

Responsiveness Summary Concerning EPA's Decision to Add Waters to Louisiana's 2008 Section 303(d) List

Administrative Records Cited

1. Federal Register, Wednesday, April 13, 2011, at Volume 76, Number 71, pages 20664 – 20665
2. The Advocate, published in Baton Rouge, Louisiana. April 20, 2011
3. Decision Document for Louisiana's 2008 Section 303(d) List. April 6, 2011. Available at <http://www.epa.gov/region6/water/npdes/tmdl/index.html>
4. United States Environmental Protection Agency, *2002 Integrated Water Quality Monitoring and Assessment Report Guidance*. November 19, 2001. Available at <http://water.epa.gov/lawsregs/lawsguidance/cwa/tmdl/2002wqma.cfm>
5. United States Environmental Protection Agency, *Guidance for 2006 Assessment, Listing and Reporting Requirements Pursuant to Sections 303(d), 305(b) and 314 of the Clean Water Act*. July 29, 2005. Available at <http://water.epa.gov/lawsregs/lawsguidance/cwa/tmdl/upload/2006irg-report.pdf>
6. 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.
7. Louisiana Administrative Code Title 33 Part IX. Subpart 1, Chapter 11. Louisiana Surface Water Quality Standards
8. Comment No. 1. Jill M. Witkowski, Esq., 4694 Santa Monica Ave., San Diego, CA 92107
9. Comment No. 2. Lisa W. Jordon, Supervising Attorney, Tulane Environmental Law Clinic, 6329 Freret Street, New Orleans, LA 70118
10. Comment No. 3. Mississippi River Collaborative, 338 Baronne St., Suite 200, New Orleans, LA 70112
11. Comment No. 4. Sam L. Philips, Assistant Secretary, Office of Environmental Services, Louisiana Department of Environmental Quality, P.O. Box 4313, Baton Rouge, Louisiana 70821-4313
12. Tulane Law (Attachment 5) Delisted Waters Evaluation
13. 2008 Hypoxic Zone Map-Data source N. Rabalais, Louisiana Universities Marine Consortium (<http://www.gulfhypoxia.net/Research/Shelfwide%20Cruises/>)
14. United States Environmental Protection Agency, 2008 Integrated Reporting Clarification Memorandum. October 12, 2006. Available at http://www.epa.gov/owow/tmdl/2008_ir_memorandum.html
15. United States Environmental Protection Agency, Science Advisory Board, *Hypoxia in the Northern Gulf of Mexico: An Update by the EPA Science Advisory Board*. December 2007. Available at http://www.epa.gov/owow/keep/msbasin/pdf/sab_report_2007.pdf

Public Participation Activity Conducted

On Wednesday, April 13, 2011, EPA Region 6 published a notice in the Federal Register at Volume 76 Number 71, pages 20664 – 20665 and The Advocate, published in Baton Rouge, Louisiana, on April 20, 2011. 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 2008 Section 303(d) List.

Summary of Actions

EPA received four public responses regarding its proposed action to add three coastal segments as well as other unrelated comments that were outside the scope of the request for public comments. This response to comments document addresses all comments received.

EPA has reviewed the public responses regarding the addition of the three coastal segments and finds no new information presented or persuasive arguments as to why these segments should not be added as part of the 2008 Louisiana § 303(d) List. Therefore, EPA is taking Final Action on the addition of coastal segments 120806, 070601, and 021102 to the Louisiana 2008 § 303(d) List.

Summary of Public Comments

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

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List of Abbreviations

CFR – Code of Federal Regulation

CWA – Clean Water Act

LDEQ – Louisiana Department of Environmental Quality

LDWF – Louisiana Department of Wildlife and Fisheries

MRB – Mississippi River Basin

LUMCON – Louisiana Universities Marine Consortium

SEAMAP – Southeast Area Monitoring and Assessment Program

1. Total Maximum Daily Load (TMDL) Priority Schedule

Public Comments

Jill M. Witkowski, Esq., 4694 Santa Monica Ave., San Diego, CA 92107. See Administrative Record No. 8

...EPA's determination that the priority ranking should be 8 to 13 years is too long and not supported by the record. In Louisiana's proposed 303(d) list, it identifies TMDL priorities as either "High" or "Low." Given the severity and scope of the dissolved oxygen problem in the three coastal segments, EPA should recommend that Louisiana designate the problem as "High" priority.

