ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 130

[FRL–6424–2]

RIN 2040–AD36

Proposed Revisions to the Water Quality Planning and Management Regulation

AGENCY: Environmental Protection Agency.

ACTION: Proposed rule.

SUMMARY: Today's action revises, clarifies and strengthens the Environmental Protection Agency's (EPA) current regulatory requirements for establishing Total Maximum Daily Loads (TMDLs) under the Clean Water Act (CWA). Today's proposed rule will provide States, Territories and authorized Tribes with the necessary information to identify impaired waters and to establish TMDLs to restore water quality. Today's proposed rule clarifies and strengthens how TMDLs are established so they can more effectively contribute to improving the nation's water quality. Through this proposal, State, Territorial and authorized Tribes can tailor their water quality programs to address the characteristics, problems, risks, and implementation tools available in individual watersheds, with meaningful involvement of stakeholders in the local community. Also in today's **Federal Register**, EPA is proposing a companion rule amending NPDES and water quality standards regulations to better support establishment of TMDLs.

DATES: Comments on this proposal must be submitted on or before October 22, 1999. Comments provided electronically will be considered timely if they are submitted by 11:59 P.M. (Eastern time) October 22, 1999.

ADDRESSES: Send written comments on the proposed rule to the Comment Clerk for the TMDL Program Rule, Water Docket (W–98–31), Environmental Protection Agency, 401 M Street, S.W., Washington, DC 20460.

For information on Filing comments, see ''Additional Comment Information'' in **SUPPLEMENTARY INFORMATION**.

A copy of the supporting documents cited in this proposal is available for review at EPA's Water Docket; Room EB–57 (East Tower Basement), 401 M Street, SW, Washington, DC 20460. For access to docket materials, call (202) 260–3027 between 9 a.m. and 3:30 p.m. for an appointment. An electronic version of this proposal will be available via the Internet at: <http://www.epa.gov/OWOW/tmdl/index.html>.

FOR FURTHER INFORMATION CONTACT: Hazel Groman, U.S. EPA, Office of Wetlands, Oceans and Watersheds (4503F), 401 M St., S.W., Washington, D.C. 20640, (202) 401–4078.

SUPPLEMENTARY INFORMATION:

Authority: Clean Water Act Sections 106, 205(g), 205(j), 208, 303, and 305.

Additional Comment Information

EPA requests that commenters submit any references cited in their comments. EPA also requests that commenters submit an original and 3 copies of their written comments and enclosures. Commenters that want receipt of their comments acknowledged should include a self-addressed, stamped envelope. All comments must be postmarked or delivered by hand. No facsimiles (faxes) will be accepted.

EPA will also accept comments electronically. Comments should be addressed to the following Internet address: ow-docket@epa.gov. Electronic comments must be submitted as an ASCII or WordPerfect file avoiding the use of special characters and any form on encryption. Electronic comments must be identified by the docket number W–98–31, and may be filed online at many Federal depository Libraries. No confidential business information (CBI) should be sent via e-mail.

ENTITIES POTENTIALLY REGULATED BY THE PROPOSED RULE

Category	NAICS Codes	SIC Codes	Examples of potentially regulated entities
State, Local, Tribal Government	N/A	N/A	States, Territories, and authorized Tribes.
Federal Government	N/A	N/A	EPA.

This table is not intended to be exhaustive, but rather provides a guide for readers regarding entities likely to be regulated by this action. This table lists the types of entities that EPA is now aware could potentially be regulated by this action. Other types of entities not listed in this table could also be regulated. To determine whether your facility, company, business organization, etc., is regulated by this action, you should carefully examine the applicability criteria in § 130.20 of the proposed rule. If you have questions regarding the applicability of this action to a particular entity, consult the person listed in the **FOR FURTHER INFORMATION CONTACT** section.

A. Background

1. What Are the Current Statutory and Regulatory Requirements for Identifying Waterbodies That Require TMDLs and Establishing TMDLs?

The CWA includes a number of programs aimed at restoring and maintaining water quality. These include national technology-based effluent limitation guidelines; national water quality criteria guidance; State, Territorial and authorized Tribal water quality standards; State, Territorial and authorized Tribal nonpoint source management programs; funding provisions for municipal wastewater treatment facilities; State, Territorial and authorized Tribal water quality monitoring programs; and the National Pollutant Discharge Elimination System (NPDES) permit program for point sources. These programs have produced significant and widespread improvements in water quality over the last quarter-century, but many waterbodies remain impaired by one or more pollutants. For example, the National Water Quality Inventory Report to Congress for 1996 indicates that of the 19 percent of the Nation's rivers and streams that have been assessed, 35 percent of these do not fully support water quality standards or uses and 8 percent of these are threatened. Of the 72 percent of estuary waters assessed, 38 percent are not fully supporting water quality standards or uses and 4 percent are threatened. Of the 40 percent of lakes, ponds, and reservoirs assessed (not including the Great Lakes), 39 percent are not fully supporting water quality standards or uses and 10 percent are threatened.

The goal of establishing TMDLs is to assure that water quality standards are attained and maintained. Section 303(d) of the CWA requires States, Territories and authorized Tribes to identify and establish a priority ranking for waters

for which existing pollution controls are not stringent enough to attain and maintain State, Territorial and authorized Tribal water quality standards, establish TMDLs for those waters, and submit, from time to time, the list of waters and TMDLs to EPA. Section 303(d) requires EPA to review and approve or disapprove lists and TMDLs within 30 days of the time they are submitted. If EPA disapproves a list or a TMDL, EPA must establish the list or TMDL for the State, Territory or authorized Tribe.

EPA issued regulations governing identification of impaired waters and establishment of TMDLs, at 40 CFR 130.7, in 1985 and revised them in 1992. The current regulations provide that:

- State, Territorial and authorized Tribal lists must include those waters for which more stringent effluent limitations or other pollution controls (e.g., best management practices) required by local, State, or Federal authority are not stringent enough to attain and maintain applicable water quality standards;
- State, Territorial and authorized Tribal lists must be submitted to EPA every two years, on April 1 of every even-numbered year;
- The priority ranking for listed waters must include an identification of the pollutant or pollutants causing or expected to cause the impairment and an identification of the waterbodies targeted for TMDL development in the next two years;
- States, Territories and authorized Tribes, in developing lists, must assemble and evaluate all existing and readily available water quality-related data and information;
- States, Territories and authorized Tribes must submit, with each list, the methodology used to develop the list and provide EPA with a rationale for any decision not to use any existing and readily available water quality-related data and information; and
- TMDLs must be established at levels necessary to implement applicable water quality standards with seasonal variations and a margin of safety that takes into account any lack of knowledge concerning the relationship between effluent limitations and water quality.

Existing regulations define a TMDL as a quantitative assessment of a water quality problem. The TMDL specifies the amount of a particular pollutant that may be present in a waterbody, allocates allowable pollutant loads among sources, and provides the basis for attaining or maintaining water quality standards. TMDLs are established for waterbody and pollutant combinations for waterbodies impaired by point sources, nonpoint sources, or a combination of both point and nonpoint sources.

Indian Tribes may be authorized to establish TMDLs for waterbodies within their jurisdiction. To date, however, no Tribe has sought or received CWA authority to establish TMDLs.

2. What Was the TMDL Federal Advisory Committee Act (FACA) Committee and What Did It Do?

In November 1996, EPA established a Federal Advisory Committee Act Committee (FACA Committee) to provide recommendations on improving regulations and guidance for identifying impaired waterbodies and establishing TMDLs. EPA charged the FACA Committee, a subgroup of the National Advisory Council for Environmental Policy and Technology, with recommending ways to improve the effectiveness and efficiency of State, Territorial, Tribal and EPA efforts to identify waterbodies for which TMDLs must be established and the way in which TMDLs are established. EPA asked the FACA Committee to provide advice on new policy and regulatory directions for TMDLs, including their role in watershed protection, the identification of impaired and threatened waterbodies, the pace of TMDL establishment, the science and tools needed to support the establishment of TMDLs and the roles and responsibilities of States, Territories, Tribes and EPA in establishing TMDLs.

The 20 FACA Committee members were a geographically balanced and highly motivated group of individuals with diverse interests in, knowledge of, and broad perspectives on TMDLs. Members included State and local officials, a Tribal consortium representative, farmers, a forestry representative, environmental advocacy group representatives, industry representatives, a law professor, the executive director of a watershed management council, and an environmental consultant. Members came from both the public and private sectors, and each brought to the committee diverse professional expertise, including law, science, public policy, management, public advocacy, and engineering. Representatives of the United States Department of Agriculture's Natural Resources Conservation Service and Forest Service, and EPA's Office of Water served as *ex officio* members of the FACA Committee.

The FACA Committee completed its deliberations in May 1998 and submitted its final report to EPA on July 28, 1998. The FACA Committee's final report includes over one hundred and sixty recommendations for improving government efforts to identify impaired waters and establish TMDLs.

B. Summary of the Proposed Rule

1. What Is the Purpose of Today's Proposed Rule?

The purpose of today's proposed rule is to clarify and strengthen how TMDLs are established so they can more effectively contribute to improving the nation's water quality. Through this proposal, EPA intends to provide clear regulatory requirements that are consistent with State, Territorial and authorized Tribal water quality programs, in particular State, Territorial and authorized Tribal watershed approaches to water quality management. Under these approaches, water quality programs can be tailored to the characteristics, problems, risks, and implementation tools available in individual watersheds, with meaningful involvement stakeholders in the local community.

In developing the proposal, EPA has carefully examined the recommendations of the FACA Committee, as well as recommendations proposed to EPA by interested stakeholders, including State and local governments, other Federal agencies, environmental advocacy organizations, industry, agriculture, and citizens. This proposal also reflects the lessons learned by EPA and the States since 1992, when this regulation was last revised.

Pursuant to section 518(e) of the CWA, EPA is authorized to treat an Indian Tribe in the same manner as a State for purposes of establishing lists of impaired waters and TMDLs. Section 130.6(d) of EPA's water quality planning and management regulations provides that a federally-recognized Indian Tribe is eligible for treatment as a State for purposes of that rule if (1) The Tribe has a governing body capable of carrying out substantial governmental duties and powers; (2) the functions to be exercised by the Tribe pertain to the management and protection of water resources which are held by a Tribe, by the United States in trust for Indians, by a member of a Tribe if such property is subject to a trust restriction on alienation, or otherwise within the borders of an Indian reservation; and (3) the Tribe is reasonably expected to be capable of carrying out the functions to be exercised consistent with the terms and purposes of the CWA and applicable regulations.

Today, EPA is clarifying that it interprets § 130.6(e) as implementing section 518(e) for purposes of allowing Indian Tribes to apply to EPA for authority to establish lists of impaired waters and TMDLs pursuant to section 303(d) of the CWA. Accordingly, if a

federally-recognized Indian Tribe can demonstrate to EPA that it meets the test contained in § 130.6(d) for purposes on the TMDL program, EPA will authorize it to establish lists of impaired waters and TMDLs for reservation surface waters over which the Tribe has jurisdiction.

EPA interprets the term ''reservation'' in § 130.6(d)(3) in light of Supreme Court case law, including *Oklahoma Tax Comm'n* v. *Citizen Band Potawatomi Indian Tribe of Oklahoma,* 111 S.Ct. 905, 910 (1991), in which the Supreme Court held that a ''reservation'' includes trust lands that have been validly set apart for the use of a Tribe even though the land has not been formally designated as a reservation. See 56 FR 63881.

In applying to EPA for authority to establish lists of impaired waters and TMDLs, Tribes are to follow the application requirements contained in § 131.8(b) of EPA's water quality standards regulations. In reviewing such applications, EPA will follow the procedures contained in § 131.8(c). In the final rule, EPA is considering revising language in § 131.8(b) and (c) to clarify that they apply to treating Tribes in the same manner as States for § 303(d) lists and TMDLs, as well as water quality standards. (See revised § 131.8(b) and (c) in docket.) EPA requests comments on this approach.

Under today's proposed rule, in order to be treated in the same manner as a State, an Indian Tribe would need adequate authority over the waters for which it seeks to establish lists and TMDLs. The jurisdiction of Indian Tribes generally extends ''over both their members and their territory.'' *United States* v. *Mazurie,* 419 U.S. 544, 577 (1975). However, Indian reservations may include lands owned in fee by nonmembers. ''Fee lands'' are privately owned by nonmembers and title to the lands can be transferred without restrictions. The Supreme Court, in *Montana* v. *U.S.*, 450 U.S. 544, 565–66 (1981), noted that tribes may have authority over nonmember activities on reservation fee lands in certain circumstances, including when the nonmember conducts ''threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the Indian tribes.''

EPA addressed the *Montana* test in the 1991 preamble to the Agency's final rule regarding tribal water quality standards programs under the CWA. In that 1991 preamble, in view of some judicial uncertainty at that time regarding the degree of impacts necessary to satisfy the *Montana* test, EPA established an ''operating rule'' that requires tribes seeking eligibility to set water quality standards governing activities of nonmembers on fee lands to show that the effects are ''serious and substantial.'' 56 FR 64878. EPA noted that ''[t]he choice of an Agency operating rule containing this standard is taken solely as a matter of prudence in light of judicial uncertainty and does not reflect an Agency endorsement of this standard *per sc.*'' Since 1991, however, the Supreme Court has reaffirmed *Montana's* impacts test verbatim without addressing the need for ''serious'' or ''substantial'' impacts. *E.g. Strate* v. *A–1 Contractors,* 117 S.Ct 1404 (1997); *South Dakota* v. *Bourland,* 508 U.S. 679 (1993). While not required to do so, as a matter of policy EPA will continue to look to see whether serious and substantial impacts exist when evaluating tribal authority under the *Montana* test.

In *Strate,* 117 S.Ct. At 1414, the Supreme Court made clear that *Montana* remains the controlling standard for evaluating tribal authority over nonmember activities in fee lands. The Court emphasized in *Strate* that the purpose of *Montana's* impacts test is to insure that Tribes retain their powers of self-government. EPA believes that protecting the public through environmental protection programs from serious and substantial effects on health and welfare is a core governmental function whose exercise is critical to self-government. See 56 FR 64879.

Whether an Indian Tribe has jurisdiction over activities of nonmembers on fee lands will be determined case-by-case, based on factual findings. The determination as to whether the required effect is present in a particular case depends on the circumstances. The Agency believes, however, that the activities covered by the TMDL program generally have the potential for direct impacts on human health and welfare that are serious and substantial. See 56 FR 64878. EPA's approach to evaluating tribal jurisdiction on fee lands was recently upheld by the Ninth Circuit Court of Appeals in *Montana* v. *EPA*, 137 F 3d 1135 (9th Circuit), cert. Denied, 119 S.Ct. 275 (1998).

The process that the Agency will use for Indian Tribes seeking to demonstrate their authority over nonmembers on the fee lands for the TMDL program includes a submission of a statement under § 131.8(b) explaining the legal basis for the applicant Indian Tribe's authority. The Indian Tribe must explicitly assert and demonstrate jurisdiction, i.e., show that activities covered by the TMDL program conducted by nonmembers on fee lands could lead to water quality impairments that have impacts on the health, welfare, economic security or political integrity of the Indian Tribe and its members that are serious and substantial. However. EPA will also rely on its generalized findings regarding the relationship of activities regulated under water quality programs and impacts to Tribal health, welfare, economic security or political integrity. See 56 FR at 64878 and 64879.

Under § 131.8(c)(2)(ii), appropriate governmental entities (i.e., States, Tribes and other Federal entities located contiguous to the reservation of the Tribe that is applying for treatment in the same manner as a State) will be provided notification of and an opportunity to comment on the Indian Tribe's jurisdictional assertions prior to EPA's action on the Indian Tribe's application. EPA will seek to make its notification sufficiently prominent to inform local governmental entities, industry and the general public, and will advise interested parties to direct comments on tribal jurisdiction to appropriate governmental entities.

The Agency recognizes that jurisdictional disputes between Indian Tribes and States can be complex and difficult and that it may, in some circumstances, be most effective to address such disputes by attempting to work with the parties in a mediative fashion. However, EPA's ultimate responsibility is protection of human health and the environment. In view of the mobility of environmental problems, and the interdependence of various jurisdictions, it is imperative that all affected sovereigns work cooperatively for environmental protection.

2. What Are the Key Changes the Proposed Rule Makes to Existing Regulatory Requirements?

Below is a summary of the key changes to the existing regulatory requirements that are being proposed today:

- Revised definitions of TMDL, wasteload allocation, and load allocation;
- Definitions of impaired waterbody, threatened waterbody, pollution, pollutant, reasonable assurance and waterbody that clarify EPA's existing interpretation of these terms;
- A new requirement for a more comprehensive list and a new format for the list;
- A new requirement that States, Territories and authorized Tribes establish and submit schedules for establishing TMDLs for all waterbodies impaired or threatened by pollutants;
- A new requirement that the listing methodologies developed by States, Territories and authorized Tribes be more

specific, subject to public review, and submitted to EPA on January 31 of every [second], [fourth] or [fifth] year;

- A possible change in the listing cycle so that States, Territories and authorized Tribes submit lists to EPA on October 1 of every [second], [fourth] or [fifth] year beginning in the year 2000;
- Clarification that TMDLs include 10 specific elements;
- A new requirement for an implementation plan as a required element of a TMDL; and
- New public participation requirements.

Today's proposed rule language encompasses all of 40 CFR part 130 even though EPA is not proposing to revise most of the existing sections in this Part. EPA is, however, proposing to reformat the part to include subparts and to extensively renumber the sections in part 130, in addition to the substantive revisions discussed in detail below. EPA is also proposing to delete § 130.3, which sets out the same definition of ''water quality standard'' that is found in the water quality standards regulations at 40 CFR part 131 and, as a result, is duplicative and unnecessary. Today's proposal also would delete § 130.10(d), which is obsolete and no longer relevant since it provided for a one-time deadline of February 4, 1989, for State submission of certain water quality information. In light of the extent of these formatting and numbering changes, EPA is publishing all of 40 CFR part 130 to show how the changes proposed today relate to the existing sections of the current regulation. The following table of contents for part 130 identifies each of the sections in the proposed rule and highlights the proposed changes.

40 CFR Part 130 as Revised and Reorganized by Today's Proposal

Subpart A: Summary, Purpose, and Definitions

130.0 Program summary and purpose (unchanged)
130.1 Applicability (unchanged)
130.2 Definitions (amended in part)
130.3 Deleted

Subpart B: Water Quality Monitoring and Reporting

130.10 Water quality monitoring (formerly § 130.4, unchanged)
130.11 Water quality report (formerly § 130.8; unchanged)

Subpart C: Identifying Impaired and Threatened Waterbodies and Establishing Total Maximum Daily Loads (TMDLs) (formerly § 130.7; amended; see below)

130.20 Who must comply with subpart C of this rule?
130.21 What is the purpose of this subpart?
130.22 What data and information must you assemble to identify and list impaired or threatened waterbodies?
130.23 How do you document your approach for considering and evaluating all existing and readily available data and information to develop your list and priority rankings?
130.24 When must your methodology be submitted to EPA?
130.25 What is the scope of your list of impaired or threatened waterbodies?
130.26 How do you apply your water quality standards antidegradation policy to the listing of impaired and threatened waterbodies?
130.27 How must you format your list of impaired or threatened waterbodies?
130.28 How do you prioritize the waterbodies on Part 1 of your list?
130.29 When can you remove a waterbody from your list?
130.30 When must you submit your list of impaired or threatened waterbodies and priority rankings to EPA and what will EPA do with it?
130.31 What must your schedule for submitting TMDLs to EPA contain and when must you submit it to EPA?
130.32 Must you establish TMDLs?
130.33 What are the minimum elements of a TMDL submitted to EPA?
130.34 How are TMDLs expressed?
130.35 What actions must EPA take on TMDLs that are submitted for review?
130.36 Can EPA establish a TMDL if you fail to do so?
130.37 What public participation requirements apply to the list, priority rankings, schedule, and TMDLs?
130.38 What is the effect of the proposed rule on transitional TMDLs?

Subpart D: Water Quality Planning and Implementation

130.50 Continuing planning process (formerly § 130.5; amended, see below)
130.51 Water quality management plans (formerly § 130.6; amended, see below)

Subpart E: Miscellaneous Provisions

130.60 Designation and De-Designations (formerly § 130.9; unchanged)
130.61 State submittal to EPA (formerly § 130.10; removed section, otherwise unchanged)
130.62 Program management (formerly § 130.11; unchanged)
130.63 Coordination with other programs (formerly § 130.12; unchanged)
130.64 Processing application for Indian Tribes (formerly § 130.15; unchanged)
130.65 Petitions to EPA to establish TMDLs (new section)

3. What Definitions Are Being Added or Revised by this Proposal?

Existing requirements. The existing regulations contain definitions of ''TMDL,'' ''wasteload allocation,'' and ''load allocation.''

Proposed rule. Today's action proposes revisions to the definitions of ''TMDL'', ''wasteload allocation,'' and ''load allocation'' that clarify and add to the required elements of TMDLs and the ways in which TMDLs can be expressed. Today's action also proposes adding definitions for the terms ''pollution,'' ''pollutant,'' ''impaired waterbody,'' ''threatened waterbody,'' ''thermal discharge,'' ''reasonable assurance'' and ''waterbody.''

Today's proposal significantly revises the text of the regulatory definition of ''TMDL.'' The proposed revisions are intended primarily to define what a TMDL is and the elements it must contain. Instead of describing a TMDL as the sum of wasteload allocations and load allocations, as in the current regulations, EPA proposes to define a TMDL as a written analysis of an impaired waterbody established to ensure that water quality standards will be attained and maintained throughout the waterbody in the event of reasonably foreseeable increases in pollutant loads. The proposed revision to the definition of ''TMDL'' also includes a statement describing the 10 basic elements of a TMDL required for approval by EPA, as contained in proposed 40 CFR 130.33(b) and discussed in section 5.a. of this preamble.

EPA is proposing to revise the definition of a TMDL for a number of reasons. Current regulatory requirements have engendered different interpretations. States, Territories and authorized Tribes need greater certainty in establishing TMDLs and submitting them to EPA for approval. EPA requires a more precise definition to promote consistency in reviewing and approving TMDLs nationally. Other stakeholders need a clear understanding of what the minimum regulatory requirements are for TMDLs.

EPA is also proposing to revise the definition of a TMDL to clarify that TMDLs are established for pollutant(s) and that a TMDL sets the amount of pollutant(s) that may be present in a waterbody and still assure that the water quality standards are attained or maintained. Although States, Territories and authorized Tribes have the flexibility to develop a TMDL for a single pollutant in a listed waterbody and develop TMDLs for other pollutants on that waterbody at a later date, EPA encourages States, Territories and authorized Tribes to develop TMDLs for all pollutants impairing a listed waterbody at the same time. In addition, EPA is revising the definition to clarify the ways in which TMDLs can be expressed to meet the requirements of the CWA.

