority ranking or schedule for TMDL development to waters added to a States' § 303(d) list. However, in order to communicate EPA's commitment to addressing Hypoxia in the Gulf of Mexico, EPA proposed an assigned priority ranking and associated schedule for TMDL development to the proposed three added segments.

In making the determination to assign a priority ranking and schedule to the three coastal segments, EPA considered both the designated uses and the severity of pollution as required by the CWA and federal regulations. See CWA § 303(d)(1)(A) and 40 CFR 130.7(b)(4). EPA does not dispute the dissolved oxygen problem in these three coastal segments is severe. As EPA noted in its proposal to list the waters, the segments show a high proportion (70%) of minimum dissolved oxygen values well below the dissolved oxygen criteria and often times below hypoxic levels. Dissolved oxygen criteria are assigned to protect the segments Fish and Wildlife Propagation Use, and existing data show the applicable criterion is not currently being met. Further, EPA understands the importance of these waters to Louisiana’s fishing industry and to the State’s economy as a whole. EPA is fully committed to addressing the water quality issues present in these three coastal segments, as well as the overall problem of hypoxia in the Northern Gulf of Mexico as quickly as possible. However, this issue will require a complex analysis before a TMDL can be developed, and the State will need sufficient time to collect the data and information necessary to complete such an analysis.

Therefore, in consideration of the scope and severity of the problem and the resulting need to allow sufficient time to complete a scientifically sound TMDL, EPA assigned each of the three added coastal segments a priority ranking of not later than 8 to 13 years from the time the waters were first identified in Category 5, which is consistent with *EPA’s 2006 Integrated Reporting Guidance* for establishing timelines for TMDL development in water quality limited segments. As noted in EPA’s 2006 guidance, “a severe water quality problem may require complex analysis before developing a TMDL, and the state may therefore choose to give it a lower priority to allow time to collect necessary information and complete the analysis. Thus, the most severe water quality problems or the most toxic pollutants need not always be given the highest priority for TMDL development, if circumstances warrant a lower priority. See Administrative Record No. 7. EPA continues to encourage the State of Louisiana to collect information and data, as well as any other relevant precursors to TMDL development that may be related to interpretation or refinement of relevant water quality standards without delay and to complete the TMDL as expeditiously as possible, with the expectation that the TMDL could be completed within 8 years from the time the waters were first identified in Category 5. See Administrative Record Nos. 3 and 5.

3) EPA Should Develop the TMDLs for Subsegments 120806, 070601 and 021102 of Louisiana’s Coastal Waters.

Public Comment

Lisa W. Jordan, Counsel for GRN and LEAN, Tulane Environmental Law Clinic, 6329 Freret Street, New Orleans, LA 70118. See Administrative Record No. 8

EPA should promulgate TMDLs for subsegments 120806, 070601 and 021102 in accordance with the statutory language of 303(d)(2). The EPA must “identify such waters in such State *and* establish such loads” upon disapproval of a 303(d) submission. In addition to identifying WQLSs that should have been submitted, the Administrator has a dual duty to also “establish such loads.” The word “such” in this statute is continually referring to the same “waters,” thereby linking the duty to “establish such loads” to the specific waters that the Administrator identified upon disapproval.

EPA Response

At this time EPA has no plans to establish TMDLs for the three Louisiana coastal segments that EPA is adding to the 2012 Louisiana § 303(d) list. EPA's regulations require States to establish TMDLs for waters included on State § 303(d) lists. For those waters added to the § 303(d) list by EPA in a disapproval action, EPA's longstanding policy allows States the opportunity first to establish the TMDLs. EPA reviews the State's TMDLs and if EPA disapproves the TMDL, then EPA must establish the TMDL.

4) LDEQ Did Not Provide GRN or LEAN With Its Response to Comments.

Public Comment

Lisa W. Jordan, Counsel for GRN and LEAN, Tulane Environmental Law Clinic, 6329 Freret Street, New Orleans, LA 70118. See Administrative Record No. 8

GRN and LEAN commented on LDEQ's proposed 2012 303(d) list; these comments included opposition to LDEQ's delisting of the three coastal subsegments for DO. Exhibit 5. LDEQ provided EPA with its response to these comments, but did not provide its response to GRN, LEAN, or its legal representatives. Nor did LDEQ provide EPA with GRN and LEAN's comments; rather, it provided a very brief summary.

LDEQ's failure to provide commenters with its response to these comments and failure to provide EPA with the comments themselves renders its 2012 303(d) decision procedurally deficient.

EPA Response

EPA does not agree with the commenter's assertion that LDEQ's failure to provide commenters with its response to comments and failure to provide EPA with the comments themselves renders its 2012 § 303(d) decision procedurally deficient.

EPA evaluated the public participation process during its review of the State of Louisiana 2012 § 303(d) list submission including LDEQ's response to comments as found in Appendix G of the 2012 submittal. See Administrative Record Nos. 5 and 10. Additionally, EPA reviewed the state's public participation process as described in the state's Continuing Planning Process (CPP). See Administrative Record No. 11 and 40 CFR § 130.7(a). EPA concluded that the state's actions were consistent with the language in the state's CPP and that the state reasonably met the minimum public participation requirements specified in 40 CFR §§ 25.3, 25.4 and 25.8. There is nothing in federal regulations or the state's CPP that requires LDEQ to provide a direct response to a commenter or to provide EPA with actual copies of the comments received as opposed to a summary of those comments. The state prepared a Responsiveness Summary in accordance with the requirements of its CPP, which was submitted to EPA and made available to the public as Appendix G to the State's 2012 Integrated Report. See Administrative Record No. 10.

Summary

EPA has carefully considered all the comments received concerning EPA's decision to partially approve and proposal to partially disapprove Louisiana's 2012 § 303(d) list. EPA finds no new information presented or persuasive arguments as to why the three coastal segments should not be added to the 2012 Louisiana § 303(d) list. Therefore, EPA is taking Final Action on the addition of coastal segments 120806, 070601, and 021102 to the Louisiana 2012 § 303(d) list.