Further, EPA's recommendation of 8 to 13 years for TMDL priority fails to take into account any site-specific factors related to the listing. Instead, it merely imports the general guidance from EPA's 2006 Integrated Reporting Guidance stating: EPA encourages the states to ensure that the schedule provides that all TMDLs for every pollutant-segment combination listed on previous section 303(d) lists be established in a time frame that is no longer than 8 to 13 years from the time the pollutant-segment combination is first identified in Category 5.

By suggesting the 8 to 13-year timeline, EPA is encouraging Louisiana to further delay taking substantive action on the dissolved oxygen impairment in its coastal segments. This advice is particularly frustrating in the face of EPA's refusal to work with states in the Mississippi River basin to develop a comprehensive TMDL to address the Dead Zone issue...

Lisa W. Jordon, Supervising Attorney, Tulane Environmental Law Clinic, 6329 Freret Street, New Orleans, LA 70118. See Administrative Record No. 9.

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 for the States to develop TMDLs. *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, the EPA assigned all three subsegments the lowest ranking of 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. The EPA supplemented these requirements in its 1991 guidance, which it relied upon in making its determination of priority ranking for these subsegments. EPA Decision Document at 2. 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 dissolved oxygen 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. A look at these factors argues in favor of a higher ranking than the one EPA proposes to establish, which is the lowest ranking possible. The coastal segments of Louisiana and the aquatic life that inhabit them are a vital economic resource for Louisiana and its coastal communities as well as the nation as a whole. EPA itself has recognized this. See <http://www.epa.gov/gmpo/about/facts.html>. Low levels of dissolved oxygen create large areas where trawlers are unable to catch anything significant. The LUMCON 2007 press release stated that areas with low dissolved oxygen 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 dissolved oxygen reduce the total area which can be fished and trawled, thereby also 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 the EPA stating the importance of reducing nitrogen and phosphorous pollution and reducing the size of the Dead Zone. See Attachment 4. 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. The Coastal Goal of the GHAP is to "reduce or make significant progress toward reducing the five-year running average areal extent of the Gulf of Mexico hypoxic zone to less than 5,000 square kilometers by the year 2015." 2008 GHAP at 8. Given this goal, we recommend that the priority ranking be 4-5 years, which would at least show progress to the 2015 goal.

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 2008 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. 4 and 40 CFR 130.7(d)(1). The Integrated Report includes five categories as established in EPA guidance with Category 5 the 2008 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. 4. 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 be protective of the segments' Fish and Wildlife Propagation Use, and existing data show the Wildlife and Propagation use 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 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, which is consistent with EPA's 2006 *Integrated Reporting Guidance* for establishing timelines for TMDL development in water quality limited segments. EPA encourages the State of Louisiana to begin the collection of 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. See Administrative Record Nos. 3 and 5.

2. EPA's Decision to Add Three Coastal Subsegments For Dissolved Oxygen Absent Nutrients

Public Comments

Lisa W. Jordon, Supervising Attorney, Tulane Environmental Law Clinic, 6329 Freret Street, New Orleans, LA 70118. See Administrative Record No. 9.

The low dissolved oxygen that the Gulf subsegments suffer from is a result of the nitrogen and phosphorus flowing into the Northern Gulf of Mexico.² Because of this, these subsegments must also be listed for phosphorus and nitrate/nitrite. EPA's own Science Advisory Board confirmed this in a 2007 study. The Board found confirmed that the hypoxic zone in the northern Gulf is "primarily related to nutrient loads from the Mississippi Atchafalaya River basin." 2007 SAB Study at ii. Yet, in its proposed decision reasoning for not listing the Gulf subsegments for nutrients, EPA states that the low dissolved oxygen in the Dead Zone is "likely a function of many variables." EPA Decision Document at 13. EPA should provide support for this statement, which contradicts the findings of its Science Advisory Board. For its part, LDEQ adds no support for not listing the Gulf subsegments for nutrients. Its reasoning for not listing these subsegments for phosphorus and nitrate/nitrite was that, because no nutrient criteria have been developed for these pollutants, it could not make an accurate assessment of attainment. LDEQ Response to Comments at G4, #23. This, however, is not accurate. LDEQ does have criteria in place for nutrients; they are narrative rather than numeric. These criteria are contained at La. Admin. Code tit. 33, § 1113.B.8, and state that "The naturally occurring range of nitrogen-phosphorous ratios shall be maintained." Because of all of the studies confirming the contribution of nitrogen and phosphorus to the existence of the Dead Zone, it is apparent that the naturally occurring range of nutrients is not present in the Dead Zone.