In addition, EPA is proposing to include in the definition of ''TMDL'' a statement of the statutory requirement that a TMDL be established with seasonal variations. EPA interprets this

statutory language as requiring that TMDLs be established to implement water quality standards in any season. While there may be other ways a TMDL can be established ''with'' seasonal variation, the proposed interpretation is consistent with the statutory directive that TMDLs ''be established at a level necessary to implement the applicable water quality standards with seasonal variation.'' The most straightforward interpretation of this language is that Congress intended for TMDLs to be established at levels that describe the maximum allowable loading in different seasons of the year, to implement standards year-round. This may require that, for some pollutants, different TMDLs are established for different levels of instream flow, based on variations in flow over the course of the year.

TMDLs may be established on a watershed basis. TMDLs established on a watershed basis must, like all TMDLs, be established for each pollutant identified as causing or expected to cause an exceedance of water quality standards and assure that water quality standards are attained and maintained throughout the watershed. Certain pollutants, e.g. nutrients, might be best addressed by allocating pollutant loads on a watershed, rather than on a segment-specific, basis. In such cases, TMDLs established for a watershed would be more likely to result in effective control measures than segment-by-segment TMDLs.

Finally, EPA proposes to amend the definition of ''TMDL'' to clarify that TMDLs must be established to ensure that water quality standards will be attained and maintained in the event of reasonably foreseeable increases in pollutant loads. This proposed revision is intended to address waters that are currently impaired or threatened and are expected to experience increased pollutant discharges. Since the CWA requires TMDLs to be established at levels ''necessary to implement'' standards, States, Territories and authorized Tribes need to address anticipated increases in pollutant loadings that could result in (or exacerbate) the current failure to attain and maintain water quality standards. While there may be situations where load increases cannot reasonably be anticipated, generally it should be possible to establish TMDLs in such a manner as to anticipate increases in pollutant loadings over time. For this reason, EPA is proposing to clarify the current definition of ''TMDL'' by explicitly stating that TMDLs must assure attainment and maintenance of applicable standards in the event of reasonably foreseeable load increases.

EPA is proposing clarifying revisions to the current definition of ''load allocation.'' These proposed revisions explicitly include atmospheric deposition as a nonpoint source of pollutants, codifying EPA's current interpretation. EPA's authority to require load allocations for atmospheric deposition is discussed in greater detail in section 4.b. of this preamble. Today's proposed § 130.33(b)(6) also clarifies that load allocations may, if possible, contain allocations to categories, subcategories, or individual sources while emphasizing EPA's intent to require establishment of TMDLs where sufficient information is not available to allocate loads to individual nonpoint sources.

EPA is proposing to allow some wasteload allocations to contain an allocation to a single point source or to a group of point sources. Current regulations require a wasteload allocation for each existing or future point source. EPA is proposing at § 130.33(b)(5) to allow allocations to categories or subcategories of point sources that are subject to a general permit (including storm water, combined sewer overflows, abandoned mines, and combined animal feeding operations), and to categories and subcategories of sources where the pollutant load does not need to be reduced in order to meet water quality standards. Wasteload allocations for individual point sources would still be required for each industrial and municipal point source permitted under CWA section 402. It is appropriate to allocate to the aggregate of sources covered by a general permit since the number and identity of sources discharging under a general permit generally will not be known. Since the CWA does not contain the terms ''load allocation'' and ''wasteload allocation,'' EPA has discretion to interpret these terms, created in the regulations to implement the TMDLs, in a reasonable manner.

EPA is proposing to amend the current regulations by adding definitions of the terms ''impaired waterbody'' and ''threatened waterbody.'' The proposed definitions of these terms are derived from the definitions in EPA's guidance (*Guidelines for Preparation of the Comprehensive State Water Quality Assessments (305(b) Reports and Electronic Updates*, EPA–841–B–002A, September 1997) on section 305(b) reports. The addition of these definitions clarifies States', Territories' and authorized Tribes' listing and TMDL establishment obligations by clarifying the kinds of waterbodies that must be included on section 303(d) lists and the kinds of waterbodies for which TMDLs must be established. EPA's rationale for the types of waterbodies for which TMDLs must be established is discussed in greater detail in section 4.b. of this preamble.

EPA is also proposing a definition of the term ''reasonable assurance.'' EPA proposes to define ''reasonable assurance'' in § 130.2(p) as a demonstration that wasteload allocations and/or load allocations in a TMDL will be implemented. EPA proposes that each TMDL contain reasonable assurance that allocations contained in TMDLs will in fact be implemented to attain and maintain water quality standards. EPA's incorporation of this term in § 130.33(b)(10)(iii) dealing with TMDL implementation plans emphasizes EPA's view that implementation of the allocations in TMDLs is critical to the ultimate attainment of standards in waterbodies across the country. The proposed regulations provide that reasonable assurance for point sources is demonstrated by procedures that ensure that enforceable NPDES permits will be issued to implement applicable wasteload allocations for point sources. For nonpoint sources, reasonable assurance means that nonpoint source controls will be implemented to achieve applicable load allocations. For nonpoint sources reasonable assurance would need to be specific to the pollutant of concern, expeditiously implemented and supported by reliable delivery mechanisms and adequate funding.

EPA also proposes to add to the regulations the CWA's definitions of ''pollutant'' and ''pollution.'' This decision is explained in greater detail in section 4.b. of this preamble. This amendment is intended to clarify that the statutory definitions apply to these terms as used in the TMDL regulations. Similarly, EPA is proposing a definition of ''thermal discharge'' to clarify the meaning of that term for the purposes of TMDLs..

EPA is proposing to clarify that the definition of pollutant encompasses drinking water contaminants that are regulated under section 1412 of the Safe Drinking Water Act (SDWA) and that may be discharged to waters of the U.S. that are the source waters of one or more public water systems. This clarification is consistent with both the language and the intent of the CWA. First, drinking water contaminants that meet the criteria of this clarification fall within the meaning of one or more of the terms

used to define pollutant. Second, ''public water supplies'' is listed under section 303(c)(2)(A) of the CWA as a potential beneficial use to be protected by water quality standards.

To elaborate, all microbial contaminants that may be discharged to waters of the US (e.g., bacteria, viruses and other organisms) fall under the term ''biological materials''; chemical contaminants that may be discharged to waters of the US (e.g., industrial solvents, pesticides) fall under the term ''chemical wastes''; and all radio nuclides that may be discharged to waters of the U.S. fall under the term ''radioactive materials''. Drinking water contaminants regulated in the future that meet this criteria will also fall under one or more of these terms.

Under the SDWA, pollutants are referred to as ''contaminants'' and, pursuant to section 1412, EPA is required to ''promulgate a national primary drinking water regulation for a contaminant * * * if the Administrator determines that: (i) The contaminant may have an adverse effect on the health of persons; (ii) the contaminant is known to occur or there is a substantial likelihood that the contaminant will occur in public water systems with a frequency and at levels of public health concern; and (iii) in the sole judgment of the Administrator, regulation of such contaminant presents a meaningful opportunity for health risk reduction for persons served by public water systems.''

Finally, EPA is proposing a definition of the term ''waterbody'' that codifies EPA's interpretation of the term for the purposes of TMDLs. The proposed definition includes a broad range of waterbodies, geographically defined so that members of the public can easily locate waterbodies included on States', Territories' and authorized Tribes' section 303(d) lists. Section 303(d) distinguishes between waterbodies impaired by pollution and pollutants generally and waterbodies affected by ''thermal discharges.'' For waterbodies impaired by pollution and pollutants generally, listing and/or TMDL decisions are based on whether the water is or is not attaining or maintaining water quality standards.

Waterbodies affected by ''thermal discharges,'' are subject to different listing criteria and requirements for establishing TMDLs. Under section 303(d)(1)(B), each State shall identify those waterbodies for which controls on thermal discharges under section 301 are not stringent enough to assure ''protection and propagation of a balanced, indigenous population of shellfish, fish and wildlife.'' Similarly, under section 303(d)(1)(D), States shall estimate for such waterbodies ''the total maximum daily thermal load required to assure protection and propagation of a balanced, indigenous population of shellfish, fish and wildlife.''

This distinction between ''pollution'' and ''pollutants'' generally and ''thermal discharges'' has its origins in section 316 of the CWA. Section 316 provides that the ''balanced, indigenous population'' standard (''BIP'') may be applied to determine the thermal component of an effluent limit for any point source subject to the provisions of sections 301 or 306 in lieu of more stringent effluent limitations. The drafters of section 316 believed that thermal discharges from point sources should be treated in a different manner than other pollutants. [CWA Leg. His. at 227–28]. Congress believed that steam-electric generating plants were the major sources of thermal discharges subject to CWA regulation. [CWA Leg. His. at 263]. It believed that thermal discharge limits for such facilities should be set on a case-by-case basis, taking into account the nature, physical characteristics, and dissipative capabilities of the receiving water. [*Id.*].

This distinction was carried over into section 303(d). It is important to note, however, that the more flexible ''BIP'' standard only applies to listing and TMDL actions related to thermal discharges from point sources. It does not apply to listing and TMDL decisions related to heat excesses in waterbodies resulting from other causes, such as solar radiation, channel and habitat modification and lack of stream flow. Where heat build up is a result of those (and other non-point source discharge) causes, decisions to list and establish TMDLs related to heat must be based on the applicable water quality standard for heat. In other words, whereas listing and TMDL decisions for ''thermal discharges'' from point sources are regulated under CWA sections 303(d)(1)(B) and 303(d)(1)(D), such decisions for water bodies impaired by heat from other causes are regulated under CWA sections 303(d)(1)(A) and 303(d)(1)(C).

This is a reasonable interpretation of the statute. Given the express language of sections 303(d)(1)(B) and (D), it is clear that Congress wanted lists and total maximum daily thermal loads to address the problems presented by discharges of heat from point sources, i.e., thermal discharges, albeit using a different standard (''BIP'') than for other pollutants covered by sections 303(d)(1)(A) and (C). Because Congress included ''heat'' in the definition of ''pollutant,'' EPA also reads section 303(d) as covering all forms of heat-impaired waterbodies and not just those affected by thermal discharges. Congress's express reference to ''thermal discharges'' was not intended to limit the section's applicability to impairments caused by point sources. Instead, Congress merely wanted to ensure that point source thermal discharges were given the same treatment under section 303(d) as under section 316. Where water quality standards for temperature are not being attained due to other causes, e.g., sediment runoff, habitat degradation, flow diversion, sections 303(d)(1)(A) and (C) would apply.

Comments sought. EPA solicits comment on any or all aspects of the proposed revisions to the existing definitions and the addition of new definitions.

4. What Are the Proposed Rule's Requirements for Identifying and Listing Impaired or Threatened Waterbodies?

a. Assembling the Data and Documenting the Approach for Considering and Evaluating Existing and Readily Available Data and Information

Existing requirements. Existing regulations require States, Territories and authorized Tribes to assemble and evaluate ''all existing and readily available water quality-related data and information'' when developing their lists. Existing regulations specify that ''all existing and readily available water quality-related data and information'' includes, but is not limited to, data and information about: waterbodies identified in: (1) The States', Territories' and authorized Tribes' most recent approved section 303(d) list; (2) States', Territories', and authorized Tribes' most recent CWA section 305(b) report as ''partially meeting'' or ''not meeting'' designated uses or as ''threatened''; (3) section 319 nonpoint source assessments; (4) drinking water source assessments under section 1453 of the Safe Drinking Water Act; (5) dilution calculations or predictive models which indicate nonattainment of water quality standards; and (6) data and information reported by local, State, or Federal agencies, e.g. National Water Quality Assessment, (NAWQA), National Stream Quality Accounting Network (NASQAN), members of the public, or academic institutions.

In addition, existing regulations require States, Territories and authorized Tribes to submit to EPA a description of the methodology used to develop the list, a description of the data and information used to list

waterbodies, a rationale for any decision to not use any existing and readily available data and information, and any other reasonable information requested by the Regional Administrator, including ''good cause'' for not including a waterbody or waterbodies on the list.

Proposed rule. EPA recognizes, as did the FACA Committee, that well-designed monitoring programs are vital elements in States', Territories', and authorized Tribes' efforts to characterize, identify, and ensure the protection and restoration of impaired and threatened waterbodies. Because monitoring is expensive and time-consuming, however, it is generally the case that only a small percentage of each States', Territories', and authorized Tribes' waterbodies are actually being monitored to identify impairments or threats, and States, Territories, and authorized Tribes must strive continually to expand the scope of their monitoring programs by carefully focusing resources to achieve the greatest positive influence on water quality.

In today's proposal, at § 130.22, EPA is retaining the requirement that States, Territories, and authorized Tribes assemble and consider all existing and readily available data and information to identify impairments and threats to impairment and develop their lists. The sources of existing and readily available data and information specified in the proposed regulation constitute the basic sources and types of information States, Territories and authorized Tribes need to consider in order to determine which waterbodies are impaired and threatened. In addition, these sources of data and information are required to be developed and collected by both the CWA and the SDWA and are generally available to States, Territories, authorized Tribes and stakeholders.

In developing today's proposal, EPA considered the proper role of ''monitored data'' and ''evaluated data and information.'' Monitored data refers to direct measurements of water quality, including sediment, bioassessments and some fish tissue analyses. Evaluated data and/or information provides an indirect appraisal of water quality through such sources as information on historical adjacent land uses, aquatic and riparian health and habitat, location of sources, results from predictive modeling using input variables and some surveys of fish and wildlife. The FACA Committee recognized the differences in available data and information. Although the committee preferred basing listing decisions on monitored data, it also recognized the reality of needing to use evaluated information. Today's proposal therefore reflects the need for States, Territories, and authorized Tribes to consider and evaluate both monitored and evaluated data and information. EPA agrees with the FACA Committee's recommendation that the best available data and information for each waterbody being considered for listing should be used. It is appropriate to use both monitored and evaluated data.

EPA is proposing at § 130.22(b)(4) to include the results of source water assessments conducted under section 1453 of the SDWA as ''existing and readily available data'' which States, Territories, and authorized Tribes must consider in deciding whether to list a waterbody as impaired or threatened. Under the Source Water Assessment Program (section 1453, SDWA), States must ''delineate the boundaries of the assessment areas from which one or more public water systems . . . receive supplies of drinking water'' and, within each delineated area, ''identify the origins of contaminants'' for which safety standards have been established to ''determine the susceptibility of the public water systems to such contaminants.'' These delineated areas will include one or more stream segments, or waterbodies, upstream of each intake. The assessments will identify each pollutant (contaminant), and the origins thereof, to which a public water system has some degree of susceptibility.

A ''national primary drinking water regulation'' (NPDWR) is the SDWA's term for a drinking water safety standard. Safety standards are typically established as ''maximum contaminant levels'' (MCLs) and expressed as concentrations e.g., milligrams per liter (mg/l). Safety standards are sometimes established as ''action levels'', or a similar term, but are also expressed as concentrations. Therefore, drinking water safety standards provide reference points (a) Against which States can compare water quality monitoring data, or (b) that States can use to add or revise water quality criteria to support public water supply use, in the absence of more stringent criteria that support more sensitive ecological uses.

Source water assessments will need to incorporate data from compliance monitoring and ambient water quality monitoring to support use of the assessment results as a basis for listing a waterbody as impaired or threatened. In some cases, this is easily accomplished *e.g.*, where compliance monitoring for chemical contaminants is required at the intake or where compliance monitoring data is unaffected by intervening treatment that is not designed to address the contaminant at issue. In other cases, where intervening treatment is affecting the monitoring results, it may be possible to estimate (back calculate) the ambient water values from the compliance monitoring results.

If the listing is based on a designated use but the State has not adopted a water quality criterion for the pollutant(s) of concern, either in support of public water supply use or in support of a more stringent use (*e.g.*, aquatic habitat), the State should use a reference point sufficiently below the drinking water safety standard (maximum contaminant level or MCL) to prevent excursions above the safety standard at the source water intake as its starting point for developing a TMDL

Today's proposal, at § 130.23, also retains the requirement that States, Territories, and authorized Tribes submit to EPA a methodology documenting their approach for considering and evaluating the data and information used to develop the list and priority rankings. Today's proposal requires States, Territories, and authorized Tribes to explain to EPA and to the public how they will consider and evaluate chemical, physical, biological and radiological data and information and describe the data thresholds they will use to define waterbodies that are impaired or threatened and are required to be listed.

EPA is also requiring that the methodology used to compile the section 303(d) list must contain a description of the method and factors used to assign a priority ranking to the waterbodies on a list, *i.e.*, how States, Territories and authorized Tribes consider the severity of the impairment or threat of impairment and the uses to be made of the waterbody and any other factors in assigning priority rankings to listed waterbodies (see section 4.d, below). Moreover, States, Territories and authorized Tribes must provide for public notice and comment on a draft version of the methodology and submit the final methodology, along with a summary of the public comments, to EPA on January 31 of every listing year, which is eight months before the October 1 list submission deadline. The proposed rule provides that EPA will review the listing methodology and may provide comments to the State, Territory or authorized Tribe. EPA recognizes that final regulations may be promulgated after January 31, 2000. In this event, EPA may decide in the final regulations to specify an alternative date, most likely in year 2000, for States, Territories, and authorized Tribes to

submit their methodology to EPA. EPA solicits comment on when to require submittal of the listing methodology, in the event that the regulations are promulgated after January 31, 2000.

These additional requirements are aimed at providing EPA and the public with a comprehensive description of each State's, Territory's and authorized Tribe's approach for listing waterbodies. It is critical that the public have an opportunity to understand and participate in the States', Territories' and authorized Tribes' listing process. These requirements are also intended to help ensure that States, Territories and authorized Tribes consistently use reliable and credible data and information. While EPA does not expect every State, Territory and authorized Tribe to use exactly the same information and have exactly the same minimum data requirements for identifying and listing impaired and threatened waterbodies, EPA does expect each State, Territory and authorized Tribe to document and follow a deliberate, logical, and consistent approach for making listing decisions.

EPA will consider the methodology when it reviews and approves or disapproves the section 303(d) list. EPA's comments on the methodology will address whether the methodology will result in the identification of all impaired or threatened waterbodies. When EPA reviews the State's, Territory's or authorized Tribe's list, EPA will review how the State, Territory or authorized Tribe responded to comments raised during EPA's review of the methodology. EPA may cite any unremedied deficiencies it raised in comments to the State, Territory or authorized Tribe as a factor in a decision to disapprove all or part of the State's, Territory's or authorized Tribe's list.

Today's proposal therefore requires that States, Territories and authorized Tribes document their methods for determining impairment and develop appropriate decision rules based on whether they are considering and evaluating physical/chemical, biological, radiological, or aquatic and riparian habitat data and information. The methodology may, for example, explain how many exceedances of a numeric chemical criteria constitute an impairment or threat. Similarly, the methodology may explain how information on riparian condition and streambank stability might be used to determine whether a waterbody is impaired or threatened.

Today's proposal recommends a closer relationship between the section 303(d) and section 305(b) processes by requiring the section 303(d) listing methodology to describe how section 305(b) information will be used to determine which waterbodies should be included on the section 303(d) list. EPA recommends that States, Territories and authorized Tribes use the section 305(b) guidelines for defining waters that are impaired or threatened when developing this part of the section 303(d) listing methodology. While these section 305(b) decision rules represent a solid starting point for State, Territorial and authorized Tribal section 303(d) listing methodologies, EPA encourages State, Territorial and authorized Tribal listing methodologies for section 303(d) to be more specific, if necessary, to determine which waterbodies are impaired or threatened. EPA also encourages consistency between water quality reported in the section 305(b) report and the section 303(d) list of impaired and threatened waterbodies, particularly in regard to waterbodies that are impaired for purposes of section 303(d) and not supporting or partially supporting uses as reported under section 305(b).

Today's proposal eliminates the existing regulatory provisions that States, Territories and authorized Tribes provide EPA with a rationale for any decision not to use any existing and readily available data and information, and that, upon request by the EPA Regional Administrator, States, Territories or authorized Tribes may demonstrate ''good cause'' for not including a waterbody or waterbodies on the list. These provisions are redundant and unnecessary in light of the more specific requirements in today's proposal for States, Territories and authorized Tribes to provide EPA and the public with a more detailed methodology for developing their lists.

EPA also agrees with the concern expressed by some States, Territories, or authorized Tribes that listing decisions and TMDL calculations be based on high-quality data that meets State procedures for data quality and will, if necessary, stand up to legal challenge. EPA intends for the methodology required by today's proposal to support, not undermine, State procedures for assuring data quality and use of appropriate analytic methods. Further, EPA intends that the proposed requirement in § 130.22 for States, Territories, and authorized Tribes to consider all existing and readily available information and document their approach for doing so be consistent with the State, Territorial, or authorized Tribal data quality control procedures and methodologies documented in accordance with proposed § 130.23. Accordingly, data which does not meet data requirements established in the methodology required by today's proposal need not be used for listing; likewise, data that does meet data requirements in the methodology must be used. EPA requests comment on the requirements in § 130.22 and § 130.23.

Today's proposal also recommends that, where the waterbody is designated for drinking water use, the TMDL methodology should address information developed for source water assessments under the SDWA. The types of information developed for source water assessments that will be important in determining impairment of waterbodies and needed corrective actions are the information that States, Territories and eligible Tribes use to delineate source water areas, identify the origin of contaminants, and determine public water system susceptibility.

Exceedance of a narrative criterion is a basis for placing a waterbody on the section 303(d) list. EPA recognizes that to establish a TMDL where a narrative criterion has been exceeded, it is necessary to quantify how the narrative criterion should be interpreted for specific pollutant loads. EPA's Water Quality Standards Regulation Advance Notice of Proposed Rulemaking (ANPRM) describes current requirements for States and authorized Tribes to identify the procedures they intend to use to interpret and implement narrative criteria as they pertain to point source discharges of toxics (63 FR 36742 at 36765, July 7, 1998). The ANPRM emphasizes the need for clear procedures for interpreting and implementing narrative criteria and requests comment on whether the current identification requirements should be expanded to include interpretation of narratives as they pertain to nonpoint sources and pollutants in addition to toxics (see ANPRM at 36765, questions 6 and 7). EPA's current thinking is that such interpretation and implementation procedures are necessary and, if required, should be required by amending the water quality standards regulation as contemplated in the ANPRM discussion cited here.

The methodology proposed today requires, at § 130.23(d)(2), a process for resolving disagreements with other jurisdictions. States, Territories and authorized Tribes often have different water quality standards for boundary waterbodies. Establishing TMDLs for boundary waterbodies requires agreement on how to determine when a

waterbody is impaired or threatened and for what pollutant load the TMDL must be established. Having dispute resolution mechanisms in place will eliminate many potential disagreements and conflicts.

Finally, the proposal requires, at § 130.23(e), that the methodology specify exactly what conditions must exist before the waterbody is removed from the list of impaired and threatened waterbodies.

Other options considered. In developing today's proposal, EPA considered several other options. One option considered was to retain all existing regulatory requirements. EPA also considered developing, and requiring all States, Territories and authorized Tribes to follow, a single national listing methodology and criteria to develop their lists. EPA also considered two default listing approaches. First, EPA considered streamlining the listing process by requiring that, absent data and information indicating attainment of water quality standards, waterbodies must be included on State, Territorial and Tribal lists. Alternatively, EPA considered streamlining the listing process by requiring that waterbodies not be included on State, Territorial and authorized Tribal lists unless data and information demonstrated non-attainment of water quality standards.

Comments sought. EPA seeks comments on whether the TMDL regulations should retain the requirement that States, Territories and authorized Tribal lists consider and evaluate existing and readily available data and information in developing their lists of impaired and threatened waterbodies. EPA would also like comments on whether the regulation should more specifically define national minimum criteria or thresholds that define waterbodies that are impaired or threatened (e.g., existing criteria used for development of 305(b) reports). EPA is also seeking comment on the proposal to require States to provide more details on their listing methodologies and eliminate the current provision that, upon request by the EPA Regional Administrator, States, Territories and authorized Tribes may demonstrate ''good cause'' for not including a waterbody or waterbodies on the list. EPA solicits comments on any aspects of the proposal, including the options considered.

b. Scope of the list

Existing requirements. Existing regulations (40 CFR 130.7(b)(1)) require that State, Territorial and authorized Tribal lists include waterbodies for which pollution control requirements required by local, State, or Federal authority, including technology-based or more stringent point source effluent limitations or nonpoint source best management practices, are not stringent enough to implement water quality standards. In addition, existing regulations require States, Territories and authorized Tribes to identify the pollutants causing or expected to cause violations of water quality standards. EPA guidance on the scope of the list has been incomplete. Successive guidance documents, starting with the guidance issued in April 1991 (*Guidance for Water Quality-based Decisions: The TMDL Process,* EPA 440/4–91–001, April 1991), did not specifically address whether the definition of pollution contained in section 502(19) (''the man made or man-induced alteration of the chemical, physical biological or radiological integrity of water''), or the definition of pollutant in section 502(6) (''the term pollutant means dredged spoil, solid waste, incinerator residue, sewage, garbage, sewage sludge, munitions, chemical wastes, biological materials, radioactive materials, heat, wrecked or discarded equipment, rock, sand, cellar dirt and industrial, municipal and agricultural waste discharged into water * * *'') of the CWA, was the proper basis of determining impairment and listing waterbodies on the section 303(d) list. The result was that some States, Territories and authorized Tribes used the broader definition of pollution while others used the narrower definition of pollutant to identify and list impaired waterbodies. EPA approved lists which identified impaired waterbodies on the basis of both definitions. In August, 1997 EPA issued guidance (*New Policies for Establishing and Implementing Total Maximum Daily Loads,* Robert Perciasepe, Assistant Administrator for Water, August 8, 1997), to clarify the listing requirements for the lists due in April, 1998. The best reading of this guidance and the *National Clarifying Guidance for 1998 State and Territory Section 303(d) Listing Decisions,* Robert H. Wayland III, Director, Office of Wetlands, Oceans and Watersheds, August 27, 1998) issued for the lists due in April, 1998, is that waterbodies are required to be listed and scheduled for establishment of TMDLs only if a pollutant was identified as the source of the impairment and that TMDLs are required only where the impairment or threat is directly attributable to a pollutant, such as nitrogen, copper or excessive sediment. *Proposed rule.* Today's proposal at § 130.25 clarifies that States, Territories and authorized Tribes must list waterbodies impaired or threatened by point sources only, a combination of point and nonpoint sources, and nonpoint sources only, including atmospheric deposition. The proposal also clarifies that waterbodies must be listed regardless of whether the impairment or threat is caused by individual pollutants, multiple pollutants or pollution from any source, including atmospheric deposition.

Listing Requirement: Point/Nonpoint Sources. Although some have argued to the contrary, section 303(d) provides ample authority to list waterbodies impaired by nonpoint sources of pollution and establish TMDLs for waterbodies impaired by nonpoint sources of pollutants. Looking first at the words of section 303(d), there is no express exclusion of nonpoint source impacted waterbodies from the statute's requirements. Section 303(d)(1)(A) requires identification of ''those waterbodies * * * for which effluent limitations required by section [301(b)(1) (A) and (B)] * * * are not stringent enough to implement any water quality standard. * * *'' Nowhere does the section say that nonpoint source impacted waterbodies need not be listed. While it is true that the effluent limitations required by section 301 apply only to point sources, this fact does not necessarily restrict the scope of section 303(d) to point source-only waterbodies.

In general, there are three categories of waterbodies that a State, Territory or authorized Tribe needs to consider for inclusion on its section 303(d) list. First, there are waterbodies impacted solely as a result of point sources. Second, there are waterbodies impacted by both point and nonpoint sources (''blended waterbodies''). Third, there are waterbodies impacted only by nonpoint sources. It is reasonable to read the language of section 303(d)(1)(A) to encompass all three categories of waterbodies.

Waterbodies in the first two categories (point source-only impacts and blended waterbodies) satisfy the section 303(d) listing criteria if those waterbodies do not meet standards (or are threatened) despite the existence of section 301 effluent limits on those waterbodies' point sources. Because those waterbodies do not meet standards (or are threatened), and because they have point source discharges feeding into them, it necessarily follows that existing section 301 limitations on those dischargers (if any) are not stringent enough to implement applicable water quality standards.

Waterbodies in the third category (i.e., those without point source dischargers on them) can also meet section 303(d)(1)(A)'s listing criteria. The first step would be a determination that such waterbodies are not meeting standards. If such a determination is made, it follows that such waterbodies must be listed. By definition such waterbodies have no point source dischargers on them, and, therefore, section 301-required effluent limits can never be stringent enough to implement applicable water quality standards. Therefore, such waterbodies meet the statutory criteria for listing found in section 303(d)(1)(A). Accordingly, it is reasonable for EPA to read the listing requirement language of section 303(d)(1)(A) as extending to nonpoint source-only impacted waterbodies.

The same is true of section 303(d)(1)(C) dealing with TMDLs. That section provides that each State shall establish for the waterbodies identified on a State's list TMDLs ''for those pollutants which the Administrator identifies under section [304] * * * as suitable for such calculation.'' Section 304(a)(2)(D) required EPA to publish ''for the purposes of section [303] * * * the identification of *pollutants* suitable for maximum daily load measurement correlated with the achievement of water quality objectives.'' (Emphasis added). EPA identified such pollutants in December 1978. At that time it said ''[a]ll pollutants, under the proper technical conditions, are suitable for the calculation of total maximum loads''. 43 FR 60665 (Dec. 28, 1978).

As with section 303(d)(1)(A), there is no express exclusion of nonpoint source waterbodies from the TMDL requirements of section 303(d)(1)(C). Assuming that section 303(d)(1)(A) lists cover nonpoint source waterbodies, TMDLs must also be established for pollutants in those waterbodies because—by its very terms—the reach of section 303(d)(1)(C) is coextensive with that of 303(d)(1)(A) (''shall establish for the waterbodies identified in paragraph (1)(A)'').

EPA's belief that section 303(d) applies to nonpoint sources is also consistent with the Clean Water Act's definition of pollutant. An examination of the Act ''as a whole'' supports an interpretation that Congress did not intend to limit the term ''pollutant'' to point sources. The relevant provisions of section 502(6) define the term ''pollutant'' as follows:

> The term *pollutant* means dredged spoil, solid waste, incinerator residue, sewage, garbage, sewage sludge, munitions, chemical wastes, biological materials, radioactive materials, heat, wrecked or discarded equipment, rock, sand, cellar dirt and industrial, municipal, and agricultural waste discharged into water.

Section 319, a section that exclusively addresses nonpoint sources, provides clear evidence that Congress did not intend to limit the use of the term ''pollutant'' to point sources. The very first element of a state's section 319 plan is an ''identification of the best management practices and measures which will be undertaken to reduce *pollutant* loadings resulting from each category, subcategory, or particular nonpoint source. * * *'' section 319(b)(2)(A)(emphasis added). In addition, every year each State must report to EPA any ''reductions in nonpoint source *pollutant* loading and improvements in water quality. * * *'' section 319(h)(11)(emphasis added). Finally, in its report to Congress, EPA must also identify ''the progress made in reducing *pollutant* loads and improving water quality * * *'' as a result of nonpoint source focused activities carried out under section 319. section 319(m)(2)(D) (emphasis added).

In drafting section 319, it is clear that Congress understood that nonpoint sources could cause *pollutant* loadings to waterbodies. Indeed, it asked the States to identify measures to reduce those nonpoint pollutant loadings and required annual reports of any reductions. In the face of these directives, it is not reasonable to think that Congress somehow understood the section 502 definition of ''pollutant'' to apply narrowly to only point sources.

Other sections of the CWA also indicate that Congress felt quite comfortable with the idea that ''pollutants'' can come from nonpoint sources. *See* Section 320(b)(3) (estuary management conference shall ''develop the relationship between the inplace loads and point and nonpoint loadings of *pollutants* to the estuarine zone * * *'') (emphasis added); section 105(d)(1)(EPA shall develop ''waste management methods applicable to point and nonpoint sources of *pollutants* to eliminate the discharge of pollutants, including, but not limited to, elimination of runoff of pollutants and the effects of pollutants from inplace and accumulated sources'') (emphasis added); section 107(a) (in context of mine remediation projects, linking ''acid'' and ''sediment'' impacts to ''other *pollutants*'' without specifying that they must originate from point sources) (emphasis added); section 117(a)(4) (Chesapeake Bay Office shall determine ''impact of *pollutant* loadings of nutrients, chlorine, acid precipitation, dissolved oxygen, and toxic pollutants'' on Bay without specifying that such pollutants must originate from point sources) (emphasis added); section 119(c)(2)(F) (Long Island Sound Office shall study atmospheric deposition of acidic and other *pollutants* into Long Island Sound'' without specifying that such pollutants must originate from point sources) (emphasis added).

Pollutant/Pollution. Today's proposed rule requires States, Territories and authorized Tribes to list all waterbodies impaired or threatened by pollutants, as defined in 40 CFR 130.2(d), and pollution, as defined in 40 CFR 130.2(c). Section 303(d)(1)(A) requires that States, Territories and authorized Tribes identify all waterbodies for which certain specified effluent limits are not stringent enough to implement water quality standards. The focus of the section is on whether or not the water is meeting standards following application of effluent limits. There is no indication that, to be listed, the water must be impaired by a pollutant as opposed to some other form of pollution. Indeed, the section expressly states that, when assigning a priority ranking to listed waterbodies, the State, Territory or authorized Tribe must account for the severity of the waterbody's ''pollution.'' EPA interprets this to mean that a waterbody can be listed if it is impaired or threatened by either pollution or a pollutant.

EPA's interpretation is consistent with the broad goal articulated in section 101(a) of the CWA ''to restore and maintain the chemical, physical, and biological integrity of the nation's waterbodies.'' This consistency is evidenced by the fact that the above-stated goal is mirrored in the Act's definition of ''pollution'' in section 502(19), which is incorporated into the regulations at 40 CFR 130.2(c): ''the man-made or man-induced alteration of the chemical, physical, biological, and radiological integrity of water.'' Accordingly, EPA interprets the statute to allow it to require that waterbodies be listed when any such alteration of their chemical, physical, biological, and radiological integrity causes them to be impaired or threatened. Such alteration can be caused by ''pollutants,'' as that term is defined in section 502(6) of the CWA, or any broader causes of impairment from pollution, such as low flow or degraded aquatic or riparian habitat.

Although the FACA Committee was not able to reach consensus on this issue, the committee noted on page 5 of its report that the TMDLs ''establish the CWA's primary mechanism for addressing water quality impairments'' and, of all CWA provisions, only the

TMDL provisions ''focus broadly on waterbodies that do not meet water quality standards, including beneficial uses.'' The FACA Committee also recognized that ''all stakeholders, including the general public, have a right to know about the health of their waterbodies and, especially, about waterbodies that are impaired and require corrective action.'' It is appropriate to have the section 303(d) list serve as a comprehensive accounting of waterbodies impaired or threatened by pollution and pollutants.

While EPA interprets section 303(d) to require identification of all waters not meeting water quality standards, whether caused by pollutants or pollution, EPA interprets section 303(d) to require that TMDLs only be established where a waterbody is impaired or threatened by a ''pollutant''. (See 130.32(a)). The term pollutant is defined in section 502(6) of the CWA and in the proposed 40 CFR 130.2(d) as follows:

''The term *pollutant* means dredged spoil, solid waste, incinerator residue, sewage, garbage, sewage sludge, munitions, chemical wastes, biological materials, radioactive materials, heat, wrecked or discarded equipment, rock, sand, cellar dirt and industrial, municipal, and agricultural waste discharged into water.'' [Omitted here are certain statutory exclusions.]

Section 303(d)(1)(C) expressly provides that, for listed waterbodies, States shall establish TMDLs ''for those pollutants which EPA has identified as suitable for such calculation''. Section 304(a)(2)(D) required EPA to publish ''for the purposes of section [303] * * * the identification of pollutants suitable for maximum daily load measurement correlated with the achievement of water quality objectives.'' EPA identified such pollutants in December 1978. At that time, EPA said that ''[a]ll pollutants, under the proper technical conditions, are suitable for the calculation of total maximum loads''. 43 FR 60665 (Dec. 28, 1978). The clear reference to ''pollutants'' in section 303(d)(1)(C), as well as in sections 303(d)(3) and 304(a)(2)(D), supports the conclusion that EPA is authorized to require that TMDLs be established only for pollutants as defined in section 502(6), and not for pollution.

EPA acknowledges an argument could be made that, while Congress was not as specific about its use of the word ''pollutant'' in section 303(d)(1)(A) dealing with listing as it was in section 303(d)(1)(C) dealing with TMDLs, the scope of a State's list should be the same as its obligation to do TMDLs. By that logic, only waterbodies impaired or threatened by pollutants would be included on a State's list. EPA disagrees with this position, not only because it believes its own interpretation of section 303(d) is more reasonable, but also because it sees great value in listing waterbodies impaired or threatened by both pollutants and pollution.

Threatened Waters. Today's proposal at § 130.25 retains the existing regulatory requirement that States, Territories and authorized Tribes list impaired and threatened waterbodies. To further clarify the scope of this requirement, EPA is also proposing at § 130.2(n) to define a threatened waterbody as one that currently meets water quality standards, but for which adverse declining trends indicate that standards will be exceeded by the next listing cycle.

The FACA Committee spent considerable time addressing this issue, both in terms of whether threatened waterbodies should be listed and, if so, how to define ''threatened waterbodies.'' They did not reach consensus on whether the TMDL regulations should require States to list threatened waterbodies. The FACA Committee recommended that ''threatened waterbodies be put on a discrete list for focused attention, with the goal of keeping them from becoming impaired.'' The Committee did not recommend that TMDLs be required for threatened waterbodies. The Committee did recommend that a watershed-based loadings analysis be performed for threatened waterbodies as soon as possible, consistent with the State's priority list, but at a minimum, before new or modified permits that allow increased discharges to a threatened waterbody or other actions that would contribute to increased pollution to a threatened waterbody over which the State has approval authority, are issued. The loadings analysis would not necessarily include all of the components of a TMDL for impaired waterbodies, but would have to provide for restoration so that the waterbody is no longer threatened.

EPA interprets section 303(d)(1)(A) to provide authority for EPA to require that states list threatened, as well as impaired, waterbodies. Pursuant to that section, each state must identify those waterbodies for which effluent limitations required by section 301(b)(1)(A) and (B) ''are not stringent enough to implement any water quality standard applicable to such waterbodies.'' In the case of ''threatened waterbodies'', data showing a declining trend in water quality may indicate that, although the waterbody currently attains water quality standards, it is not likely to do so by the time of the next listing cycle. That being the case, the State may determine that currently applicable effluent limitations are not stringent enough to implement water quality standards. If they were stringent enough, there would not be a declining water quality trend foreshadowing nonattainment before the next listing cycle. Rather than ignore such declining water quality data, the CWA gives EPA the authority to require that threatened waters be listed.

EPA's decision to propose that the list include threatened waterbodies is consistent with one of the CWA's fundamental goals—to protect water quality from deterioration. In addition, the inclusion of threatened waterbodies on State, Territorial and authorized Tribal lists reflects EPA's view that it is more desirable, both environmentally and economically, to protect waterbodies from possible impairment than to wait until they are impaired and then need to be restored. Through today's proposed comprehensive listing process, States, Territories and authorized Tribes can become aware of the threatened status of a particular waterbody and then initiate actions to prevent the waterbody from becoming impaired. EPA is specifying, consistent with the FACA recommendations, a definition of threatened waterbodies as likely to exceed water quality standards within the next two years when the determination that a waterbody is threatened is based on data that show a significant declining trend or knowledge of specific changes that would adversely impact water quality. In determining whether to list threatened waterbodies, states should consider information on known sources that have either recently been added or removed or are expected to be added or removed in order to determine if an apparent declining trend is likely to continue, or if a waterbody is likely to be impaired by the next listing cycle despite the absence of a trend.

Atmospheric Deposition. The FACA Committee was not able to reach consensus on how the TMDLs should address waterbodies impaired or threatened by atmospheric deposition. Consistent with EPA's view that the section 303(d) listing requirement applies to all sources of impairment and threat, today's proposal at § 130.25(b)(2) codifies existing EPA policy that States must list waterbodies impaired or threatened by atmospheric deposition. EPA recognizes that data, analytical approaches and models to establish TMDLs for pollutants originating from air deposition may not be immediately available, especially for pollutants subject to long range transport in the

atmosphere. EPA recommends that where additional time is needed to develop data, analysis, or models for air deposition of pollutants significantly contributing to a water quality impairment, States, Territories and authorized Tribes assign these waterbodies a low priority for establishment of TMDLs.

Relationship to Antidegradation Requirements in Water Quality Standards. Today's proposal (§ 130.26) also clarifies how State, Territorial and authorized Tribal antidegradation policies affect the identification and listing of impaired and threatened waterbodies under section 303(d). Antidegradation policies and associated implementation procedures are an essential part of State, Territorial and authorized Tribal water quality standards programs and are required under 40 CFR 131. Antidegradation policies help ensure that water quality necessary to support existing uses (Tier 1) and water quality which is better than needed to support protection and propagation of fish, shellfish and wildlife and recreation in and on the water (Tier 2) is maintained unless through a public process, a decision has been made to allow some decline in water quality. Antidegradation policies also identify and protect waterbodies of exceptional recreational and ecological significance. (Tier 3)

The purpose of section 303(d) is to identify impaired and threatened waterbodies while the purpose of antidegradation policies is to prevent deterioration of existing levels of good water quality. There is a relationship, however, between section 303(d) listing requirements and antidegradation policies.

Tier 3 waterbodies are waterbodies of exceptional recreational or ecological significance. Generally, when a State, Territory or authorized Tribe has identified waterbodies as Tier 3, no decline in water quality is allowed. Today's proposal requires that decline in water quality for Tier 3 waterbodies represents an impairment for the purpose of section 303(d). These waterbodies must be identified and listed.

Tier 2 waterbodies are waterbodies for which existing water quality is better than necessary to support propagation of fish, shellfish, wildlife and recreation. Since existing water quality is better than required, these waterbodies do not need to be listed as impaired under section 303(d). Any decline in existing water quality is not authorized unless an antidegradation analysis is completed as required in 40 CFR 131. Tier 2 waterbodies may, however, be threatened and must be listed when adverse trend data and information indicate that a designated use will not be maintained by the time of the next listing cycle.

All waterbodies are subject to Tier 1 protection. Generally, Tier 1 waterbodies do not exceed section 101(a)(2) goals or do not have additional assimilative capacity to receive additional amounts of a pollutant without exceeding the existing use. Tier 1 waterbodies are impaired and must be listed if the designated use is not being attained. In some cases, Tier 1 waterbodies may be listed if existing uses have been identified pursuant to 40 CFR 131.3. An existing use is a use that has actually occurred since November 28, 1975 (when the water quality standards regulation was published) or where water quality is suitable to allow such a use to occur. States, Territories and authorized Tribes must incorporate existing uses into their designated uses pursuant to 40 CFR 131.10(i). The water quality standards regulation provides, however, that a demonstration of an existing use different than a designated use may be made to the State, Territory or authorized Tribe. In the case that such a demonstration is made by a member of the public, a waterbody must be listed if the existing use is more protective than the designated use. EPA expects that most Tier 1 waterbodies identified as impaired and listed on the section 303(d) list will be listed on the basis of designated uses.

Options considered. In developing today's proposal, EPA considered other options for defining the scope of the list. EPA considered whether to limit the list to impaired waterbodies and not require States, Territories and authorized Tribes to also list threatened waterbodies. EPA recognized that this option might allow States, Territories and authorized Tribes to focus the limited resources for TMDLs more effectively on addressing existing impairments. EPA did not propose this option because EPA believes it is inconsistent with the goals of the CWA and a list that serves as a comprehensive public accounting of impaired and threatened waterbodies. EPA also considered whether to allow States, Territories and authorized Tribes not to list waterbodies impaired or threatened by nonpoint sources only, as well as waterbodies impaired or threatened by atmospheric deposition. EPA did not propose these options because they are inconsistent with EPA's interpretation of section 303(d) and the goals of the CWA. Finally, when deciding on the proper scope of the list, EPA considered whether to require States, Territories and authorized Tribes to establish TMDLs for all waterbodies impaired or threatened by either pollutants or pollution. Based on EPA's interpretation that section 303(d) requires TMDLs to be established only where a waterbody is impaired or threatened by pollutants, today's action does not propose that TMDLs be established for waterbodies impaired or threatened by pollution.

Comments sought. EPA solicits comments on any or all aspects of the proposal, including options considered. EPA solicits comments on the proposed requirement that States, Territories and authorized Tribes must list waterbodies impaired or threatened by pollution and by pollutants. EPA also seeks comment on today's proposal to retain the existing regulatory requirement to list threatened bodies. In addition, EPA seeks comment on today's proposal to codify existing EPA guidance to require States, Territories and authorized Tribes to list waterbodies impaired or threatened by an unknown pollutant and by all sources, including nonpoint sources only and atmospheric deposition. EPA seeks comment on today's clarification that TMDLs must be established only for waterbodies impaired or threatened by pollutants. Finally, EPA seeks comments on the listing requirements for impaired and threatened waterbodies stemming from State, Territorial, and authorized Tribes' antidegradation policies.

c. Required Components of the List

Existing requirements. The existing regulations (at 40 CFR 130.7(b)) require that the list developed under section 303(d) of the CWA consist of ''water quality-limited segments still requiring TMDLs,'' but recognize that certain waterbodies, while impaired or threatened, do not require TMDLs and therefore need not be included on the list. The existing regulations (at 40 CFR 130.7(b)(1)) identify such waterbodies as those that are expected to attain or are already attaining water quality standards following the application of best practicable control technology for point sources and secondary treatment for publicly owned treatment works, more stringent effluent limitations required by either Federal, State or local authorities, or other required pollution controls (such as best management practices).