Therefore, EPA should also disapprove Louisiana's failure to list the three Gulf subsegments as impaired for phosphorus and nitrate/nitrite.

EPA Response

EPA does not agree with the commenter's assertion that EPA should disapprove Louisiana's failure to list the three coastal segments for nitrate/nitrite and phosphorus, in addition to disapproving the State's failure to list the segments for dissolved oxygen. EPA acknowledges that elevated nutrient loadings from the Mississippi River may be a contributing factor in the formation of low dissolved oxygen concentrations in Gulf waters as identified in the *Hypoxia in the Northern Gulf of Mexico: An Update by the EPA Science Advisory Board*. However, the low dissolved oxygen concentrations in these coastal segments are likely a function of many variables, including freshwater flow, organic loading rates, water depth and stratification, circulation patterns, water temperature and meteorological conditions. See Administrative Record No 15.

The Louisiana Water Quality Standards contain narrative nutrient criteria applicable to all waters specifying that the "naturally occurring range of nitrogen-phosphorous ratios shall be maintained. This range shall not apply to designated intermittent streams. To establish the appropriate range of ratios and compensate for natural seasonal fluctuations, the administrative authority will use site-specific studies to establish limits for nutrients." See Administrative Record No. 7. Without data definitively attributing the low dissolved oxygen levels in these segments to nitrogen and phosphorus, EPA did not believe it was appropriate to list the segments for nitrogen or phosphorus. However, EPA determined there was sufficient information to list these segments based on the exceedance of applicable dissolved oxygen criteria. During the TMDL development, nutrients and other contributing factors will be evaluated to determine to what degree nutrients are contributing to the coastal segment impairments.

3. Failure to List Mississippi and Atchafalaya Subsegments for Nutrients

Public Comments

Lisa W. Jordon, Supervising Attorney, Tulane Environmental Law Clinic, 6329 Freret Street, New Orleans, LA 70118. See Administrative Record No. 9.

As Gulf hypoxia is caused by nitrogen and phosphorus pollution emanating from the Mississippi and Atchafalaya Rivers, and given the hypoxia problem has increased over the past decade, these subsegments (00101, 070201, 070301, 070401, 010101, 010201, 010301, 010401, 010501) should be added to the 303(d) list.

EPA Response

EPA's action on April 6, 2011, was to propose for listing as impaired the three subject segments. While several related and other comments were received as a result of that solicitation, EPA concluded its action on all other segments at issue with respect to Louisiana's waters with its April 6, 2011 partial approval. In making the determination to partially approve the State's list, EPA reviewed the data and information submitted by the State concerning individual waters and the State's evaluation of those waters. Based on its review, EPA determined that the State reasonably identified waters that meet Federal listing requirements specified in section 303(d) and 40 CFR 130.7, except for the three coastal segments EPA is adding to the state's list.

4. EPA Must Also Disapprove LDEQ's Removal of Over One Hundred Waterbodies from the 303(d) List

Public Comments

Lisa W. Jordon, Supervising Attorney, Tulane Environmental Law Clinic, 6329 Freret Street, New Orleans, LA 70118. See Administrative Record No. 9.

In its 2008 Integrated Report, LDEQ proposed to delist over 100 waterbodies by removing them from Category 5. LDEQ delisted one hundred thirty waterbody-impairment combinations, when compared to the 2006 list. Similarly, LDEQ removed 99 waterbodies-pollutant combinations from Category 4, with no evidence to support these removals. See Attachment 5: Spreadsheet 2008 IRC 5 and 4 De-listings. However, LDEQ did not support the delistings or the removals with any documentation, which is required under the law. 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).

Many of the 2008 delistings are waterbodies that had been listed as Category 5 in 2006, but which LDEQ reclassified as Category 3. Category 3, according to EPA, represents waterbodies where "[t]here is insufficient available data and/or information to make a use support determination." 2006 Guidance at 47. In response to GRN and LEAN objections to the 2008 Integrated Report, LDEQ asserted that the "required documentation" for its delisted water body segments were "implicit in the overall assessment methodology described in the Rationale. . . ." LDEQ Decision Document, Appendix G, Public Comments on the 2008 Integrated Report and Louisiana Department of Environmental Quality's Response to Comments, Aug. 25, 2009 ("LDEQ Response to Comments") at G1, #3. By this standard, LDEQ could remove water body segments from the 303(d) list without further justification other than a description of the program's overall testing methodology. However, LDEQ must provide specific justification for each delisted water body.

A mere change in approach to how LDEQ wishes to treat 303(d)-listed waterbodies is insufficient under the law. Indeed, it would appear incongruous for a waterbody to have been listed based on data, whether monitoring data or "evaluative" data, and then for LDEQ to declare that it has insufficient data. Once the waterbody is listed, unless a TMDL (or other sufficient control) is completed,

LDEQ must actively provide data supporting a decision to delist it. This is supported by EPA guidance. EPA guidance on good cause states:

Good cause includes, but is not limited to, more recent and accurate data, more sophisticated water quality modeling, flaws in the original analysis that led to the waterbody being listed, or changes in conditions, e.g. new control equipment, or elimination of discharges. Where a waterbody was previously listed based on certain data or information, and the state or territory removes the waterbody without developing or obtaining any new information, EPA will carefully evaluate the state's or territory's re-evaluation of the available information, and will not approve such removals unless the state's or territory's submission describes why it is appropriate under the current regulations to remove each affected waterbody.

Accordingly, because LDEQ lacked the supporting documentation required by law, EPA must additionally disapprove this portion of LDEQ's list.

EPA Response

EPA's action on April 6, 2011, was to propose for listing as impaired the three subject segments. While several related and other comments were received as a result of that solicitation, EPA concluded its action on all other segments at issue with respect to Louisiana's waters with its April 6, 2011 partial approval. In making the determination to partially approve the State's list, EPA reviewed the data and information submitted by the State concerning individual waters and the State's evaluation of those waters. Based on its review, EPA determined that the State had reasonably identified waters that meet Federal listing requirements specified in section 303(d) and 40 CFR 130.7. EPA reviewed Attachment 5 (Administrative Record No. 9), identifying 149 segments, that were either delisted during the current 2008 or previous Louisiana § 303(d) listing cycles on which EPA has taken current or previous approval actions. Based on EPA's review, these segments were delisted based on completed TMDLs (Category 4a) and/or Data Indicates Attainment (Categories 1 or 2). Administrative Record No. 12 provides the status for each of the 149 segments. EPA discussed its authority regarding waters in Integrated Report Categories 1-4 and the State's delisting of waters based on insufficient information to make a listing decision in EPA's Decision Document for Louisiana's § 2008 303(d) List. However, in the interest of completeness, EPA restates its conclusions below on the relevant aspects of the comments received.

a. EPA's Authority Regarding Waters on Categories 1 - 4

Louisiana chose to combine the 2008 § 305(b) report and § 303(d) list into a single report following EPA's listing guidance titled *Guidance for the 2002 Integrated Assessment and Reporting on the Quality of States' Waters* (Integrated Report). See Administrative Record No. 4. The Integrated Report included five categories as established in EPA guidance. Category 5, which is the 2008 § 303(d) list, was also included in the report. Category 5 is the only portion of the Integrated Report on which EPA takes approval and/or disapproval action and EPA neither has authority nor takes approval/disapproval action regarding Categories 1 – 4(a-c).

b. Category 5 Omissions

There were 50 waters omitted from Category 5 based on the rationale of Insufficient Data and/or Information. See Administrative Record No. 3. After thorough review of routine monitoring data, LDEQ flagged segments where the quality of the data was in question (improper calibration, collection or transcription error). LDEQ also flagged a number of segments where water quality may have been affected by tidal fluctuations and weather patterns which were causing elevated levels of TDS, Chlorides and Sulfates in segments near estuarine lakes or bays. LDEQ has agreed, as resources allow, to re-evaluate each station location and follow-up with additional monitoring for future assessments. EPA agreed with LDEQ's determination to omit these 50 segments from Category 5 of the 2008 Louisiana § 303(d) List where data quality questions exist and station locations within the segments needs to be re-evaluated for future monitoring. Absent any specific data and/or information offered by the public during the solicitation by LDEQ (See Administrative Record No. 3) for all readily available data, EPA found no basis for disapproval of LDEQ's decision to omit these segments from Category 5.