Existing regulations do not address the question of when States, Territories and authorized Tribes can remove previously listed waterbodies from their lists. Current guidance (*Guidance for 1994 Section 303(d) Lists*, Geoffrey H. Grubbs, Director, Assessment and Watershed Protection Division,

November 26, 1993 and *National Clarifying Guidance for 1998 State and Territory Section 303(d) Listing Decisions*, Robert H. Wayland III, Director, Office of Wetlands, Oceans and Watersheds, August 27, 1997) addresses the issue by identifying two circumstances that would justify removing previously listed waterbodies. These circumstances are: (1) if water quality standards are being attained or are expected to be attained within two years, or (2) if, upon re-examination, the original basis for listing the waterbodies is determined to be inaccurate. In addition, current guidance (*Guidance for 1994 Section 303(d) Lists*, Geoffrey H. Grubbs, Director, Assessment and Watershed Protection Division, November 26, 1993) gives States, Territories and authorized Tribes the option of removing previously listed waterbodies after EPA approves a State-established TMDL.

Proposed rule. Today's proposal (at 40 CFR 130.27) eliminates the term ''water quality-limited segments still requiring TMDLs'' from the regulations and broadens the scope of the list. Today's proposal requires States, Territories and authorized Tribes to list *all* impaired or threatened waterbodies, regardless of whether the waterbody is expected to attain water quality standards following the application of technology-based controls required by section 301 and 306 of the CWA, more stringent effluent limitations, or other required pollution controls. As already discussed, this includes waterbodies impaired or threatened by individual pollutants, multiple pollutants and pollution from all sources, waterbodies impaired or threatened by unknown pollutants or pollution and waterbodies impaired or threatened by atmospheric deposition. The proposal also clarifies that States, Territories and authorized Tribes must list waterbodies impaired or threatened by point sources, a combination of point and nonpoint sources only.

Today's proposal at § 130.27 establishes a specific format for States, Territories, and authorized Tribes follow which organizes the types of waterbodies included on the list and clearly identifies which waterbodies require the establishment of TMDLs. The proposed rule requires that State, Territorial and authorized Tribal lists consist of four parts:

- Part 1—Waterbodies impaired or threatened by one or more pollutants or unknown cause as defined by 40 CFR 130.2(d). A TMDL is required for waterbodies on this part of the list.
- Part 2—Waterbodies impaired or threatened by pollution as defined by 40 CFR 130.2(c) but not impaired by one or more pollutants. A TMDL is not required for waterbodies on this part of the list.
- Part 3—Waterbodies for which EPA has approved or established a TMDL and water quality standards have not yet been attained.
- Part 4—Waterbodies that are impaired, for which implementation of best practicable control technology for point sources and secondary treatment for publicly owned treatment works or controls enforceable by State, Territorial, authorized Tribal or Federal law or regulation are expected to result in attainment of water quality standards by the next listing cycle. A TMDL is not required for waterbodies on this part of the list. If a waterbody on Part 4 does not attain water quality standards by the time the next list is due to EPA, it must be included on Part 1 of the list.

Today's proposal is meant to ensure that all impaired and threatened waterbodies are identified and placed on the list. EPA does not expect States, Territories, and authorized Tribes to list waterbodies for which there is no existing and readily available data and information that indicates the existence of an impairment or threat. EPA does expect, however, the State, Territory, or authorized Tribe to list impaired or threatened waterbodies if such data demonstrates impairment or threat and believes a pollutant or pollution is the cause of the impairment or threat. If the State, Territory, or authorized Tribe believes a pollutant is the cause of the impairment or threat, but does not know the specific identity of the pollutant, the waterbody must be included on Part 1 of the list and scheduled for the establishment of a TMDL. EPA expects that the pollutant causing the impairment will be identified as part of establishing the TMDL. EPA anticipates, in some cases, that new and additional data and information may need to be generated to identify the cause of the impairment. If the cause of the impairment or threat is identified as pollution, no TMDL is required and the waterbody should be placed on Part 2 of the list.

This requirement to list where the exact pollutant is unknown is especially important with regard to waterbodies identified as impaired or threatened on the basis of biological data or screening methods. Unlike impairments or threats attributed to physical or chemical data and information, in which the pollutant or pollution is intrinsically known or evident, impairments or threats identified by the use of biological data or screening methods may not be as easily traced back to the underlying cause. A chemical pollutant, for example, that exceeds in-stream criteria is generally identifiable. The pollutant or pollution causing biological impairment, on the other hand, may not be readily apparent. A bioassessment of a stream may indicate unhealthy aquatic populations which fail to attain or maintain the designated use. The bioassessment, however, generally does not indicate the pollutant causing the impairment. EPA stresses that the first step in establishing a TMDL for these kinds of impairments is identifying the cause of the impairment and the pollutant for which the TMDL must be established. Requiring waterbodies which are impaired or threatened but for which the cause of the impairment or threat is unknown to be listed on part 1 of the list will provide an incentive for States, Territories and authorized Tribes to expeditiously identify the pollutant causing the impairment or threat at the time when that waterbody is placed on the list. If the cause of the impairment is determined to be pollution, no TMDL is required and the waterbody should be placed on part 2 of the list. This approach is consistent with EPA's evolving approach for the use of biological assessments and criteria.

Today's proposal at § 130.29 adopts the FACA Committee's recommendations that waterbodies remain listed until water quality standards are attained, and that a previously listed impaired waterbody may be removed from the list only when new data or information indicate that the waterbody has attained water quality standards or that the waterbody was incorrectly listed. Similarly, the proposed rule specifies that a previously listed threatened waterbody may be removed from the list when new data or information indicate that the waterbody is no longer threatened or that the waterbody was incorrectly listed. EPA adopted these FACA Committee recommendations because it believes that the section 303(d) list of impaired and threatened waterbodies is a comprehensive accounting of where the water quality problems in any State, Territory or authorized Tribe are. Retaining waterbodies on the list until water quality standards are attained provides a way to measure progress for program managers and other stakeholders.

EPA proposes that additional waterbodies be included on Part 4 of the list. These waterbodies are waterbodies for which implementation of best practicable control technology for point sources, secondary treatment for publicly owned treatment works, or controls enforceable by State or Federal law or regulation are expected to result in attainment of water quality standards by the next listing cycle. Some examples of enforceable controls which may achieve water quality standards are state

regulations or local ordinances requiring erosion control, state laws requiring manure management practices, NPDES controls for point sources based on best available technology, and Habitat Conservation Plans adopted under the Endangered Species Act (ESA). EPA believes that it is appropriate to provide time to allow controls such as these to attain water quality standards, especially in light of the large numbers of TMDLs that need to be established nationally.

Section 303(d)(1)(C) provides that each State, Territory or authorized Tribe shall establish TMDLs for waterbodies identified on the § 303(d) list ''for pollutants which the Administrator identifies * * * as suitable for such calculation.'' Section 304(a)(2)(D) required EPA to publish ''for purposes of section [303] * * * the identification of pollutants suitable for maximum daily load measurement correlated with the achievement of water quality objectives.'' EPA identified such pollutants in December, 1978. At that time it said, ''all pollutants, under proper technical conditions, are suitable for calculation of total maximum daily loads.'' (43 FR, 60665, Dec. 28, 1978)

The current proposal does not change the determination that all pollutants, under proper technical conditions, are suitable for calculation of TMDLs. The proper technical conditions for TMDL calculations are that data, analyses, or models are available or can reasonably be developed to establish a TMDL consistent with the requirements proposed today. Since EPA considers all pollutants suitable for calculation in nearly all situations, today's proposed rule does not enumerate or identify specific situations in which data, analyses or models are not available to establish TMDLs. EPA could, however, identify and describe situations, either in the final rule or in guidance, for which the proper technical conditions are not available to establish TMDLs. One example of a situation that EPA might identify is waters impaired primarily by air deposition of pollutants. If EPA were to identify specific situations where the proper technical conditions for TMDLs are not available, EPA could also specify that these waters could be included as a separate part of the list to be reviewed at each review cycle by the State and approved by EPA. EPA asks for comment on the advisability of identifying specific situations where the proper technical conditions for establishment of a TMDL are not met, and what those specific situations might be.

Other options considered. In developing today's proposal, EPA considered other ways to format the list. The options EPA considered focused on whether or not to divide the list into a number of different parts or segments. EPA decided to create a segmented list as a way to improve and better organize State and EPA management of the section 303(d) list and to provide important information to the general public and other stakeholders about the status of the listed waterbodies and the reasons for listing them. EPA also considered various options when deciding the appropriate categories for segmenting the list. One option EPA considered was whether to include a category for waterbodies for which there is some evidence of threat or impairment, but which would not be immediately scheduled for establishment of TMDLs. Waters could have been placed in this category if the State, Territory or authorized Tribe committed to collect additional data and information or conduct additional monitoring necessary to support establishment of TMDLs. EPA did not propose this option because it concluded that there was no need to delay scheduling waterbodies for TMDL establishment based on less than conclusive evidence of impairment or threat since any additional needed data or information could be obtained during the period between listing and State, Territorial and authorized Tribal establishment of the TMDL.

EPA also considered whether to continue the current regulatory requirement that gives States, Territories and authorized Tribes the option not to list waterbodies that fail to meet water quality standards, but for which other pollution control requirements or actions are planned or are being implemented that are expected to provide for standards attainment. The FACA Committee did not reach consensus on this issue. EPA did not propose this option because it is inconsistent with its view that the section 303(d) list should serve as a comprehensive public accounting of all waterbodies impaired or threatened by pollution and pollutants, irrespective of the tool or mechanism being used to achieve standards.

EPA also concluded that allowing waterbodies to be removed from State, Territorial or authorized Tribal lists once a TMDL has been approved by EPA is inconsistent with our belief that State, Territorial and authorized Tribal lists provide for a comprehensive public accounting of all waterbodies that are not attaining or are not expected to attain water quality standards. In addition, EPA agreed with the FACA Committee that requiring waterbodies to remain listed until they attain standards could serve as an incentive to establish and implement the TMDL, resulting in the restoration of impaired waterbodies.

Comments sought. EPA seeks comments on today's proposal to create a new format for the list of impaired and threatened waterbodies and to broaden the scope of the list to include waterbodies that are expected to attain standards after the application of technology-based controls required by sections 301 and 306 of the Act, more stringent effluent limitations, or other required pollution controls. EPA also seeks comment on our proposed criteria for removing waterbodies from the list. EPA solicits comments on any or all aspects of the proposal, including the options considered. EPA also asks for comment on the advisability of identifying specific situations where the proper technical conditions for establishment of a TMDL are not met, and what those specific situations might be.

d. Assigning Priorities to Listed Waterbodies

Existing requirements. Section 303(d) of the CWA and EPA's existing regulations require that States, Territories and authorized Tribes assign a priority ranking to each listed waterbody. Existing regulations specify that the priority ranking must include an identification of the pollutant(s) causing or expected to cause each waterbody's impairment and an identification of the waterbodies targeted for TMDL development in the next two years. Section 303(d) requires States, Territories and authorized Tribes to determine priority rankings by taking into account the severity of the pollution and the uses to be made of the waterbody. The statute does not explain how these factors should be taken into account and the current regulation does not expand on the statutory language. EPA guidance (*Guidance for Water Quality-based Decisions: The TMDL Process*, EPA 440/4–91–001, April 1991) acknowledges discretion in developing and assigning priority rankings and suggests a number of factors that States, Territories and authorized Tribes may consider, based on our belief that the statutory factors are not exclusive. These factors include immediate programmatic needs, vulnerability of particular waterbodies as aquatic habitats, recreational, economic and aesthetic importance of particular waterbodies, degree of public interest and support and State, Territorial

authorized Tribal, or national policies and priorities.

Proposed rule. Today's proposal at § 130.28 affirms the existing statutory and regulatory requirement that States, Territories and authorized Tribes assign a priority ranking to each listed waterbody. It also includes a new requirement that States, Territories and authorized Tribes assign either a ''high,'' ''medium,'' or ''low'' priority to each listed waterbody and pollutant combination on Part 1 of the list. States, Territories and authorized Tribes must assign a ''high'' priority to impaired waterbodies with water quality standards designated uses as public drinking water supplies where the impairment is contributing to a violation of an MCL, and for waterbodies in which species listed as endangered or threatened under section 4 of the ESA unless the State, Territory, or authorized Tribe shows that the impairment does not affect the listed species. Today's proposal maintains the existing regulations' requirement that the pollutant, pollutants, and/or pollution causing or expected to cause impairment be identified for each listed waterbody. Identification of each pollutant or type of pollution that causes or contributes to impairment of a waterbody is a critical part of the listing process because it sets the stage for TMDL development and helps the State, Territory and authorized Tribe determine appropriate priorities and schedules. Today's proposal, however, eliminates the current requirement that the priority ranking include an identification of the waterbodies targeted for TMDL development in the next two years. This is because EPA is proposing (at 40 CFR 130.31) a requirement that States, Territories and authorized Tribes develop a comprehensive schedule for establishing TMDLs for all waterbodies and pollutants on Part 1 of the list. A separate requirement to identify the waterbodies for which TMDLs will be developed over the next two years is unnecessary.

The priority ranking of impaired waterbodies and identification of the pollutant(s) or pollution causing or expected to cause each waterbody's impairment are important elements of each State list. The CWA provides States, Territories and authorized Tribes broad discretion in deciding how to rank their listed waterbodies. Adding a requirement that States must assign waterbodies a priority ranking of either ''high,'' ''medium,'' or ''low'' will enhance national consistency and help States and the public understand the relative significance of establishing TMDLs on specific waterbodies. EPA is proposing that all impaired and threatened waterbodies and pollutant combinations for which the impairment contributes to a violation of an MCL in waters where the designated use is public drinking water supply or in which a threatened or endangered species is present, be assigned a high-priority ranking by States, Territories and authorized Tribes. However, if a State, Territory or authorized Tribe shows that the impairment does not affect threatened or endangered species, it is not required to assign a high priority to that waterbody.

As noted earlier in section 4.a. of this preamble, States, Territories and authorized Tribes are required to provide EPA with a methodology illustrating how they considered the severity of the impairment and the use of the waterbody in identifying impaired and threatened waterbodies. Today's proposal requires the same type of illustration regarding the setting of priorities.

Finally, today's proposal provides, at §§ 130.28(d) and (e), that States, Territories and authorized Tribes may consider additional factors such as efficiencies gained by establishing TMDLs for all pollutants that cause or contribute to impairment of a listed waterbody; establishing TMDLs for single or multiple pollutants in multiple waterbodies on a watershed scale; the vulnerability of particular waterbodies; the value of particular waterbodies; the recreational, economic and aesthetic importance of particular waterbodies; the cost and complexity of establishing and implementing TMDLs; degree of public interest and support; and State, Territorial or authorized Tribal policies in setting priorities. All of the above factors are important and they should be considered when setting priorities. Consideration of these factors will help States, Territories, authorized Tribes and stakeholders set priorities efficiently and in recognition of larger environmental and community needs.

Section 130.32(b) provides that States, Territories and authorized Tribes must establish TMDLs in accordance with the priority rankings established in accordance with § 130.28. EPA does not, however, intend to disapprove an otherwise approvable TMDL simply because it was not developed in accordance with a State's, Territory's or authorized Tribe's schedule or the priority ranking assigned to the waterbody on the section 303(d) list. EPA does not believe disapproving such a TMDL is required by section 303(d) or consistent with the goal of implementing TMDLs which conform with applicable water quality standards. EPA may, however, consider the extent to which a State, Territory or authorized Tribe is developing TMDLs that are not in accordance with its priority rankings and schedule when making a decision under § 130.36(a) to step in and establish TMDLs. For example, if a State, Territory or authorized Tribe is ignoring its high priority waters and submitting too many low or medium priority TMDLs, EPA may decide to establish some high priority TMDLs itself.

Other options considered. In developing today's proposal, EPA considered other options for addressing the statutory requirement for priority ranking. EPA considered proposing a more prescriptive approach than the existing regulations and specifying factors that States, Territories or authorized Tribes would have to consider when determining whether to rank a particular waterbody as high, medium or low. The factors considered include the type and individual characteristics of the pollutant, e.g., toxic chemical, sediment; the use of the waterbody, e.g., drinking water, cold water sport fishery; the degree of impairment, e.g., numeric rankings; the difficulty and/or time involved in establishing the TMDL, e.g., most difficult TMDLs established first or in the alternative ranked lower to allow more time for the technical work necessary to establish a TMDL; or the amount of time expected to attain or maintain water quality standards. EPA also considered deferring entirely to State discretion on deciding how to rank waterbodies and not even requiring a basic high, medium or low ranking. In selecting the approach proposed today, EPA also considered the FACA Committee's recommendations to address this issue in guidance and balanced the importance of national consistency with the need for State latitude in setting priorities. EPA has determined that it is appropriate to require States to assign rankings of high, medium or low priority to each listed waterbody. EPA also considered not specifically requiring that waterbodies with designated uses as public water supplies in which there is a violation of an MCL or in which a threatened and endangered species is present be designated ''high'' priority. EPA proposes to address these waters specifically because it is important that these waterbodies be scheduled for TMDL establishment as soon as possible and EPA wanted to make sure that human health and endangered and threatened species concerns were

appropriately considered by all the States, Territories and authorized Tribes. EPA also considered the option of making human health and species concerns one (but not a determinative) factor in deciding whether to rank a waterbody in the ''high'' category.

EPA also considered whether to retain the current regulatory requirement that States, Territories and authorized Tribes identify the waterbodies targeted for TMDL establishment over the next two years in lieu of a new requirement that States, Territories and authorized Tribes develop a comprehensive schedule for establishing TMDLs for all waterbody and pollutant combinations on Part 1 of the list. However, as explained in section 4.e, below, EPA agreed with the FACA Committee's recommendation for a regulatory requirement that States, Territories and authorized Tribes develop overall schedules for TMDL establishment and today proposes to delete the targeting requirement.

EPA also considered providing different TMDL priority ranking requirements for impairments or threats resulting from ''extremely difficult to solve'' problems. An example impairment of this type is contaminated sediments which often result from the legacy of past introduction of pollutants. In many cases, the pollutant causing the impairment or threat is no longer being discharged. Allocations and cleanup may be difficult and require additional time to establish TMDLs or attain or maintain water quality standards. EPA did not propose that extremely difficult to solve problems be treated any differently because waterbodies with these types of impairments may require action sooner, rather than later, particularly when they meet the high priority requirements established by the proposal.

Comments sought. EPA seeks comment on today's proposal to require States, Territories and authorized Tribes to assign a high, medium, or low priority to each listed waterbody and delete the current targeting requirement. EPA seeks comments on requiring that impaired waterbodies with designated uses as public drinking water supplies and for which there is a violation of an MCL due to the impairment be ranked as high-priority for establishment of TMDLs. EPA also seeks comments on requiring that impaired waterbodies with endangered and threatened species present be ranked as high-priority for establishment of TMDLs, unless a State, Territory or authorized Tribe shows that the impairment does not affect the species. EPA seeks comment on what types of impairments, if any, should be considered difficult to solve and whether these types of impairments should be treated differently as priorities for establishing TMDLs are set. It also seeks comments on the other options considered and any alternatives for ensuring that human health and aquatic species concerns be given appropriate weight in making listing decisions. EPA also seeks comment on whether to allow the States, Territories and authorized Tribes to consider factors in addition to the statutory factors in establishing priority rankings. EPA solicits comments on any or all aspects of the proposal, including the options considered. After considering all comments received and any additional information that may become available, EPA may include any of the options discussed here in the final rule.

e. Establishing a Schedule for TMDL Development

Existing requirements. Existing statutory and regulatory requirements do not call for States to develop or submit to EPA a schedule for developing TMDLs for all listed waterbodies. Current regulations simply require that States identify, within their priority rankings, those waterbodies for which TMDLs will be targeted for development over the next two years.

The FACA Committee strongly endorsed a regulatory requirement that States, Territories and authorized Tribes establish TMDLs according to an expeditious schedule. One of the reasons for the committee's recommendation is the historically low numbers of TMDLs established by States, Territories and authorized Tribes. In reaching agreements with some of the plaintiffs in recent litigation over TMDLs, EPA has recognized the importance of timely TMDL establishment and has committed to ensuring the establishment of TMDLs for all listed waterbodies within time frames similar to that recommended by the FACA Committee.

In August 1997, EPA's Assistant Administrator for Water issued a policy memorandum specifically asking States, Territories and authorized Tribes to develop 8–13 year schedules for establishing TMDLs for all listed waterbodies, beginning with the lists submitted to EPA in 1998. The August 1997 policy memorandum also described several factors that States should consider in developing their schedules. These factors, echoed in part by the FACA Committee's recommendations, include: the number of waterbodies on a list, including the length of river miles and number of lake acres impaired or threatened; the number and complexity of TMDLs to be established; the availability of data or models; and the relative significance of the environmental harm or threat. The FACA Committee recommended that EPA regulations require States, Territories and authorized Tribes to develop expeditious schedules of not more than 8–15 years for establishing TMDLs for listed waterbodies.

Proposed rule. Today's proposal, at § 130.31, eliminates the current regulatory requirement that States, Territories and authorized Tribes, in their priority rankings, identify those waterbodies for which TMDLs will be established over the next two years. EPA is today affirming its August 1997 policy direction and the FACA Committee's recommendation and is requiring that States develop comprehensive schedules for establishing TMDLs for all waterbodies included on Part 1 of the list (as described in section 4.c, above). Today's proposal requires that such schedules be as expeditious as practicable, provide for a reasonable pace of establishing TMDLs over the life of the schedule and not extend beyond 15 years. In addition, today's proposal recommends that TMDLs for high priority waterbody and pollutant combinations on Part 1 of the list should be scheduled for establishment before medium and low priority waterbodies. Setting an overall time requirement for TMDL establishment, as well as requiring a reasonable pace of TMDL establishment over the duration of the schedule, will encourage timely, concerted action by States, Territories and authorized Tribes leading to increased numbers of approved TMDLs.