5. EPA Proposed Decision To Add Three Segments to the 2008 Louisiana § 303(d) List

Public Comments

Mississippi River Collaborative, 338 Baronne St., Suite 200, New Orleans, LA 70112. See Administrative Record No. 10

The organizations signed below, as members of the Mississippi River Collaborative, are in support of EPA's decision (as proposed in the Federal Register Volume 76, Number 71 (Wednesday, April 13, 2011)) to add the three coastal waterbodies to Louisiana's 2008 303(d) list, because as noted by the EPA, "the applicable numeric water quality standards marine criterion for dissolved oxygen was not attained in these segments." The Hypoxic Zone in the nearshore waters of the Gulf of Mexico has been well documented, and is regularly in violation of Louisiana's dissolved oxygen standards. For years the Mississippi River Collaborative has been working to improve water quality in the Mississippi River, its tributaries and distributaries from the headwaters in Minnesota to the gulf in Louisiana. Despite concerted efforts, our work has been continually hampered by Louisiana's failure to list these coastal subsegments as impaired by low dissolved oxygen. The listing of these waters is an essential component of an effective clean-up plan for the Gulf of Mexico, which must include, among other efforts, development and im-plementation of total maximum daily loads for each segment.

Lisa W. Jordon, Supervising Attorney, Tulane Environmental Law Clinic, 6329 Freret Street, New Orleans, LA 70118. See Administrative Record No. 9.

Louisiana's numeric criterion for coastal marine waters is 5mg/l. La. Admin. Code tit. 33, § 1113.C.3.c. This criterion applies during all seasons and at all depths. EPA's supporting data in its administrative record, upon which LDEQ also based its finding of impairment, clearly shows that dissolved oxygen in all three subsegments consistently fell below the numeric criterion during the summer months. In particular, the data collected by LUMCON in 2008 shows conditions below the numeric criterion in all three subsegments as part of one of the largest hypoxic zones on record. LUMCON, 'Dead Zone' Again Rivals Record Size, July 28, 2008, available at: <http://www.gulfhypoxia.net/Research/Shelfwide%20Cruises/2008/PressRelease08.pdf>. LUMCON's yearly cruise consistently finds hypoxia in the coastal segments of Louisiana, including the years 2004-08. EPA and LDEQ also correctly concluded that the data was collected from trustworthy organizations using reliable methods of data collection.

EPA Decision Document for Louisiana's 2008§ 303(d) List, Dec. 17, 2010, ("EPA Decision Document") at 7. The data in the Administrative Record shows substantial impairment of all three subsegments in greater than 10% of the samples collected. Subsequent data collected since 2008 verifies these findings, and proves that they are not merely aberrations. See Attachment 1, LUMCON Press Release 2010 Dead Zone.

Given that this consistent sampling data showing levels of dissolved oxygen far below the numeric criterion into hypoxic levels in repeated summers, EPA and LDEQ correctly concluded that all three subsegments are impaired for dissolved oxygen.

Jill M. Witkowski, Esq., 4694 Santa Monica Ave., San Diego, CA 92107. See Administrative Record No. 8.

I fully support EPA Region 6's decision to add coastal segments 120806, 070601, and 021102 to the Louisiana §303(d) list for exceedance of the State's 5 mg/L dissolved oxygen criteria.

Between 2005 and 2009, I lived in New Orleans and worked for the Tulane Environmental Law Clinic, representing the Gulf Restoration Network and the Louisiana Environmental Action Network in their efforts to restore water quality in the Gulf of Mexico. During that time, we collaborated with environmental groups up and down the Mississippi River with the ultimate goal of solving the "Dead Zone," or hypoxia problem, in the Gulf of Mexico.