The proposed requirement to establish a schedule for TMDL development is consistent with the language of section 303(d), which requires States to submit TMDLs for listed waterbodies beginning 180 days after the Administrator identifies the pollutants suitable for TMDL calculation, and ''from time to time'' thereafter. The Act does not define ''from time to time,'' and therefore EPA today proposes to define that term to mean submission of TMDLs at a reasonable pace over no more than the next fifteen years. In addition, EPA proposes that State, Territorial and authorized Tribal schedules should provide for establishment of high-priority TMDLs before TMDLs are established for medium and low-priority waterbodies. It is reasonable to expect States, Territories and authorized Tribes to establish TMDLs for high priority waterbodies on Part 1 of their lists before establishing TMDLs for lower priority waterbodies. While the number

of such waterbodies will differ from State to State, as will complexity of TMDL development and resource availability, the proposed provision should allow sufficient time for even those States with a relatively large number of high-priority waterbodies on Part 1 of their lists to establish TMDLs for waterbodies consistent with the requirements of section 303(d) that priority rankings take into account the uses to be made of waterbodies and the severity of the impairment when setting priorities for establishing TMDLs.

Today's proposal recognizes the statutory requirement that States, Territories and authorized Tribes assign a priority ranking to each listed waterbody. EPA recognizes that there are a number of ways that States, Territories and authorized Tribes may schedule TMDLs for establishment and implementation. These include focusing on waterbodies concurrently that are impaired by a particular pollutant or category or subcategory of sources or that share common ecosystem characteristics. EPA intends the prioritization and scheduling provisions in today's proposal to be flexible enough to accommodate such considerations.

EPA also recognizes and supports the watershed approach, under which States, Territories, and authorized Tribes may choose to establish all TMDLs in the same watershed at the same time. EPA strongly supports the watershed approach, but wants to ensure that States, Territories, and authorized Tribes do not depart too far from their priority rankings. EPA invites comment on the best way to integrate the statutory requirement for priority rankings with the watershed approach.

EPA recommends that States, Territories and authorized Tribes adopt a goal to establish TMDLs for all high-priority waterbodies within five years. EPA considered the FACA Committee recommendation that all high-priority TMDLs be required to be established within five years. Today's proposal, however, reflects that many States, Territories and authorized Tribes will have more high-priority waterbodies than can reasonably be expected to be established within five years based on available resources. EPA also understands that it may not make sense for States, Territories and authorized Tribes to individually schedule every TMDL, especially those with medium or low priority. States, Territories and authorized Tribes may schedule groups of TMDLs, on a watershed or some other appropriate basis, for TMDLs to be established in later years of the schedule.

Other Options Considered. In developing today's proposal, EPA considered several options. For example, EPA considered maintaining the current regulatory requirement that States, Territories and authorized Tribes identify only those waterbodies for which TMDLs will be developed over the next two years, and not requiring States to develop an overall schedule for TMDL establishment. EPA did not propose this option, even though it is often difficult to estimate the amount of time needed to develop TMDLs, especially when lists may include hundreds of impaired or threatened waterbodies. It is desirable for States, Territories and authorized Tribes to plan, on a long-term basis, for the establishment of all needed TMDLs. Moreover, many States, Territories and authorized Tribes have adopted, or are moving toward adopting, a rotating basin or watershed approach to water quality management. Under such an approach, States, Territories and authorized Tribes generally work sequentially through each of their basins on a five year cycle. They may collect data in a basin in the first year, analyze the data in the second year to assess the water quality in the basin, establish TMDLs and other management strategies in the third year, implement TMDLs and management strategies in the fourth year, and monitor for progress in the fifth year. Developing an overall schedule for TMDL establishment allows States, Territories and authorized Tribes to ensure compatibility between their rotating basin approaches and TMDL establishment.

Comments sought. EPA seeks comments on the proposed approach to require States, Territories and authorized Tribes to develop schedules for the establishment of TMDLs for all waterbodies on Part 1 of the list. EPA also seeks comments on the proposed requirement that States, Territories and authorized Tribes should schedule all high priority TMDLs for establishment before establishing TMDLs for medium and low-priority waterbodies. EPA solicits comments on any or all aspects of the proposal, including the options considered and may adopt any of the options discussed here in the final rule.

f. Submission of Lists, Priority Rankings, Listing Methodologies, and Schedules to EPA

Existing requirements. The statute and existing regulations require States to submit their lists to EPA for review and approval. Section 303(d) provides EPA with 30 days from the date of a State's submittal to either approve or disapprove the list. If EPA disapproves the list, EPA has an additional 30 days to establish the list. Existing regulations specify that the lists submitted by States to EPA for review must include the identification of the pollutant or pollutants causing or expected to cause the impairment or threat, the priority ranking of listed waterbodies, and the waterbodies identified for TMDL development over the next two years. Existing regulations also require States, Territories and authorized Tribes to submit to EPA their listing methodology; existing regulations do not, however, provide for EPA review and approval or disapproval of the methodology. Under the existing regulations, State, Territorial and authorized Tribal lists are to be submitted to EPA every two years, on April 1 of every even-numbered year.

Proposed rule. Today's proposal at 40 CFR 130.27(b) maintains the existing regulatory requirement that State, Territorial and authorized Tribal waterbody lists identify the pollutant(s) and/or pollution causing or expected to cause the impairment or threat, and the priority rankings of waterbody/pollutant combinations. Lists of impaired and threatened waterbodies must be submitted to EPA for review and approval or disapproval. As required by the statute, EPA will have 30 days to review and approve or disapprove each list. Today's proposal, at § 130.30(e), provides that EPA may establish a list of impaired and threatened waterbodies, including pollutant/pollution combinations and priority rankings, if a State, Territory or authorized Tribe asks EPA to do so, or if EPA determines that a State, Territory or authorized Tribe has not or is not likely to establish such list consistent with the schedule specified in § 130.30(a). As discussed later in this preamble, EPA believes it has authority under section 303(d) of the Clean Water Act to establish TMDLs if asked to do so, or if it determines that States, Territories, or authorized Tribes have not or are not likely to establish such TMDLs consistent with their schedules. EPA believes that the same rationale articulated later in the preamble in support of its authority, under certain circumstances, to establish TMDLs also applies to establishment of lists of impaired waters.

EPA anticipates exercising its discretionary authority to establish lists of impaired waterbodies on a case-by-case basis taking into account a variety of factors, including whether the State, Territory or authorized Tribe intends to submit a list at all, how late the State's, Territory's or authorized Tribe's list will be, any explanations offered by the

State, Territory or authorized Tribe for missing the submission deadline, and whether EPA has reason to believe the State's, Territory's, or authorized Tribe's list will be seriously flawed when it is submitted. For example, EPA does not expect that it will automatically decide to establish a list for a State, Territory or authorized Tribe just because the State, Territory or authorized Tribe may have missed the list-submittal deadline contained in § 130.30(a). However, if the State, Territory or authorized Tribe misses its § 130.30(a) deadline and, following inquiry from EPA, is not able to provide assurances that its list of impaired waters will be submitted for review within a reasonable period of time, EPA may determine to exercise its discretionary authority to establish the list itself. If, on the other hand, EPA concludes that the State, Territory, or authorized Tribe is making a ''good faith'' effort to complete list and submit it to EPA for review, EPA may decide not to establish a list of impaired waters for the State, Territory or authorized Tribe. EPA invites comment on its proposal to expressly assert in regulations its discretionary authority to establish lists of impaired waters and on the factors EPA should consider in exercising that authority.

EPA is clarifying by the use of the term ''order'' that its listing actions are informal adjudications and not rulemaking actions under the Administrative Procedure Act. Today's rule, at § 130.30(d), also requires EPA to notify the public in the **Federal Register** and in a newspaper of general circulation of its actions and request public comment for at least 30 days. EPA will send any portion of the list that it has modified to the State for incorporation into its water quality management plan.

Today's proposal, at § 130.24, also maintains the existing regulatory requirement that States, Territories and authorized Tribes must submit their listing methodologies to EPA . Under today's proposal States, Territories and authorized Tribes must submit their methodologies to EPA nine months prior to the deadline for submission of the list. As in the existing regulations, the proposal provides that EPA will review and may provide the State, Territory and authorized Tribe with comments on the methodology. EPA will not take any approval or disapproval action on the State, Territorial or authorized Tribal methodology.

EPA is not proposing at this time to approve or disapprove individual listing methodologies. EPA does recognize that the integrity of State, Territorial and authorized Tribal lists is strongly related to an explicit and deliberate approach to identifying impaired and threatened waterbodies. Requiring States, Territories and authorized Tribes to provide EPA and the public with the listing methodology prior to submission of the list will lead to more consistent, better defined listing decisions. In addition, submission of State listing methodologies to EPA prior to submission of the list will provide EPA and States, Territories and authorized Tribes with an opportunity to discuss exactly how impaired and threatened waterbodies are identified. These discussions will substantially reduce questions and comments at the time the section 303(d) list is submitted to EPA for action. EPA recognizes that the methodologies submitted nine months prior to the lists may be revised in response to feedback from the public or EPA, or issues and concerns that may arise as the methodologies are actually used to develop the lists. EPA is not proposing to approve or disapprove State, Territorial or authorized Tribal listing methodologies because it has adequate authority in its review of the list of impaired or threatened waterbodies to assure that the methodologies used by States, Territories and authorized Tribes appropriately identify waterbodies required to be listed under section 303(d).

Today's proposal, at § 130.31(b), adds a new requirement that States, Territories and authorized Tribes submit schedules for establishing TMDLs for all waterbodies listed on Part 1 of the list to EPA for review. EPA is proposing that States, Territories and authorized Tribes submit schedules for establishing TMDLs with every list of impaired and threatened waterbodies submitted to EPA. Although schedules will be submitted with lists, schedules are not part of the lists and EPA will not develop a schedule if a State develops an inadequate one or fails to submit one. While EPA does not propose to approve or disapprove the schedules, EPA will consider the schedules in evaluating the identification of waterbodies and priority ranking. Approving or disapproving schedules is not required because EPA reviews the priorities for establishing TMDLs in approving or disapproving the State, Territorial and authorized Tribal list and EPA retains ultimate authority to establish TMDLs if States, Territories and authorized Tribes fail to do so. If a State, Territory or authorized Tribe submits a schedule for Part 1 waterbodies that EPA concludes is inadequate (e.g., because it extends beyond fifteen years), EPA would provide comments to the State, Territory and authorized Tribe in its action on the list, and would expect the State, Territory or authorized Tribe to address EPA's comments. Finally, shifting the date of list submission from April 1 to October 1 will ease the difficulties that States, Territories and authorized Tribes may have in completing both section 305(b) reports and section 303(d) lists and submitting them to EPA on time; both are currently due to EPA on April 1 of every even-numbered year.

Options considered. Today's proposal requests comments on the existing regulatory requirement that State, Territorial and authorized Tribal lists be submitted every two years. The FACA endorsed the two-year listing cycle, but EPA has received many suggestions from States, Territories and authorized Tribes suggesting that lists be submitted at four or five year intervals. EPA is considering retaining the two-year listing interval, adopting a four-year or five-year listing cycle interval, or requiring that States, Territories and authorized Tribes submit their first list under the revised regulation no later than October 1, 2000, with subsequent list submittals occurring at longer intervals, e.g., every four years or every five years.

The existing two year listing cycle provides frequent intervals for States, Territories and authorized Tribes, EPA and stakeholders to identify impaired and threatened waterbodies and document progress in attaining water quality standards. The two-year listing requirement is also consistent with the section 305(b) reporting cycle. Such a short listing cycle, however, may over emphasize the listing of waterbodies as opposed to establishing and implementing TMDLs. A two-year listing cycle may also be inefficient because States, Territories and authorized Tribes generally do not find significant changes in water quality over such a short period of time.

A four-year listing cycle is also being considered. This interval would promote greater emphasis on establishing and implementing TMDLs, as opposed to listing impaired and threatened waterbodies. It would also allow for periodic coordination between section 303(d) lists and section 305(b) reports. A four-year listing cycle would not, however, provide for as frequent updates in progress towards attainment of water quality standards for States, Territories and authorized Tribes, EPA and stakeholders.

A five-year listing cycle is also being considered. A five-year cycle would allow States, Territories and authorized

Tribes to focus more time and resources on establishing and implementing TMDLs and is compatible with State, Territorial and authorized Tribal rotating basin and watershed approaches. It would also allow for a complete NPDES permitting cycle between each list.

Comments sought. EPA solicits specific comments on the cycle on which States, Territories and authorized Tribes should submit lists to EPA. EPA also solicits comments on whether EPA should approve or disapprove State, Territories and authorized Tribal schedules and whether schedules should be included as part of lists of impaired and threatened waters. EPA solicits comment on any or all aspects of the proposal, including the options considered.

g. Proposal To Change List Submission Deadline to October 1, 2000 in the Existing TMDL Regulations

Proposed rule. In addition to the comprehensive revision of the Part 130 regulations being proposed today, EPA also is proposing to amend the existing regulations to change the current April 1 deadline to October 1 for submission by the States, Territories, and authorized Tribes of their lists of impaired waters. If after consideration of public comments, EPA decides to promulgate this proposal, EPA intends that it would promulgate this amendment as a separate action as soon as possible after the close of the comment period.

The existing regulations at 40 CFR 130.7(d)(1) require States, Territories, and authorized Tribes to submit their lists on April 1 of every even-numbered year. EPA believes it makes sense to delay this requirement until October 1. EPA prefers that the next lists submitted should be based on the new requirements being proposed today. It is unlikely that EPA will promulgate these comprehensive revisions well in advance of the current April 1 deadline for submission of lists. To avoid the States, Territories, and authorized Tribes developing lists under the existing regulations to meet the April 1 deadline, EPA proposes to move that deadline to October 1. EPA expects to promulgate the comprehensive revisions well in advance of October 1. In that event, States, Territories, and authorized Tribes will develop their lists pursuant to the new regulations. In the event the new regulations are delayed, States, Territories, and authorized Tribes would be required to submit lists by October 1, 2000 pursuant to the existing regulations.

Comments sought. EPA requests comment on this separate proposal to amend the April 1 deadline in 40 CFR section 130.7(d)(1) to be October 1. EPA also requests comment on its proposal to promulgate this amendment as a separate action as soon as possible after the close of the public comment period. If you provide comments to EPA on this separate proposal, EPA requests that you highlight those comments for EPA's consideration immediately upon the close of the public comment period.

5. What Are the Proposed Rule's Requirements for TMDL Establishment and EPA Review of TMDLs Submitted by States, Territories and Authorized Tribes?

a. Minimum Elements of a TMDL Submitted to EPA

Existing requirements. Pollutant loads may be transported into a waterbody directly through effluent discharge, bank and bar erosion (in streams, rivers, estuaries, and lakes), re-circulation (e.g., nutrients in lakes, estuaries, and wetlands; contaminated sediments), solar heating, atmospheric deposition, and groundwater flows; or indirectly by overland flow caused by snowmelt or precipitation. A TMDL is established to attain or maintain the water quality standard for a specific pollutant that has been identified as the cause of an impairment or threat to a waterbody. Consistent with this goal, the existing TMDL regulations require States, Territories and authorized Tribes to establish TMDLs at levels necessary to meet water quality standards with seasonal variations and a margin of safety that takes into account any lack of knowledge concerning the relationship between pollutant loads and water quality. The existing regulations define loading capacity as the greatest amount of loading that a waterbody can receive without exceeding water quality standards and a TMDL as the sum of the individual waste load allocations for existing and future point sources and the load allocations for existing and future nonpoint sources and for natural background. The existing regulations also explain that TMDLs can be expressed, as either mass per time, toxicity, or other appropriate measures that relate to a State's, Territory's and authorized Tribe's water quality standard. The technical approach used to develop TMDLs varies according to the pollutant of concern, the type of waterbody, and the type and number of pollutant sources.

The ultimate goal of establishing TMDLs is to implement allocations that will result in the attainment and maintenance of water quality standards. Without implementation, a TMDL merely provides estimates of the pollutant load reductions necessary to attain water quality standards. Section 303(d) does not establish any new or additional implementation authorities beyond those that currently exist under the CWA or in State, Territory, local, Tribal or other Federal laws. TMDL regulations currently do not require States, Territories and authorized Tribes to develop implementation plans for TMDLs. Wasteload allocations are implemented through effluent limits in NPDES permits. Load allocations are implemented through a variety of State, local, Tribal, and Federal programs, as well as voluntary action by committed citizens.

Currently, EPA approval of TMDLs for waterbodies impaired from a combination of point and nonpoint sources requires that the wasteload allocation for the point source is determined on the basis of existing or planned reductions in loadings from nonpoint sources. EPA thus believes it is appropriate to require reasonable assurance that the load allocations will be implemented.

Proposed rule. The FACA Committee described a TMDL as an ''action oriented analysis of how to attain water quality standards'' that is crucial to the ultimate success of TMDLs. Today's proposal, at § 130.33 and § 130.34, establishes the minimum elements that States, Territories, and authorized Tribes must include in any TMDL submitted to EPA and the acceptable ways in which a TMDL can be expressed. It clarifies that a TMDL must be calculated to ensure that water quality standards will be attained and maintained throughout the waterbody in the event of reasonably foreseeable increases in pollutant loads. In today's proposal, TMDLs continue to provide for tradeoffs between alternative point and nonpoint source control options so that cost effectiveness, technical effectiveness, and the social and economic benefits of different allocations can be considered by decision-makers.

The technical approach used to establish individual TMDLs may vary according to the pollutant of concern, the type of waterbody and the type and number of pollutant sources. Today's proposal, at § 130.33, maintains the existing requirement that all TMDLs must consider the total pollutant load to a waterbody from point, nonpoint, and background sources. Today's proposal, at § 130.34, also clarifies that all TMDLs must contain an expression of the

pollutant load or load reduction necessary to assure that the waterbody will attain and maintain water quality standards, including aquatic or riparian habitat, biological, channel, geomorphological, or other appropriate conditions that represent attainment or maintenance of the water quality standard.

For example, a spawning use may be impaired because excessive sediment (i.e., clean sediment) is clogging the interstitial spaces of the stream bottom. These spaces normally provide habitat for the insects that are a food source for fish and dissolved oxygen needed by young fish to survive. While the ultimate water quality goal for this problem may be to increase successful spawning by 20 percent, the TMDL analysis and pollutant load allocation will be based on decreasing the pollutant load of clean sediment in the stream system and must be expressed in those terms. This example fits within the approach set out in § 130.34(3) for expressing TMDLs.

It is important that a TMDL be expressed in terms that are appropriate to the characteristics of the waterbody and pollutant combination. Today's proposal, at § 130.34, allows States, Territories and authorized Tribes to use one of four approaches when expressing a TMDL: sources. A ''daily'' load allocation would not provide the allocation of phosphorus necessary to attain or maintain water quality standards because, while it might cover current loads, it would not account for the amount of the pollutant stored in the lake or reservoir. In addition, allocations expressed in terms of daily loads might not account accurately for the different loadings and effect of the pollutant on water quality in the lake resulting from different seasons and climatic events. For a pollutant like phosphorus, the average annual load is the best indicator of actual conditions in the lake and best way to express the allocations established in any TMDL.

Similarly, waterbodies may be impaired by loadings of fine sediment delivered to the waterbody from hillslope or bank erosion. Allocations established as part of a TMDL for fine sediment would need to address the variability of sediment loadings due to flows related to rainfall or snowmelt, the natural background sediment loads carried by the waterbody, channel characteristics and aquatic life needs. A daily load of sediment would not necessarily be an accurate representation of the natural background load, the variability in loadings over time and season, or the amount of pollutant load reduction needed to maintain sediment loads within the natural limits and requirements of the waterbody to attain or maintain water quality standards. A seasonal or annual in-stream sediment allocation would be a more accurate and technically correct expression of the amount of sediment in the waterbody over time that would attain or maintain water quality standards.

Temperature is another example of a pollutant where other than daily loads may be the most appropriate expression of an allocation established as part of a TMDL. Temperature varies as a result of climate and season. Aquatic life require a range of temperatures to spawn, grow and maintain viable populations. A daily load of heat and the resultant temperature in the waterbody is not as important as maintaining the range required by the aquatic life through different seasons and climatological events. Therefore, an allocation of pollutants causing changes in temperature is often better expressed as seasonal or monthly averages keyed to preservation of the needed temperature ranges throughout the seasons.

EPA recognizes that some non-attainment of water quality standards is due in part, or entirely, to extremely difficult to solve problems. These include circumstances where attainment of water quality standards is technically or practically difficult or costly. The FACA recommended, and EPA concurs, that it is feasible to establish a TMDL for these difficult to solve problems. Both EPA and the FACA recognized, however, that some of the processes necessary to attain water quality standards are likely to take a long time to show progress in attaining water quality standards. EPA recognizes that implementation plans for these types of TMDLs may allow a relatively longer timeframe for water quality standards attainment.

The FACA Committee recommended that EPA clarify the minimum elements of an approvable TMDL for States, Territories and authorized Tribes and other stakeholders. The FACA Committee recommended that the ''TMDL development/implementation planning process'' be composed of seven components: (1) Target identification; (2) identification of needed pollutant reduction; (3) source identification; (4) allocation of pollutant loads; (5) implementation plan; (6) monitoring and evaluation; and (7) procedures for any needed revision based on evaluation. The FACA Committee did not reach consensus on whether the implementation plan is a required component of the TMDL under section 303(d) or whether the plan should be submitted separately from the TMDL under section 303(e).

Today's proposal endorses the FACA Committee's recommendation for regulatory clarification of the minimum elements of an approvable TMDL. The minimum elements are discussed below.

Waterbody Name and Geographic Location. Identification of the name and geographic location of the impaired or threatened waterbody. It is important to identify not only the name and location of the waterbody for which the TMDL is being established, but also the names and geographic locations of the waterbodies upstream of the waterbody that contribute significant amounts of the pollutant of concern. The geographic location of the waterbody must be identified using a nationally recognized georeferencing system. EPA will provide guidance and technical support necessary to ensure standardized georeferencing.

Identify the Pollutant Load. Identification of the pollutant load that may be present in a waterbody and still assure attainment and maintenance of water quality standards. After identifying the waterbody name and location, the next step in establishing a TMDL is to quantify the pollutant load for the pollutant or pollutants that have been identified as causing the waterbody impairment. For most or many pollutants, numeric water quality standards are available. When no numeric water quality standard is available, the pollutant load must still be quantified. The numeric pollutant load selected depends on consideration of the type of waterbody, its location, and how seasonal variations impact water quality.

Identify the Deviation from the Pollutant Load. Identification of the amount or degree by which the current pollutant load deviates from the pollutant load representing attainment or maintenance of water quality standards. Once the pollutant load has been identified, the degree to which conditions deviate from that load can be calculated, resulting in a determination of how much the existing pollutant load must be reduced to meet the required pollutant load. In some situations, the baseline load may not be quantifiable in which case the required load reduction may be based on the degree to which water quality deviates from the water quality standards and expressed in terms of a percentage reduction rather than an absolute mass-per-time reduction. Further, the allocations of the TMDL may be expressed in terms of a percentage reduction on a source-by-source basis rather than an absolute

mass-per-time load allocation to each source.