It became abundantly clear that, while upstream states were open to the possibility of doing their part to address the Dead Zone issue, they had no interest in doing so until downstream states like Louisiana and Mississippi recognized it as a problem. Listing three coastal segments as impaired for dissolved oxygen and requiring a TMDL is a key step to solving the Dead Zone issue.

EPA Response

EPA acknowledges and concurs with the comments to add these three segments as discussed in this document.

6. EPA's Proposed Decision to Add Category 4b Waters to the 2008 Louisiana § 303(d) List

Public Comments

Lisa W. Jordon, Supervising Attorney, Tulane Environmental Law Clinic, 6329 Freret Street, New Orleans, LA 70118. See Administrative Record No. 9.

The EPA has interpreted the language of the Act to allow States to avoid placing impaired waters on the 303(d) list if they met certain conditions; namely, that other pollution control requirements are stringent enough to attain water quality standards within a reasonable amount of time. Guidance for 2006 Assessment, Listing, and Reporting Requirements Pursuant to Sections 303(d), 305(b), and 314 of the Clean Water Act, EPA, July 29, 2005 ("2006 Guidance"); 40 CFR § 130.7(b)(1). This designation is known as Category 4b. Louisiana placed the subsegments at issue in Category 4b despite admitting that they were impaired for dissolved oxygen, relying upon the Gulf Hypoxia Action Plan (GHAP) as the required control expected to attain water quality standards. However, the GHAP, a voluntary plan which does not even have adequate funding to meet its own goals, fails in numerous ways to qualify as a required control. The EPA, in issuing its decision on Louisiana's 303(d) list, properly recognized this and placed subsegments 120806, 070601 and 021102 on Louisiana's 303(d) list as impaired for dissolved oxygen.

Jill M. Witkowski, Esq., 4694 Santa Monica Ave., San Diego, CA 92107. See Administrative Record No. 8.

I applaud the EPA for its decision that the 2008 Gulf Hypoxia Action Plan is insufficient to supplant a TMDL. EPA's finding that, while "the 2008 Gulf Hypoxia Action Plan contains useful trends information, identifies objectives, needs and actions intended to accelerate the reduction of nitrogen and phosphorus loadings from the Mississippi River," it "does not, by itself, meet the requirements of 40 CFR 130.7(b)(1) and expectations for Category 4b as discussed in EPA's Integrated Reporting Guidance" is well-supported in both the record and in practice.

Sam L. Philips, Assistant Secretary, Office of Environmental Services, Louisiana Department of Environmental Quality, P.O. Box 4313, Baton Rouge, Louisiana 70821-4313. See Administrative Record No. 11.

LDEQ disagrees with EPA Region 6's decision to place the dissolved oxygen impairments for subsegments 021102, 070601, and 120806 in Integrated Report Category (IRC) 5 instead of IRC 4b. At this time LDEQ continues to stand by its position that these coastal subsegments must be placed in category 4b. This position is based primarily on the plan of action described in the *Gulf Hypoxia Action Plan 2008* and others which follow.

Development of a dissolved oxygen Total Maximum Daily Load (TMDL) specific to these three coastal subsegments of Louisiana will not resolve the gulf hypoxia issue and is therefore inappropriate.

Please see Administrative Record No. 10 for the remainder of the respondent's comments.

EPA Response

EPA concurs with the comments agreeing with EPA's decision to place the dissolved oxygen impaired segments in Integrated Report Category 5 instead of Category 4b. EPA disagrees with the comment asserting that these three coastal segments should be placed in Integrated Report Category 4b. EPA's rationale for proposing to place coastal segments 120806, 070601, and 021102 in Category 5 in lieu of Category 4b was discussed in detail in EPA's Decision Document for Louisiana's 2008 303(d) List. However, as a reminder, EPA's rationale is restated below.

- a. Why did Louisiana not include the three coastal segments on the 2008 Louisiana § 303(d) List?