Source Categories, Source subcategories or Individual Sources. Identification of the source categories, source subcategories, or individual sources of the pollutant for which the wasteload allocations and load allocations are being established. The source assessment identifies (i.e., lists) and characterizes pollutant source(s) or category(ies) of sources that cause the waterbody impairment. The character of each pollutant source, its temporal loading and variability and location with respect to the waterbody are important. The factors to identify when conducting a source assessment include the source type (e.g., point, nonpoint, background, atmospheric); relative location and magnitude of each load; transport mechanisms (e.g., runoff vs. infiltration); and time scale of loading to the waterbody (i.e., duration and frequency of loading to receiving waterbodies).

Wasteload Allocation and Load Allocation. Waste load allocations for pollutants from point sources and load allocations for pollutants from nonpoint sources, including atmospheric deposition and natural background. Allocations are central to the TMDL process and TMDLs must clearly specify an allowable load for each source. TMDLs must include a wasteload allocation for each point source permitted under section 402 of the Clean Water Act discharging the pollutant for which the TMDL is being established. In two circumstances, however, pollutant waste loads may be allocated to a category or subcategory of sources or considered part of background loads. The first is when the discharge is subject to a general permit. As explained above, it is appropriate to allocate to the aggregate of sources covered by a general permit since the number and identity of sources discharging under a general permit generally will not be known. The second circumstance is when the State, Territory or authorized Tribe determines that certain pollutant loads relating to specific individual point sources do not need to be reduced in order for the waterbody to attain or maintain standards. In the case of nonpoint sources, allocation of pollutant loads to categories or subcategories of sources may be appropriate, especially if measures to reduce these loads are implemented for a whole category at once.

Margin of Safety (MOS). A margin of safety, expressed as unallocated assimilative capacity or conservative analytical assumptions used in calculating the TMDL. Each TMDL must include a MOS sufficient to account for technical uncertainties in establishing TMDLs and describe the manner in which the MOS is determined and incorporated into the TMDL. If a portion of the loading capacity is left unallocated to provide an MOS, the amount left unallocated must be identified and the basis for it described. If conservative modeling assumptions are relied on to provide an MOS, the specific assumptions providing the MOS must be identified. In either case, the basis for believing that the MOS is sufficient to attain and maintain water quality standards must be explained.

Seasonal Variations. TMDLs must account for seasonal variations and critical conditions concerning receiving water flow (e.g., low flow during drought periods), receiving water conditions (e.g. temperature), beneficial use impacts (e.g., key aquatic life stages), pollutant loadings (e.g., high flow nonpoint source runoff), and other environmental factors that affect the relationship between pollutant loading and water quality impacts. This ensures that the TMDL protects the receiving water when it is most sensitive to the pollutant.

Allowance for Future Loading. States, Territories and authorized Tribes must include an allowance for future loading in their TMDL that account for reasonably foreseeable increases in pollutant loads and carefully document their decision-making process. This allowance should be based on existing and readily available data at the time the TMDL is established. States, Territories, and authorized Tribes may choose to completely allocate the pollutant loading for a waterbody and thus leave no loading for future growth. EPA encourages State and local governments to adopt ''Smart Growth'' policies and requirements. Where adoption and/or implementation of ''Smart Growth'' policies and requirements will reduce future loadings, the allowance for future loadings may be reduced accordingly.

Implementation Plan. Today's proposal would revise the current regulations by requiring States, Territories, and authorized Tribes to submit a plan to implement the load allocations and waste load allocations of a TMDL, or group of TMDLs, as a component of a TMDL. Today's proposal reflects the FACA recommendation that TMDLs include implementation plans and proposes to substantially adopt the FACA's recommended minimum elements of an implementation plan. EPA is proposing that the implementation plan itself would be required to contain eight minimum elements: (a) implementation actions; (b) time line; (c) reasonable assurance; (d) legal or regulatory controls; (e) time required to attain water quality standards; (f) monitoring plan; (g) milestones for attaining water quality standards; and (h) TMDL revision procedures.

The proposal requires States, Territories and authorized Tribes to submit implementation plans that show how each TMDL is to be implemented. While States, Territories and authorized Tribes may submit an individual implementation plan with each TMDL, EPA believes that it is more effective for one implementation plan to describe how a number of TMDLs will be implemented. One implementation plan may, for example, show how all the TMDLs for a pollutant within an entire watershed will be implemented or how implementation of TMDLs for different pollutants within a particular basin will be implemented. EPA believes that this approach provides States, Territories and authorized Tribes with the flexibility to consider the complexity of water quality problems, effectively implement solutions and take advantage of existing implementation mechanisms such as management programs approved under section 319 or rotating basin approaches.

EPA has authority to require an implementation plan as an element of an approvable TMDL under section 303(d). Section 303(d) requires that TMDLs ''be established at a level necessary to implement the applicable water quality standards.'' (33 U.S.C. § 1313(d)(1)(C)). EPA is charged with approving or disapproving the TMDLs submitted by States, Territories or authorized Tribes, 33 U.S.C. § 1313(d)(2), but aside from explicitly requiring that a TMDL be established ''with seasonal variation'' and ''a margin of safety,'' Congress did not clearly establish the individual elements of a TMDL necessary to enable EPA to determine whether a specific TMDL is approvable as established at the necessary level. EPA has inherent power to establish regulations to fill this gap. *Morton* v. *Ruiz*, 415 U.S. 199, 231 (1974) (''The power of an administrative agency to administer a congressionally created . . . program necessarily requires the formulation of policy and the making of rules to fill any gap left, implicitly or explicitly, by Congress.''). EPA has previously determined that there are elements, such as a separate determination of the proper allocations for point sources (WLAs) and nonpoint sources (LAs), which are necessary for EPA to determine whether statutory

goals are met by the TMDLs established by States, Territories and authorized Tribes.

Today EPA is proposing that one additional appropriate way to enable EPA to determine properly whether or not a TMDL is established at the level necessary to implement the applicable water quality standards is to require that an implementation plan be a component of a TMDL submittal. In determining whether EPA is properly construing the CWA, the first step is to determine ''whether Congress has directly spoken to the precise question at issue.'' *Chevron* v. *Natural Resources Defense Council*, 467 U.S. 837, 842 (1984). EPA has found that section 303(d) and its sparse legislative history are silent or ambiguous on the specific question of whether or not an implementation plan should be part of a TMDL. Therefore, the question is simply whether EPA's construction of the statute is permissible. *Id*. at 842–843. Given the statute's requirement that TMDLs, whether established by a State, Territory, or authorized Tribe, or by the Administrator, ''be established at a level necessary to implement the applicable water quality standards,'' section 303(d)(1)(C); section 303(d)(2), EPA's decision that one way to determine whether TMDLs are so established is to review the State, Territorial, or authorized Tribal plan to implement the TMDLs to see if it is a reasonable one. A plan which, among other things, demonstrates that the State, Territory, or authorized Tribe has selected specific implementation actions for sources, calculates the time which it should take for those actions to result in achievement of water quality standards, and establishes a monitoring plan to determine whether standards are in fact being achieved is, in EPA's judgment, an appropriate requirement to enable EPA to approve TMDL submittals. Moreover, Congress' concern that the establishment of TMDLs not be a paper exercise is manifest in its requirement that they be tied to the implementation of water quality standards and the requirement that approved TMDLs be incorporated into the State, Territorial, or authorized Tribal plan for its navigable waterbodies under section 303(e).

A consequence of today's proposal to require an implementation plan as one of the minimum elements of a TMDL is that the plan itself, like the other elements, is subject to EPA approval or disapproval. In evaluating an implementation plan, EPA would assess whether the State's, Territory's, or authorized Tribe's implementation plan contains each of the components required by the regulation and discussed in more detail below. If EPA disapproves a TMDL because it determines that the implementation plan is inadequate, pursuant to the statute, EPA would have 30 days to establish a TMDL, including an implementation plan.

EPA's proposal to require an implementation plan under section 303(d) does not directly result in a more enforceable TMDL. EPA's existing point source regulations require that permit effluent limits ''are consistent with the assumptions and requirements of any available wasteload allocation for the discharge.'' 40 CFR 122.44(d)(1)(vii)(B). Section 303(d) does not provide any additional CWA authorities to implement nonpoint source controls, therefore, the implementation plan will provide a program to deal with nonpoint source contributions to impaired waterbodies using existing Federal, State and local authorities and voluntary action to implement the allocations contained in TMDLs.

Each TMDL implementation plan must contain the following components:

Implementation actions. A description of the control actions and/or management measures required to implement the allocations contained in the TMDL, along with a description of the effectiveness of these actions and/or measures in achieving the required pollutant loads or reductions. These actions may vary depending on the pollutant for which the TMDL is being established, the complexity of the water quality problem and the controls required. For point sources, a list of NPDES permits and a schedule for revising the permits to be consistent with the TMDL is required.

For nonpoint sources, a description of best management practices or other management measures is required. EPA expects that section 319 management programs will be the basis for this description. EPA expects that the implementation plan would contain a description of what best management practices and/or controls will be used and identify the source categories, subcategories or individual source of the pollutant for which the TMDL is being established. The implementation plan may deal with sources on a watershed basis as long as the scale of the implementation plan is consistent with the geographic scale for which the TMDL allocations are being established.

EPA expects that the implementation plan would also describe what actions will be implemented by source category, subcategory or individual sources. The description of the actions should include an analysis of the anticipated or past effectiveness of the best management practices and/or controls that are expected to meet the wasteload and load allocations. The implementation plan should describe where the best management practices and/or controls will be implemented. This description should tie the implementation activity to the pollutant and geographic scale of the TMDL.

Timeline. The implementation schedule must contain a description of when the activities necessary to implement the TMDL will occur. It must include a schedule for revising NPDES permits to be consistent with the TMDL. The schedule must also include when best management practices and/or controls will be implemented for source categories, subcategories and individual sources. Interim milestones to judge progress are also required. The timeline should tie the implementation activity to the pollutant, the description of implementation actions and the geographic scale of the TMDL.

Reasonable assurance. The implementation plan must contain reasonable assurance that the implementation activities will occur. Reasonable assurance means a high degree of confidence that wasteload allocations and/or load allocations in TMDLs will be implemented by Federal, State or local authorities and/or voluntary action. For point sources, reasonable assurance means that NPDES permits (including coverage under applicable general NPDES permits) will be consistent with any applicable wasteload allocation contained in the TMDL. For nonpoint sources, reasonable assurance means that nonpoint source controls are specific to the pollutant of concern, implemented according to an expeditious schedule and supported by reliable delivery mechanisms and adequate funding. Examples of reasonable assurance include State, Territorial or authorized Tribal regulations or local ordinances, performance bonds, memoranda of understanding, contracts or similar agreements.

Voluntary and incentive-based actions may also be acceptable measures of reasonable assurance. Like all other forms of reasonable assurance for nonpoint sources, voluntary and incentive-based actions must be specific to the pollutant of concern, implemented according to an expeditious schedule, and be supported by adequate funding. Examples of voluntary and incentive-based programs include State, Territorial, or authorized Tribal programs to audit the implementation of agricultural or forestry best management practices,

memorandums of understanding between States, Territories, or authorized Tribes and organizations representing categories of sources or State-approved programs for categories or subcategories of sources to ensure effectiveness of best management practices. Voluntary participation by landowners in agricultural or forestry water quality protection or conservation programs, for example, installation or maintenance of riparian buffers or implementation of activities to participate in watershed-based effluent trades, is acceptable during establishment of the initial TMDL, subject to the conditions established in the regulation. However, if monitoring shows that voluntary measures are not resulting in the progress towards attainment and maintenance of water quality standards envisioned when the TMDL was approved, the State, Territory, or authorized Tribe may need to establish a regulatory approach.

EPA is aware that some States, Territories, or authorized Tribes are concerned that the proposed definition of ''reasonable assurance'' would require adequate funding for implementation measures addressing nonpoint sources at the time that the implementation plan is developed. While States, Territories, or authorized Tribes may have difficulty in completely identifying funding sources for all such measures, EPA intends that States could describe, based on best information available at the time, how adequate funding will be secured. In particular, currently available funding sources should be identified specifically. EPA requests comment on this particular provision of the reasonable assurance component of the implementation plan.

Section 303(d)(1)(C) of the CWA provides EPA with authority to require that reasonable assurance be included as one of the elements of a TMDL's implementation plan. Section 303(d)(1)(C) provides that TMDLs must be established at a level necessary to implement the applicable water quality standards. Section 130.33(b)(10)(iii) of today's proposal would require that each implementation plan contain a discussion of the State's, Territories' or authorized Tribe's reasonable assurance that wasteload allocations and load allocations will be implemented. Since TMDLs must be established at a level to implement standards, it is reasonable for EPA to require that the TMDL itself contain an explanation of how that implementation will occur. Providing such an explanation will allow the public to assess the adequacy of the TMDL when it is offered by the State, Territory or authorized Tribe for comment. It will also allow EPA an opportunity during its review of the TMDL to better determine whether the TMDL will, in fact, achieve its goal of bringing the waterbody into compliance with applicable water quality standards.

If EPA disapproves a TMDL submitted by a State, Territory or authorized Tribe, EPA may take a number of actions designed to provide reasonable assurance that implementation will occur to the same extent that a State would provide such assurance.

In the case of discharges from point sources, if EPA actions become necessary, a combination of existing and proposed NPDES permit authorities may be used to provide reasonable assurance. For example, in those States where EPA retains authority to issue NPDES permits, EPA currently has authority to issue NPDES permits to limit pollutant discharges as needed to implement TMDLs (i.e., accomplish wasteload reductions assigned to point sources in wasteload allocations). In those States where EPA has delegated authority to issue NPDES permits, current regulations give EPA clear authority to revise permit conditions in a State-issued permit as needed to implement TMDLs and otherwise comply with the Act.

Elsewhere in today's **Federal Register**, EPA is proposing changes to the NPDES permit program regulations at 40 CFR parts 122 and 123. These proposed changes would further clarify EPA's authorities which may be used to provide reasonable assurance for point sources.

For some impaired waters, attainment of water quality standards may require that pollutants from nonpoint sources be reduced. EPA has strong and diverse authorities to implement controls over nonpoint sources in the event that EPA were to disapprove a TMDL submitted by a State and to develop a TMDL for the impaired water.

For example, section 504 of the CWA provides the EPA Administrator with authority to address cases where a source or combination of sources is presenting an imminent and substantial endangerment to the health of persons, such as immediate health threats, or to the welfare of persons, such as the inability to market locally-harvested shellfish contaminated by water pollution. In these cases, the Administrator may bring suit under the authority of section 504 to restrain any person to stop the discharge of pollutants or to take any action as may be necessary. Where a waterbody is identified as impaired under section 303(d), strong evidence may exist that the impairment may present an imminent and substantial threat to the health or welfare of persons. This authority can support implementation of nonpoint pollution controls for impaired waters on a case-by-case basis.

In addition, EPA has authority to direct the way that States, Territories, and authorized Tribes use funding provided under section 319 of the CWA to implement nonpoint pollution controls. This authority is expressed in section 319(h)(1) of the CWA, which provides the EPA Administrator with clear authority to put terms and conditions on grants to States ''as the Administrator consider appropriate.'' Where EPA develops a TMDL and decides that additional resources will be necessary to provide reasonable assurance that the TMDL will be implemented, EPA may use this authority to direct that an appropriate amount of a State's, Territory's, or authorized Tribe's section 319 funding be devoted to implementing the EPA-developed TMDL. A number of authorized Tribes and all States and Territories receive grants under section 319; in 1999, the value of these grants is $200 million.

Taken together, these existing and proposed authorities for point and nonpoint sources will enable EPA to implement TMDLs in those cases where EPA establishes the TMDL in lieu of the State, Territory, or authorized Tribe.

Legal or regulatory controls. The implementation plan must contain a description of the legal authorities under which implementation will occur. These authorities include, for example, NPDES, section 401 certification, Federal Land Policy and Management programs, legal requirements associated with financial assistance agreements under the Farm Bills enacted by Congress and a broad variety of enforceable State, Territorial, and authorized Tribal laws to control nonpoint source pollution. The *Almanac of Enforceable State Laws to Control Nonpoint Source Pollution* (Environmental Law Institute, 1998) provides information on the laws in each State.

Time required to attain water quality standards. The implementation plan must contain an estimate of the time required to attain water quality standards. The estimates of time required to attain water quality standards must be specific to the source category, subcategory or individual source and tied to the pollutant for which the TMDL is being established. It must also be consistent with the geographic scale of the TMDL, including the implementation actions. As noted

above, EPA recognizes that for some extremely difficult to solve problems, implementation plans may allow relatively longer timeframes for attainment of water quality standards.

Monitoring plan. The implementation plan must contain a monitoring or modeling plan designed to determine the effectiveness of the implementation actions and to help determine whether allocations are met. The monitoring or modeling plan must be designed to describe whether allocations are sufficient to attain water quality standards and how it will be determined whether implementation actions, including interim milestones, are occurring as planned. The monitoring plan must also contain an approach for assessing the effectiveness of best management practices and control actions for nonpoint sources.

Milestones for attaining water quality standards. The monitoring plan must contain a description of milestones that will be used to measure progress in attaining water quality standards. The milestones must reflect the pollutant for which the TMDL is being established and be consistent with the geographic scale of the TMDL, including the implementation actions. The monitoring plan must contain incremental, measurable milestones consistent with the specific implementation action and the time frames for implementing those actions.

TMDL revision. The monitoring plan must contain a description of when TMDLs must be revised. EPA expects that the monitoring plan would describe when failure to meet specific milestones for implementing actions or interim milestones for attaining water quality standards will trigger a revision of the TMDL.

Endangered and Threatened Species Considerations. Today's proposal at § 130.33(d) provides that TMDLs shall not be likely to jeopardize the continued existence of an endangered or threatened species listed under section 4 of the Endangered Species Act or result in the destruction or adverse modification of its designated critical habitat. This provision reflects EPA's desire for expressly integrating the water quality objectives of the CWA and the species protection goals of the ESA. For example, EPA has recently developed a draft Memorandum of Agreement with the Fish and Wildlife Service and National Marine Fisheries Services describing how EPA will integrate species protection goals into our water quality standards and NPDES permitting programs. See 63 FR 2442 (January 15, 1999). EPA believes that consideration of the needs of endangered and threatened species is also consistent with the goals of the TMDL program as well. For example, § 130.28 of the proposed rule provides that waterbodies where federally listed species are present must be designated as ''high'' priority for the development of TMDLs, unless the State, Territory, or authorized Tribe shows information that the impairment does not affect the threatened or endangered species. Similarly, EPA believes that the prohibition against ''jeopardy'' contained in the proposed section recognizes that endangered and threatened species are an important component of the aquatic ecosystem. EPA believes it is very unlikely that any TMDL would have such a deleterious effect on any listed species, since TMDLs identify the reductions needed to meet water quality standards, and these reductions will obviously benefit listed species. Moreover, one important objective of the draft MOA recently published in the **Federal Register** is to ensure that water quality standards are protective of endangered and threatened species. However, the proposal makes clear that TMDLs must not be likely to jeopardize the continued existence of such species. This requirement is consistent with CWA authorities, which are fundamentally designed to achieve the goal of ''restoring and maintaining the biological integrity'' of the nation's waters. *See* CWA § 101(a).

Other options considered. In developing today's proposal, EPA considered several options. For example, EPA considered maintaining the current regulatory language, which does not require certain minimum elements for TMDLs. EPA rejected this option, agreeing with the FACA Committee that the regulation should more clearly state the required elements of TMDLs. This provides the States, Territories and authorized Tribes and EPA with increased certainty for TMDL development and approval.

EPA considered a number of options relating to implementation requirements. EPA considered maintaining the current regulatory language which does not specifically require an implementation plan to be submitted as an approvable element of a TMDL. EPA did not propose this option because it determined that it will be better able to evaluate a TMDL's consistency with the statutory requirements if an implementation plan is an element of a TMDL. In addition, EPA realizes that in order for TMDLs to result in water quality improvement they must be implemented. The requirement that an implementation plan be developed as part of a TMDL will ensure the establishment of successful TMDLs, that States, Territories and authorized Tribes will plan for implementing TMDLs, and will provide all stakeholders with information to help them assist in the establishment of TMDLs that help attain and maintain water quality standards.

EPA also considered requiring the submission of an implementation plan pursuant to section 303(d) concurrent with a TMDL, but not as an element of the TMDL. Requiring submission of an implementation plan separate from the TMDL is also a reasonable means for EPA to ensure that TMDLs are ''established at a level necessary to implement the applicable water quality standards'' (section 303(d)(1)(C)). Under this option, EPA would not approve or disapprove the implementation plan, but would consider the plan when reviewing the allocations established in the TMDL. A State's, Territory's or authorized Tribe's failure to submit an implementation plan could create uncertainty as to whether the TMDL was established at the statutorily required level, and that could result in EPA disapproval of the TMDL. Under this option, when EPA disapproves a State, Territory or authorized Tribal-submitted TMDL and establishes a TMDL in its place, EPA would not be required to develop an implementation plan because the plan would not be one of the required minimum elements of a TMDL. However, EPA could develop an implementation plan if it chose, and could also utilize any or all of its existing authorities to ensure that both the wasteload and load allocations established by the TMDL are implemented. EPA did not propose this option because it believes that States, Territories and authorized Tribes will develop more successful implementation plans if the failure to submit a plan or an adequate plan means that the TMDL will be disapproved and EPA will establish a TMDL, including an implementation plan, it its place.

EPA also considered requiring the submission of implementation plans as updates to water quality management plans developed pursuant to sections 208 and 303(e) of the CWA. Under section 303(e), the Administrator shall approve any continuing planning process ''which will result in plans for navigable waters within such State, which include, but are not limited to the following'' including TMDLs and implementation plans for new water quality standards. EPA reads this language to authorize EPA to require submission of implementation plans for TMDLs. Under this option, the

implementation plan would not be submitted as an element of the TMDL, but as an element of the water quality management plan under the existing regulatory requirement at 40 CFR 130.6, subject to State certification and EPA approval. Water quality management plans are used to direct implementation and TMDLs themselves are required to be incorporated into current plans. This option would revise 40 CFR 130.6 to require an implementation plan for each TMDL as an element of the water quality management plan. Like all other updates to water quality management plans, an implementation plan would be submitted to EPA for approval after the Governor certifies that the plan update is consistent with all other parts of the plan. Under this option, EPA could conditionally or partially approve the implementation plan, but would not disapprove the plan or establish a substitute plan. As part of this option, EPA considered whether to require submission of implementation plans with the TMDL or at some later date, *e.g.*, one year after the submittal of the TMDL. If EPA selected this option, it would also consider whether to require that implementation plans be submitted at the same time as the TMDL is submitted. Simultaneous submission would enable EPA to use the plan to assess the TMDL. EPA did not, however, propose this option because it concluded that requiring an implementation plan as an element of the TMDL under section 303(d) would most effectively link the assessment of water quality with necessary control actions and/or management measures. EPA also considered whether to revise the regulations consistent with the recommendations of the FACA Committee, to clarify that TMDLs may be expressed in a variety of ways, e.g., as other than daily loads, or using surrogate measures. In choosing to make these revisions, EPA relied upon the experiences of States, Territories and authorized Tribes and EPA in establishing TMDLs for pollutants often generated by nonpoint sources, such as clean sediments and nutrients. It is not always technically appropriate for such TMDLs to be expressed in terms of daily loads.