The State and EPA agreed that three coastal segments in the Gulf of Mexico are not meeting applicable water quality standards. However, instead of assigning the impaired waters to the 2008 Louisiana § 303(d) List (Category 5 of the Integrated Report), the State assigned the waters to Category 4b of the Integrated Report based on current and future efforts in the 2008 *Gulf Hypoxia Action Plan*. See Administrative Record No. 12. Category 4b is defined by EPA's 2008 Integrated Reporting Clarification Memorandum as waters for which no TMDL is required because "other required control measures are expected to result in the attainment of an applicable water quality standard in a reasonable period of time." EPA disagreed with the State's decision to not include these impaired waters on the Louisiana 2008 § 303(d) List, and thus exempt them from the TMDL development process, based on the 2008 *Gulf Hypoxia Action Plan*. Therefore, EPA partially approved Louisiana's 2008 § 303(d) list submittal, but proposed to partially disapprove the State's decision not to list the three dissolved oxygen impaired coastal segments. EPA proposed to add the three coastal segments to the 2008 Louisiana § 303(d) List for exceedance of the State's dissolved oxygen criteria.

- b. Why did EPA not agree with Louisiana's Category 4b rationale for not including these impaired waters on the 2008 Louisiana § 303(d) list?

EPA carefully reviewed the 2008 *Gulf Hypoxia Action Plan* and the State's Category 4b rationale to evaluate the State's decision to exclude the three segments at issue from Category 5 (the 2008 § 303(d) List) based on the Category 4b alternative. EPA's review was based on whether the 2008 *Gulf Hypoxia Action Plan* addressed each of the Integrated Report Category 4b provisions discussed in EPA's 2008 *Integrated Reporting Clarification Memorandum*. EPA's conclusions were described in detail in the EPA Decision Document for Louisiana's 2008 Section 303(d) List and are summarized below. See Administrative Record Nos. 3, 5 and 14.

- 1) Because the specific point and nonpoint source controls needed to achieve the applicable water quality criterion of 5 mg/L dissolved oxygen in the three coastal segments have yet to be identified, the *2008 Gulf Hypoxia Action Plan* itself does not provide sufficient information to determine whether adequate “requirements” exist. In addition, the Action Plan indicates that current “resources are insufficient to attain the goals of the Action Plan, and the lack of resources is the primary barrier to successful implementation of the plan.”
 - 2) The *2008 Gulf Hypoxia Action Plan* indicates that the Task Force accepts the advice of EPA’s Science Advisory Board that achieving the hypoxic zone reduction goal by 2015 may no longer be possible. Also, the Action Plan does not describe how reducing the areal extent of the hypoxic zone to 5,000 sq km will lead to attainment of the applicable water quality criterion of 5 mg/L for dissolved oxygen in the three coastal segments.
 - 3) The *2008 Gulf Hypoxia Action Plan* itself does not contain a schedule to implement the pollution controls needed to achieve the goal of the plan and attain the applicable water quality criterion of 5 mg/L for dissolved oxygen in the three coastal segments.
 - 4) The *2008 Gulf Hypoxia Action Plan* does not specifically address pollution controls necessary to achieve water quality standards for dissolved oxygen in the State of Louisiana and it does not contain a description of, and schedule for, monitoring milestones for tracking and reporting progress to EPA on the implementation of those pollution controls.
 - 5) The *2008 Gulf Coast Action Plan* does not identify specific point and nonpoint source controls needed to achieve the goals of the plan or the attainment of the applicable water quality criterion for dissolved oxygen in the three coastal segments.
- c. Why require a dissolved oxygen TMDL specific to these coastal segments when development of a TMDL specific to the three coastal segments added to the 2008 Louisiana § 303(d) List will not resolve the Gulf Hypoxia issue?

Following the addition of the three coastal segments to the 2008 Louisiana § 303(d) List, the CWA and federal regulations require the development of TMDLs for all pollutants preventing or expected to prevent the attainment of water quality standards. See CWA § 303(d) and 40 CFR 130.7(c)(1).

EPA has carefully considered all the comments received concerning EPA’s proposal to partially disapprove the State’s decision not to list the three dissolved oxygen impaired coastal segments and EPA’s proposal to add the three coastal segments to the 2008 Louisiana § 303(d) List for exceedance of the State’s dissolved oxygen criterion and finds no new information presented or persuasive arguments as to why the three coastal segments should not be added to the 2008 Louisiana § 303(d) List.