Comments sought. EPA solicits comments on the required minimum elements of TMDLs and whether any of the proposed required elements should be deleted or whether there are other elements that should be included. EPA also solicits comments on the proposal's requirement that States, Territories and authorized Tribes be required to submit implementation plans and whether implementation plans should be required as an element of a TMDL, as a required submission accompanying the TMDL, or as an update to a water quality management plan submitted at the same time as the TMDL. EPA may choose to adopt any of these options for the final rule.

b. Submission to EPA and EPA Actions

Existing requirements. Section 303(d) of the CWA requires that States, Territories and authorized Tribes submit TMDLs, ''from time to time,'' to EPA for review and approval. Under the statute, EPA has 30 days to approve or disapprove a TMDL. If EPA approves a TMDL, the submitting State, Territory or authorized Tribe must incorporate it into its water quality management plan required under section 303(e) of the CWA. If EPA disapproves a TMDL, it then has an additional 30 days to establish the TMDL. Existing regulations echo these statutory requirements.

Proposed rule. Today's proposal, at § 130.35, reflects the current regulatory submission and approval requirements for TMDLs. EPA is proposing several fairly minor changes to clarify how the TMDL approval process will work. Today's proposal provides that a complete TMDL submission is a TMDL that includes all of the minimum elements. EPA intends to begin its 30-day review only after EPA has received a submission with all minimum elements. The proposal also requires that when EPA establishes a TMDL, it must send it to the State, Territory, or authorized Tribe for incorporation into the water quality management plan. Finally, the proposed rule provides that when EPA establishes a TMDL, it will consider public comment on the TMDL for at least 30 days following the TMDL's establishment.

Other options considered. In developing today's proposal, EPA considered whether to revise the regulations to address how States, Territories and authorized Tribes and EPA must deal with TMDL establishment and approval decisions in the face of uncertainty. As explained below, EPA ultimately determined that this issue is best addressed in programmatic guidance and not in regulations.

The best science, coupled with rigorous and accurate data, is the best foundation upon which to establish TMDLs. TMDL development, however, can be inhibited by many factors, including inadequate data collection, incompatible data from different sources, improper analytical techniques, and inadequate or inappropriate models. As a result, many TMDLs will be developed where the data and predictive tools available do less than a perfect job of characterizing the problem and calculating allocations with a high level of certainty.

One option EPA considered was whether it would be appropriate to revise the regulations to require that TMDLs be established only on data and analyses which met very strict quality and analytical standards. EPA concluded that this approach is impractical and would significantly decrease the numbers of TMDLs that could be established. In addition, TMDL establishment is generally an iterative process; therefore, even if a TMDL is developed with less than the highest quality data and analyses, there will be opportunities in the future to re-examine the TMDL and progress made toward attaining water quality standards.

EPA also considered whether to revise the regulations to incorporate the FACA Committee's recommendation that States, Territories and authorized Tribes and EPA use a ''hierarchy approach'' to address TMDL establishment and approval in the face of uncertainty. This approach dictates that the highest level of quantitative rigor currently available always be used when establishing TMDLs. Where the desired level of quantitative rigor is not possible for certain TMDL elements, the FACA Committee recommended that the ''principle of inverse proportionality'' be applied. Relatively less quantitative rigor and certainty in certain TMDL elements is compensated for by a relatively greater degree of quantitative rigor and certainty in other TMDL elements.

EPA recognizes the benefits of applying the FACA Committee's hierarchy approach and principle of inverse proportionality to deal with the uncertainties associated with TMDL establishment and approval. However, EPA determined that the question of how to address uncertainty when establishing and reviewing TMDLs is best addressed in guidance and is therefore incorporating the hierarchy approach and the principle of inverse proportionality in the draft TMDL guidance available with today's proposal. The hierarchy approach, as explained in guidance, is one of the ways to establish TMDLs when information for certain TMDL elements is not of the highest possible quantitative rigor. In addition, other approaches to establishing TMDLs when the highest possible quantitative rigor is not available may be used by States, Territories and authorized Tribes and, therefore, EPA does not propose use of

the hierarchy approach as a regulatory requirement.

Comments sought. EPA solicits comment on any or all aspects of the proposal, including the options discussed.

c. EPA Establishment of TMDLs

Section 501(a) provides that ''[t]he Administrator [of EPA] is authorized to prescribe such regulations as are necessary to carry out his functions under this chapter.'' Accordingly, EPA is proposing in § 130.36 expressly to codify its ability to establish TMDLs if the State so requests or if EPA determines that a State, Territory or authorized Tribe is not likely to establish TMDLs consistent with their schedules, or, if EPA determines it should establish TMDLs for interstate or boundary waterbodies.

It may be necessary for EPA to establish TMDLs in a number of situations. These include when interstate or international issues and coordination needs require EPA to assume a leadership role. Such interstate issues might involve TMDLs for large rivers, large watersheds or where complex technical questions require EPA to act as a catalyst in the establishment of a TMDL. For example, in complex water systems like the Chesapeake Bay where the impaired portions of the Bay are the responsibility of two states but also involve pollutant loadings from another state and the District of Columbia, where there is a cooperative agreement for protection of the Bay, plus three other states in the watershed, who are not part of an established agreement, EPA may provide an important role in bringing all jurisdictions into the planning process and ensuring that adequate authority and public process is covered for all states where wasteload allocations and load allocations are necessary. In situations like this EPA may work with both the Chesapeake Bay consortium that involves many diverse stakeholders and officials from the other states to ensure that all interested parties are represented in determining the loading allocations. Jurisdictional issues such as those faced on boundary waterbodies, may also cause EPA to initiate establishment of a TMDL.

EPA is also considering imposing a requirement that States, Territories and authorized Tribes consult with each other before listing as impaired a waterbody which forms part of the boundary between them and before they begin developing a TMDL for such waterbody. Such a consultation requirement would insure that, before interstate and boundary waterbodies are listed or given TMDLs, the neighboring governmental entities with jurisdiction over those waterbodies will have had an opportunity to share information about the waterbody's condition and the appropriateness of any planned action under section 303(d) for that waterbody.

EPA is also considering imposing a requirement that neighboring States, Territories and authorized Tribes with jurisdiction over a listed waterbody must jointly develop any TMDL for that waterbody. This cooperative exercise would be in lieu of EPA exercising its discretionary authority to develop the TMDL itself. Such a requirement would insure that neighboring States, Territories and authorized Tribes work with each other and all affected stakeholders in developing the TMDL.

EPA requests comment on these and any other ideas for listing or doing TMDLs for interstate waterbodies, including how best to develop TMDLs that account for equitable upstream/downstream State, Territory and authorized Tribe allocations and that account for loadings to downstream waterbodies like the Chesapeake Bay from far away upstream sources.

International waters pose especial difficulties. When establishing TMDLs for waterbodies that share an international border or flow from another country, the load reductions needed to meet water quality standards may not be achievable if those reductions are allocated only to U.S. sources. Should TMDLs for such waters allocate reductions to sources both within and outside the United States or in the alternative, should such TMDLs assume the status quo in terms of loads from outside the United States and allocate reductions only within the United States? EPA requests comments on either or any other approach.

EPA may also decide to exercise its authority if it determines that a State, Territory, or authorized Tribe has not or is not likely to meet its schedule for establishing TMDLs. EPA may decide, after first working with the State, Territory or authorized Tribe, that it should step in to establish TMDLs so that the overall pace of establishing TMDLs in the State, Territory or authorized Tribe remains expeditious. EPA anticipates that the decision to step in and establish TMDLs will be rare and based on case specific decisions. Finally, EPA may exercise its authority upon the request of the State, Territory or authorized Tribe.

EPA recognizes that its authority to establish TMDLs is not expressly stated in section 303(d). However, such authority is clearly implied in the CWA, is a reasonable interpretation of the Act, and is necessary to accomplish the purposes of the Act.

Section 303(d)(1)(C) places a clear mandate on the states to establish TMDLs for listed waterbodies. Section 303(d)(2) says that, if a state submits a TMDL and if EPA disapproves it, EPA shall establish a replacement TMDL within 30 days of the disapproval. Section 303(d) does not expressly say what must or may happen if states do not submit TMDLs to EPA for approval.

Courts, in finding that EPA has a mandatory duty to do TMDLs where a state has failed to do them, believed such a duty was necessary so that the Congressional scheme contemplated by Congress in section 303(d) is not frustrated by state failures to act. *See Scott* v. *City of Hammond,* 741 F.2d 992 (7th Cir. 1984)). As the *Scott* court said: '' We think it unlikely that an important aspect of the federal scheme of water pollution control could be frustrated by the states refusal to act.'' 741 F.2d at 997.

Consistent with this case law EPA clearly has authority to promulgate regulations specifying when it will establish TMDLs. In the face of Congress' obvious desire that states do TMDLs in the first instance and that EPA does them if it disapproves a submission, Congress would not have left EPA powerless to establish TMDLs in the face of state inaction. Such a result would frustrate the purposes of the statute. *See E.I. du Pont de Nemours & Co.* v. *Train,* 430 U.S. 112, 132 (1977) (the Supreme Court stating that it '' '[could not] * * * conclude that Congress ha[d] given authority inadequate to achieve with reasonable effectiveness the purposes for which it has acted' '' in the Clean Water Act)(quoting *Permian Basin Area Rate Cases,* 390 U.S. 747, 777 (1968)).

In *Dioxin/Organochlorine Center* v. *Clarke,* the Ninth Circuit affirmed a TMDL which EPA had established for dioxin in the Columbia River 57 F.3d 1517 (9th Cir. 1995). After consultation and involvement in the development of the draft TMDL, the States of Oregon, Washington and Idaho asked EPA to issue the proposed and final TMDLs as a federal action under the authority of section 303(d)(2). EPA proposed and established the dioxin TMDL, which the court upheld. Although the question of EPA's authority to do the TMDL absent a prior state submission and disapproval was not squarely before the court, the Ninth Circuit had no trouble concluding that EPA had sufficient authority pursuant to section 303(d) to establish the TMDL. 57 F.3d at 1527, 1528 n.14. For all these reasons, section 303(d)

gives EPA authority to establish TMDLs when States fail to do so.

6. What are the Proposed Rule's Requirements for Public Participation and Coordination with Federal Agencies?

Existing requirements. EPA's existing regulations do not include any States, Territories and authorized Tribes public participation requirements, except that 40 CFR 130.7 (c)(1)(ii) requires ''that calculations to establish TMDLs shall be subject to public review as defined in the State CPP.'' EPA's existing regulations, however, do include a requirement that when EPA disapproves and establishes either a list or a TMDL, EPA must seek public comment on the list or TMDL. Historically, EPA's policy has been that there should be full and meaningful public participation at the States, Territories and authorized Tribes level in both the listing and TMDL development processes. As such, EPA has encouraged States, Territories and authorized Tribes to carry out public participation consistent with their own public participation requirements.

Proposed rule. Communicating with the public and promoting public input into the listing and TMDL development processes is key to establishment of successful, robust TMDLs. For progress to be made in improving the water quality of our Nation's waterbodies, the public must be aware of water quality impairments and support actions to eliminate impairments. Today's proposal, at § 130.37, therefore requires that States, Territories and authorized Tribes provide the public with at least 30 days to review and comment on all aspects of the list (including the priority ranking and identification of the pollutant(s) and/or pollution causing or expected to cause each waterbody's impairment), the schedule of TMDLs, and TMDLs themselves prior to their submission to EPA. Today's proposal also requires that, at the time States, Territories, and authorized Tribes submit their list, schedule or TMDLs to EPA, they provide EPA with a written summary of any public comments received during the public comment period on the list, schedule and TMDLs, and their response to such comments.

Today's proposal, at § 130.23(a), also includes a requirement that States, Territories and authorized Tribes provide public notice and comment on their listing methodologies, and provide EPA with a summary of comments received and their response thereto when the final methodology is provided to EPA.

Today's proposal includes a requirement that at the time States provide the public the opportunity to review and comment on their lists of impaired or threatened waterbodies, priority rankings, schedules, and TMDLs, they must provide a copy of each of these documents to EPA. The proposed rule also would require that States consider any comments provided by EPA on these documents; EPA will consider how the States address its comments in its final decision approving or disapproving lists, rankings and TMDLs. By giving EPA an opportunity to review and provide the State with comments at an early stage in the process, this proposed provision will facilitate development of lists, rankings, schedules and TMDLs that reflect EPA's input. It is desirable, whenever possible, for EPA to provide its technical and other expertise at the time in the process where it can be reflected in final decisions made by States. The process will improve the likelihood that lists, rankings, and TMDLs ultimately submitted to EPA will be approved.

The proposed rule also included several provisions designed to facilitate consideration of endangered and threatened species when developing lists, rankings, schedules and TMDLs. These proposed provisions reflect EPA's desire for expressly integrating the water quality objectives of the CWA with the species conservation objectives of the Endangered Species Act (ESA). Consideration of the needs of endangered and threatened species is also consistent with the requirements and the objectives of the TMDL program. The proposed rule encourages States to establish processes with both the U.S. Fish and Wildlife Service and the National Marine Fisheries Service that will provide for the early identification and resolution of threatened and endangered species as they relate to lists of impaired or threatened waterbodies, priority rankings, schedules, and TMDLs. In addition, under the proposed rule, at the time of public notice the States will send the U.S. Fish and Wildlife Services and the National Marine Fisheries Service, where appropriate (e.g., coastal areas) copies of lists and priority ranking, unless the States request EPA to do so; EPA will request the wildlife agencies to provide comments to the States and provide EPA copies of these comments. Under today's proposal States would be required to consider any comments received from the wildlife agencies prior to the submission of their lists of impaired or threatened waterbodies, priority rankings, schedules, and TMDLs. EPA will consider the comments of the wildlife agencies, and the manner in which they were addressed by the State, when taking action on lists, rankings and TMDLs submitted by States.

These proposed provisions will ensure timely input from the wildlife agencies early in the process rather than later. EPA would like to facilitate the development of working relationships between States and the Services so that the States will have the benefits of the Services' expertise, and the early involvement of the Services will help to integrate the species protection objectives of the ESA and the CWA into the TMDL program.

Other options considered. In developing today's proposal, EPA considered maintaining the status quo, i.e., not including in the regulations any specific public participation requirements. EPA rejected this option, however, because EPA believes that public participation in the listing and TMDL development processes is critical to the development of sound lists and TMDLs. In addition, providing the States, Territories and authorized Tribes with clear-cut public participation requirements eliminates any current confusion that may exist regarding EPA's expectations for States, Territories and authorized Tribes public participation on lists and TMDLs.

In developing today's proposal, EPA considered maintaining the current regulatory language that does not require copies of list, priority rankings, schedules, and TMDLs to be sent to EPA, Fish and Wildlife Service, and National Marine Fisheries at the time of public notice. EPA rejected this option because it does not provide an opportunity for meaningful input by EPA or other Federal agencies prior to the States', Territories' and authorized Tribes' submissions to EPA. EPA also considered a requirement that the States, Territories and authorized Tribes send advance copies only to EPA, not to Fish and Wildlife Service and National Marine Fisheries Service. EPA rejected this approach because the wildlife agencies would not receive these documents as early in the process if EPA, rather than the States, Territories and authorized Tribes, were to transmit these to the Service. However, if States, Territories and authorized Tribes wish, they can provide these documents only to EPA and EPA will forward them to the Services.

Comments sought. EPA solicits comment on any or all aspects of the public participation requirements in the proposal, including the options discussed.

7. What is the Effect of the Proposed Rule on Transitional TMDLs and Schedules?

Between the date of this proposal and the publication of a final rule in the **Federal Register** amending the current requirements for TMDLs, States, Territories and authorized Tribes (and in some instances EPA) will be establishing TMDLs pursuant to schedules submitted along with their 1998 section 303(d) lists or schedules incorporated into consent decrees or settlement agreements concluding TMDL lawsuits. Until these proposed amendments become final (and some aspects of this proposal may change as a result of public comments received over the next few months), the current regulations at § 130.7 establish the minimum requirements for approvable TMDLs. Given the likelihood that the current TMDL requirements will change significantly when the proposed amendments become final, there is a need to consider how these new regulations will apply and whether their effective date should be extended.

EPA is anxious that any new requirements be effective and implemented as soon as possible. Accordingly, EPA currently intends to have these revisions be effective 30 days after publication of the final rules in the **Federal Register**, as generally contemplated by the Administrative Procedure Act. However, recognizing the need for orderly administration of this program, EPA is proposing at § 130.38(a) that it will approve any TMDL submitted to it for review within 12 months of the final rule's effective date if it meets either the requirements in current § 130.7 or the new requirements proposed in §§ 130.32, 130.33 and 130.34. In recognition of the fact that EPA may establish TMDLs during this transition period, EPA is also proposing at § 130.38(b) that it may establish TMDLs within 12 months of the rule's effective date either according to the pre-amendment requirements in § 130.7 or the post amendment requirements in §§ 130.32, 130.33 and 130.34. EPA believes that this approach will afford States, Territories, authorized Tribes and EPA the certainty of knowing that, should they begin to establish TMDLs in the next year or so modeled on the requirements in the current rules, those TMDLs will not be determined to be inadequate as a result of the final adoption of these proposed amendments.

In addition to the issue of which criteria apply to TMDLs established during the period of transition between the new and old regulations, EPA is concerned about the impact of the proposed new TMDL requirements on commitments it has made to guarantee establishment of TMDLs under consent decrees and settlement agreements. During the past three years, EPA has entered into consent decrees and settlement agreements concluding 15 lawsuits alleging, among other things, that EPA should have established TMDLs in 13 different States. Those States are: Alabama, Arizona, California, Delaware, Florida, Georgia, Kansas, Mississippi, New Mexico, Pennsylvania, Virginia, Washington and West Virginia. Typically, these consent decrees or settlement agreements contains schedules according to which the States expect to establish TMDLs for all waterbodies identified on their section 303(d) lists and commitments by EPA to establish those TMDLs by certain dates if the State fails to meet its schedule. The schedules for establishing TMDLs in these consent decrees range from approximately four and one-half years to 12 years in length. The number of waterbodies and potential TMDLs covered under each consent decree also varies. Some consent decrees, like California (Newport Bay), address only a small number of impaired waterbodies. Others, like the Kansas consent decree, require the establishment of TMDLs for over 1000 waterbodies statewide.

Each of the settlements and accompanying TMDL schedules was negotiated by EPA in the context of what current regulations at 40 CFR 130.7 require an approvable TMDL to look like. Accordingly, when deciding on appropriate schedules to incorporate into these settlements, EPA considered how long it might reasonably take a State (or EPA) to establish the necessary TMDLs based on current requirements. The schedules that were negotiated with the plaintiffs and incorporated into the various settlements were aggressive even by these standards.

Today's proposal includes a number of changes to the current TMDL requirements which, while making for more effective TMDLs, may increase the time it takes to establish a TMDL. Most significantly, today's proposal at § 130.33(b)(10) would require that each TMDL include an implementation plan containing eight specific elements. While EPA always expected reasonable assurances that the TMDL's wasteload and load allocations would be implemented, the proposed regulations are more specific. Implementation plans must also include a description of the control actions and/or management measures which will be implemented and a monitoring/modeling plan designed to determine the effectiveness of these actions and measures. The proposal at § 130.37(a) also adds an express requirement that States, Territories and authorized Tribes provide the public with no less than 30 days to review and comment on any TMDLs before they are submitted to EPA. When submitted to EPA for review, TMDLs must also be accompanied by a summary of all the comments received and responses to those comments.

EPA recognizes that the new regulations may add time to the process, especially for near-term deadlines where States may not have enough time to adjust their processes. Accordingly, EPA requests comment on whether any new TMDL requirements contained in today's proposal may affect the ability of States to perform their obligations as contemplated under the various TMDL consent decrees and settlement agreements. To the extent these new provisions are promulgated and will require more time for establishment of TMDLs, EPA has at least two options it might consider. First, it might further phase in some of the requirements (for example, the requirement that all TMDLs have an implementation plan) so that States' near-term consent decree schedules can be met. Second, EPA might on a case-by case basis seek to modify court ordered TMDL schedules as appropriate to accommodate whatever additional workload is required by these new requirements. EPA invites comment on the extent to which any new TMDL requirements are likely to render any of the existing court-ordered TMDL schedules unrealistic, as well as the wisdom and necessity of pursuing either of the above-mentioned options. EPA also invites comment on whether it is appropriate to allow EPA to approve TMDLs submitted for review within 12 months of the final rule's effective date if those TMDLs meet either the pre-amendment requirements in § 130.7 or the post-amendment requirements being proposed today, and if not, what an appropriate timeframe would be. Similarly, EPA invites comment on whether it is appropriate to allow EPA to establish TMDLs within 12 months of the final rule's effective date either according to the pre-amendment requirements in § 130.7 or the post-amendment requirements being proposed today, and if not, what an appropriate timeframe would be. EPA is also considering whether it should establish a longer or shorter transitional period of time and specifically requests

comment on this issue and suggestions of alternative transition periods.

8. What Changes Does the Proposed Rule Make to the Continuing Planning Process and Water Quality Management Plan Requirements?

Existing requirements. EPA's existing TMDL regulations do not require States, Territories and authorized Tribes to develop implementation plans for TMDLs and do not include any requirements for States, Territories and authorized Tribes submission of implementation plans for TMDLs. EPA's regulations at 40 CFR 130.6, however, require States, Territories and authorized Tribes to update their water quality management plans, which are used to direct implementation of States', Territories' and authorized Tribes' water quality programs and which must include certain elements, including TMDLs and implementation measures.

Proposed rule. Today's proposal, at § 130.50 and § 130.51, makes several minor changes to the continuing planning process and water quality management plan requirements currently found at 40 CFR 130.5 and 130.6, respectively. It revises the existing continuing planning process regulations to clarify that States, Territories and authorized Tribes have discretion to go beyond the mandatory plan elements set out in the regulation and also include other processes, such as watershed-based planning and implementation. The proposal also makes clear that a CPP need not be a single document. This reflects the current practice that the CPP may be a compendium of many different State, Territorial and authorized Tribal planning documents. Today's proposal also revises the current regulatory requirements for water quality management plans at 40 CFR 130.6 to clarify that updates to water quality management plans should incorporate approved TMDLs and generally have a watershed basis. Under 40 CFR 130.6, States, Territories and authorized Tribes should update their water quality management plans as needed to reflect, among other things, changing water quality conditions and the results of implementation actions. If a State's, Territory's, or authorized Tribe's water quality management plan needs to be updated, EPA can, under 40 CFR 130.6, require the State, Territory or authorized Tribe to update their plan.

Other options considered. EPA considered not proposing any changes to the existing regulatory requirements for water quality management plans and CPPs.

Comments sought. EPA seeks comments on its proposed changes to the continuing planning process and water quality management regulatory requirements. EPA also seeks comments on whether other changes are needed to these requirements.

9. How Can the Public Petition EPA to Establish TMDLs?

This regulation is proposed under authority granted to EPA under CWA sections 501(a) and 303(d), 33 U.S.C. §§ 1361(a), 1313(d).

The purpose of § 130.65 is to formalize a petition process for the public to request that EPA step in and perform duties imposed on States, Territories and authorized Tribes by section 303(d). Although this petition process has been available to the public since section 303(d) was enacted, it has seldom been utilized in the context of section 303(d). This new section should increase public awareness of this procedure for requesting Agency action. See, APA § 555(b), 5 U.S.C. § 555(b).

EPA is proposing to codify a specific petition process for section 303(d) for several reasons. First, EPA recognizes that numerous citizen groups and individuals are very interested in promoting the expeditious development of meaningful TMDLs throughout the Nation. EPA is also aware that many of these groups and individuals have been dissatisfied both with the pace at which States have been establishing TMDLs and, to some extent, with the nature and degree of EPA oversight of State progress in establishing TMDLs. Although these citizens at all times have possessed the right to petition EPA to intervene more actively in a State's TMDL development process, EPA interprets the lawsuits that citizens have filed against EPA within the last five years to be an indication either that the public is unaware that it can take its grievances directly to EPA for consideration, or that it has concluded that taking such grievances directly to EPA would be futile. By proposing this petition process, EPA hopes to make it very clear to the public that EPA recognizes the important role that the public serves in helping the States and EPA to implement section 303(d). Second, presenting grievances in the first instance to EPA rather than to the courts will allow EPA, by applying its expertise to the facts the citizens present, to respond more directly to citizens' concerns in the context of its national policy objectives. EPA's discretionary authority to oversee the State, Territorial and authorized Tribal implementation of section 303(d) is not unfettered; the petition process thus would provide a mechanism whereby citizens can assure that EPA exercises that discretion wisely. Third, the petition process—and the resulting administrative record—will promote more efficient judicial review of EPA's decision whether and, possibly, how to intervene in any particular State.

When Congress directed EPA to approve or disapprove State, Territories or authorized Tribes section 303(d) lists and TMDL submissions and to establish its own lists or TMDLs in the event EPA disapproves the submission, Congress imposed very specific duties on EPA under section 303(d). However, EPA does not believe that its role under section 303(d) is limited to those narrow, although important, duties. Section 303(d) reasonably can also be interpreted to vest in EPA more general oversight authority to ensure the States' timely and meaningful implementation of section 303(d).

EPA, on its own initiative, can and does exercise that oversight authority. For example, over the past decade, EPA has modified its regulations and issued numerous guidance documents to emphasize the importance of the section 303(d) listing process. As a consequence, States'', Territories' and authorized Tribes' section 303(d) lists have become more comprehensive and, accordingly, more useful in water quality decision making. EPA has also provided considerable technical and financial assistance to invigorate TMDL development, e.g., by providing technical support in establishing TMDLs, completing and supporting analyses necessary to establish TMDLs and developing computer models for use in establishing TMDLs. EPA has also worked with States, Territories and authorized Tribes to develop long-term schedules providing for the establishment of TMDLs on all listed waters.

EPA recognizes, however, that members of the public would like to influence how EPA exercises its discretionary authority to oversee the TMDLs, specifically with respect to particular States, Territories and authorized Tribes. The proposed petition process is the best way to accomplish this. (Indeed, although the petition regulation is merely proposed, not codified, EPA notes that citizens are free to exercise their petition rights at any time.) First, the petition process allows EPA to apply the statutory scheme to particular factual situations raised by the petitioners. It allows EPA to consider the facts presented by the petitioners, to make its own findings of facts, to apply its expertise, and, finally, to exercise the discretion granted it by

Congress to determine if, when, and how to intervene to reinforce a State's, Territory's or authorized Tribe's implementation of section 303(d). In response to a petition, EPA will also need to explain the bases for its decisions, which in turn can stimulate further policy debate. Second, the petition process allows EPA to consider the petitioner's request in light of its overall national policy goals, statutory obligations, and resource constraints. Because EPA is charged with implementing numerous other environmental statutes in addition to the CWA, the petition process allows EPA to balance all of its responsibilities and objectives in a way that ensures that it is carrying out its overall mission in the most timely and effective manner possible. Third, the petition process does not prevent citizens from seeking redress in federal court. To the contrary, the petition process will facilitate judicial review of EPA's oversight of the State, Territorial or authorized Tribal TMDLs. In response to citizens' petitions, EPA will assemble and analyze relevant facts, reach a decision, and explain the basis for that decision. If a citizen is dissatisfied with the resulting decision and files suit, a reviewing court would have an administrative record against which to evaluate the reasonableness of EPA's decision. In EPA's view, the petition process allows the administrative process to proceed, with the results of the process subject to judicial review only at the conclusion of the process. This not only honors the separate roles and responsibilities of the administrative and judicial processes, but it also assures that EPA, in the first instance, has an adequate opportunity to exercise the discretionary authority Congress conferred upon it.

Section 130.65(b) clarifies that this petition procedure is not intended to be used to prompt EPA to establish a TMDL for a particular waterbody, or for moving a particular waterbody to a different part of a the schedule. Efforts to alter State, Territorial or authorized Tribal priorities are more suitably directed to that State, Territory or authorized Tribe. The best time to convey comments on State, Territory or authorized Tribal priorities is likely to be when the section 303(d) list of waters needing TMDLs and the schedule for establishing TMDLs is published for public comment. EPA hopes to reserve what limited resources it has for intervening with support in those instances where the shortcomings, or perceived shortcomings, of State, Territorial or authorized Tribal efforts are substantial.

It is EPA's goal to answer petitions filed under 40 CFR 130.65(c) within four months of receipt. See 40 CFR 130.65(e). In accordance with APA section 555(b), ''within a reasonable time, each agency shall proceed to conclude a matter presented to it.'' Although EPA cannot guarantee that each petition will be answered within four months, it commits to making reasonable efforts to meet that deadline.

Section 130.65(d) is not intended to delineate an exhaustive list of elements a petition must contain. Nor is 40 CFR 130.65(f) intended to contain a comprehensive list of factors EPA will consider in evaluating whether to step in and take primary responsibility for conducting activities that States, Territories or authorized Tribes are directed to perform under section 303(d). EPA will consider any and all relevant information submitted with a petition under 40 CFR 130.65.

10. What Changes Does the Proposed Rule Make to the Water Quality Standards and State Submission Requirements?

Existing requirements. EPA's regulations at § 130.3 provide a definition of ''water quality standard'' that replicates the definition found in the water quality standards regulations at 40 CFR Part 131. EPA's regulations at § 130.10(d) describe requirements that EPA promulgated in 1989 to implement CWA section 304(l). Section 304(l) required States, Territories, and authorized Tribes to submit certain water quality information about waters by February 4, 1989.

Proposed rule. EPA is proposing to delete both § 130.3 and § 130.10(d). Section 130.3 merely duplicates the same definition of ''water quality standard'' found in the water quality standards regulations at 40 CFR Part 131. As a result, the existing language at § 130.3 is duplicative and unnecessary. Section § 130.10(d) required a one-time information submittal by States, Territories, and authorized Tribes. This requirement has not been used since all the States and Territories submitted this information, and CWA section 304(l) requires only one submittal. Therefore, that the requirement to submit this information is now obsolete.

Comments sought. EPA seeks comments on its proposed deletions to the existing water quality standards definition and the CWA section 304(l) parts of the state submittal requirements.

Regulatory Requirements

A. Regulatory Flexibility Act

The Regulatory Flexibility Act (RFA) (5 U.S.C. 601 *et seq.*), as amended by the Small Business Regulatory Enforcement Fairness Act, generally requires Federal agencies to conduct an initial regulatory flexibility analysis (IRFA) describing the impact of the regulatory action on small entities for any rule for which a notice of proposed rulemaking is required under the Administrative Procedure Act (5 U.S.C. section 551 *et seq.*) or any other statute. However, under section 605(b) of the RFA, if the Administrator for EPA certifies that the proposed rule will not have a significant economic impact on a substantial number of small entities, EPA is not required to prepare an IRFA. The Administrator is today certifying, pursuant to section 605(b) of the RFA, that this proposed rule will not have a significant economic impact on a substantial number of small entities. Therefore, EPA did not prepare an initial regulatory flexibility analysis.

The RFA requires analysis of the impacts of a rule on the small entities *subject to the rule's requirements.* See *United States Distribution Companies* v. *FERC*, 88 F.3d 1105, 1170 (D.C. Cir. 1996); *Mid-Tex Electric Co-op., Inc.* v. *FERC*, 773 F.2d 327 (D.C. Cir. 1985); *Motor & Equipment Manufacturers Ass'n* v. *Nichols*, 142 F.3d 449 (D.C. Cir. 1998). Today's rule establishes no requirements applicable to small entities, and so is not susceptible to regulatory flexibility analysis as prescribed by the RFA. (''[N]o [regulatory flexibility] analysis is necessary when an agency determines that the rule will not have a significant economic impact on a substantial number of small entities *that are subject to the requirements of the rule.*'' *United Distribution* at 1170, quoting *Mid-Tex Elec. Co-op* v. *FERC*, 773 F.2d 327, 342 (D.C. Cir. 1985) (emphasis added by *United Distribution* court). EPA is therefore certifying that today's rule will not have a significant economic impact on a substantial number of small entities, within the meaning of the RFA, for the following reasons.

First, section 303(d) of the CWA directs States, Territories and authorized Tribes (and EPA, if it disapproves the State's, Territory's or authorized Tribe's efforts) to establish lists of impaired waterbodies and TMDLs for those waterbodies. Tribes may apply for authority to establish lists and TMDLs in Indian Country. The proposed regulations establish requirements for EPA, States, Territories and authorized Tribes to follow when establishing TMDLs and lists of

impaired waterbodies under section 303(d) of the CWA. The regulations apply only to those three categories of entities and do not impose TMDL or listing requirements upon any small entities.

Second, the impact (if any) on small entities of any TMDLs or lists that might be established or approved by EPA, States, Territories and authorized Tribes pursuant to these proposed regulations is indirect and highly speculative. First, no impact flows directly from these proposed regulations. Only the listing or TMDL action itself taken by EPA, States, Territories and authorized Tribes pursuant to these regulations would have any possible impact. Second, any economic impact on small entities will result, if at all, only as a consequence of future State, territorial, tribal or EPA actions. The CWA and these proposed regulations afford the States, Territories, authorized Tribes and EPA considerable discretion in deciding which waterbodies to list, how to prioritize such waterbodies, how to schedule the waterbodies for TMDL development, and how to calculate and apportion TMDLs and their component load and wasteload allocations. The extent to which future listing or TMDL approval decisions may have any impact on small entities is impossible to predict given the uncertainties inherent in a process involving the exercise of discretion over so many variables. While a State's, Territory's or authorized Tribe's implementation of today's rule *may* ultimately result in the listing of a water or development of a TMDL that *may* have an impact on point or nonpoint source dischargers, EPA's action today does not apply to any discharger, including small entities.

Third, the uncertainty regarding what (if any) impact these proposed regulations may have on small entities is increased by the fact that TMDLs are not self-implementing. Assuming a TMDL is established by a State, Territory, authorized Tribe, or EPA for a listed water, the TMDL's wasteload allocations (for point sources) and the load allocations (for nonpoint sources) are not directly enforceable under the CWA. Under EPA's NPDES permitting rules, effluent limits in point source permits must be ''consistent with'' (but not necessarily identical to) wasteload allocations in approved TMDLs. However, the TMDLs themselves (and their wasteload allocations) are not independently enforceable. With respect to nonpoint sources, the load allocations in a TMDL are only ''enforceable'' to the extent they are made so by State, Territorial, or authorized Tribal laws and regulations. There are no Federal requirements that such load allocations actually be met by small (or any other) entities. Given the compounding uncertainties regarding (1) Whether any particular waterbody will be listed, (2) if it is, when a TMDL will be established, (3) what the TMDL's allocations will be, (4) which entities will be assigned those allocations, and (5) whether, and in what form, those allocations will be implemented, it is impossible to say whether or to what extent these proposed regulations (and any resulting TMDL or listing actions) will impact small entities.

Finally, even assuming that future listing or TMDL actions may ultimately have some discernable effect on small entities, such impacts would actually flow from requirements already established by section 303(d) of the CWA and the States, Territories' and authorized Tribes' water quality standards and not these proposed regulatory amendments. Section 303(d) requires that States, Territories and authorized Tribes (or, under certain circumstances, EPA) list waterbodies and establish TMDLs with reference to criteria contained in State, Territorial or authorized Tribal water quality standards. Independent of today's proposed amendments, States, Territories and authorized Tribes (and, under certain circumstances, EPA) already have an obligation to list waterbodies and establish TMDLs necessary to implement the State, Territorial, and authorized Tribal water quality standards. Today's proposals merely amend EPA's existing regulations implementing those statutory requirements. Any impacts should be seen as resulting from the independent statutory obligation to establish TMDLs that implement the State, Territorial and authorized Tribal water quality standards, and not from these proposed regulatory requirements.

B. Executive Order 12866

Under Executive Order 12866 (58 FR 51735, October 4, 1993), EPA must determine whether the regulatory action is ''significant'' and therefore subject to Office of Management and Budget (OMB) review and the requirements of the Executive Order. The Order defines ''significant regulatory action'' as one that is likely to result in a rule that may:

(1) Have an annual effect on the economy of $100 million or more or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or Tribal governments or communities;

(2) Create a serious inconsistency or otherwise interfere with an action taken or planned by another agency;

(3) Materially alter the budgetary impact of entitlements, grants, user fees, or loan programs or the rights and obligations of recipients thereof; or

(4) Raise novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in the Executive Order.

Pursuant to the terms of Executive Order 12866, it has been determined that this rule is a ''significant regulatory action.'' As such, this action was submitted to OMB for review. Changes made in response to OMB suggestion or recommendations will be documented in the public record.

Under the regulatory review provisions of Executive Order 12866 EPA evaluates the benefits and costs of proposed new rules. In the case of an existing program, like the TMDL program, this assessment focuses on the benefits and costs associated with the change in regulatory requirements. Accordingly, EPA has prepared an analysis of the direct costs that the new requirements of this proposed rule will impose on States, Territories and authorized Tribes that must list, and develop TMDLs for, impaired waters. This analysis, entitled ''Analysis of the Incremental Costs of Proposed Revisions to the TMDL Program Regulations'' is available in the docket for the rulemaking.

However, EPA recognizes that the TMDL program is of interest to a wide range of stakeholders, and expects that stakeholders will have an interest in understanding the costs and benefits resulting from implementation of the TMDL program as well as the direct costs of developing TMDLs to States, Territories, and authorized Tribes under this proposed rule. In anticipation of the interest of diverse stakeholders, EPA has begun work to gather information about the costs and benefits that can be expected to result from implementation of the TMDL program. A key part of this assessment is to better understand the costs and benefits of the existing TMDL program, as well as the incremental costs and benefits that will result from the changes to the TMDL program.

As part of this effort, EPA is gathering information concerning the costs that pollution sources may incur in implementing the pollution controls called for in TMDLs developed under the new rule. These costs, however, are difficult to estimate. A TMDL is developed on a specific water body and is the product of a locally-based decision-making process. The allocation decisions made at the local level may

produce water quality benefits at a lower cost than projected by EPA cost models. Also, many of the actions identified in TMDLs as needed to meet water quality goals may to be required under other provisions of the Clean Water Act or other Federal or State laws. It may be difficult in some cases to distinguish actions undertaken to comply with other statutory provisions from those undertaken to implement TMDLs. In such cases, it is appropriate to consider alternative assumptions about the costs and benefits that would occur anyway and those that would result from implementing TMDLs.

EPA is also gathering information on the water quality, environmental, public health and economic benefits of the TMDL program and the restoration of the health of the Nation's polluted waters. While the estimation of benefits is traditionally difficult, EPA is working to develop improved models for describing benefits in both qualitative and quantitative terms. As noted above, because the TMDL program is related to other provisions of the Clean Water Act, and other Federal and State laws, attributing benefits to the TMDL program requires a certain amount of judgment and may require consideration of alternative assumptions or ''baselines''.

EPA is working to develop this information and analysis expeditiously. As this work evolves and its quality is sufficient to meaningfully inform the public, EPA will make it available for public review and comment. EPA hopes to be able to provide results from this work prior to the final promulgation of the TMDL rule.

C. Unfunded Mandates Reform Act

Title II of the Unfunded Mandates Reform Act of 1995 (UMRA), Pub. L. 104–4, establishes requirements for Federal agencies to assess the effects of their regulatory actions on State, Territory, authorized Tribal or local governments and the private sector. Under section 202 of the UMRA, EPA generally must prepare a written statement, including a cost-benefit analysis, for proposed and final rules with ''Federal Mandates'' that may result in expenditures to State, local, and Tribal governments, in the aggregate, or to the private sector, of $100 million or more in any one year. Before promulgating an EPA rule for which a written statement is needed, section 205 of the UMRA generally requires EPA to identify and consider a reasonable number of regulatory alternatives and adopt the least costly, most cost-effective or least burdensome alternative that achieves the objectives of the rule. The provisions of section 205 do not apply when they are inconsistent with applicable law. Moreover, section 205 allows EPA to adopt an alternative other than the least costly, most cost-effective or least burdensome alternative if the Administrator publishes with the rule an explanation why that alternative was not adopted. Before EPA establishes any regulatory requirements that may significantly or uniquely affect small governments, including Tribal governments, it must have developed under section 203 of the UMRA a small government EPA plan. The plan must provide for notifying potentially affected small governments, enabling officials of the affected small governments to have meaningful and timely input in the development of EPA regulatory proposals with significant Federal intergovernmental mandates, and informing, educating, and advising small governments on compliance with the regulatory requirements.

EPA has determined that today's proposed rule does not contain a Federal mandate that may result in expenditures of $100 million or more for State, local, and tribal governments, in the aggregate, or the private sector in any one year. The costs for States, Territories and authorized Tribes to implement the requirements in today's proposal are not expected to exceed $25 million in any one year. In addition, since today's proposal does not impose any requirements on the private sector, the private sector will incur no costs. Thus, today's proposal is not subject to the requirements of section 202 and 205 of UMRA.

As explained in the Regulatory Flexibility Act section of the preamble, this proposed rule establishes no requirements applicable to small entities and, thus, this proposed rule will not significantly affect small entities. EPA has determined that this proposed rule contains no regulatory requirements that might significantly or uniquely affect small governments including Tribal governments. As explained earlier in this preamble, the Clean Water Act authorizes EPA to treat an Indian Tribe in the same manner as a State for purposes of establishing lists of waters and TMDLs, and EPA today is clarifying the test an Indian Tribe must meet to be authorized to establish lists of impaired waters and TMDLs in Indian country. Currently, there are no Tribes authorized to establish TMDLs under section 303(d) and, as a result, today's proposal will not significantly or uniquely affect Tribal governments. However, as Tribes continue to build their Clean Water Act capacity and obtain water quality standards program approval, some Tribes are likely to seek approval to establish TMDLs. Moreover, whether or not Tribes choose to do so, they have a strong interest in protecting water quality on Tribal lands. Thus, even though today's proposal will not significantly or uniquely affect Tribal governments, Tribes may in the future be subject to the requirements in today's proposal. Recognizing the need to consider the views and concerns of Tribal governments in any comprehensive evaluation of how TMDLs are established, EPA determined it was appropriate to include a Tribal representative on the TMDL FACA Committee. The committee's final report addresses Tribal issues, recommending that EPA increase efforts to educate Tribes about water quality programs, including TMDLs, and ensure that EPA and State water quality staff respect the government-to-government relationship with Tribes in all TMDL activities.

D. Paperwork Reduction Act

Today's action adds new information requirements in 40 CFR part 130. The information collection request for these new provisions are currently under development. EPA expects to publish a proposed Information Collection Request (ICR) for these requirements in the **Federal Register** for comment at the time the ICR is submitted for approval to the Office of Management and Budget (OMB) under the Paperwork Reduction Act, 44 U.S.C. 3501 *et seq.* after public comment. EPA expects to publish this notice within 30 days of the publication of this proposal. An agency may not conduct or sponsor, and a person is not required to respond to a collection of information unless it displays a currently valid OMB control number. The OMB control numbers for EPA's regulations are listed in 40 CFR part 9 and 48 CFR chapter 15.

E. Executive Orders on Federalism

Under Executive Order 12875, ''Enhancing the Intergovernmental Partnership,'' EPA may not issue a regulation that is not required by statute and that creates a mandate upon a State, local, or tribal government, unless the Federal government provides the funds necessary to pay the direct compliance costs incurred by those governments, or EPA consults with those governments. If EPA complies by consulting, Executive Order 12875 requires EPA to provide to OMB a description of the extent of EPA's prior consultation with representatives of affected State, local, and tribal governments, the nature of their concerns, any written communications from the governments,

and a statement supporting the need to issue the regulation. In addition, Executive Order 12875 requires EPA to develop an effective process permitting elected officials and other representatives of State, local and tribal governments ''to provide meaningful and timely input in the development of regulatory proposals containing significant unfunded mandates.''

EPA has concluded that this proposed rule will create a mandate on State governments and authorized Tribes and that the Federal government will not provide all of the funding necessary to pay the direct costs incurred by the State governments and authorized Tribes in complying with the mandate. However, EPA has substantially increased funding for States, Territories, and authorized Tribes through the State-matched CWA section 106 and 319 grant programs. In developing this proposed rule, EPA consulted with State, local, and tribal governments to enable them to provide meaningful and timely input in the development of this rule.

Before beginning to develop today's proposal, EPA convened a Federal Advisory Committee to make recommendations for improving the efficiency and effectiveness of TMDLs. The TMDL FACA Committee was comprised of 20 members, including four senior level state officials, an elected local official, and a Tribal consortium representative. Over a period of one and one-half years, the TMDL FACA Committee held six meetings at locations throughout the country. These meetings were open to the general public, as well as representatives of State, local, and Tribal governments, and all included public comment sessions. The TMDL FACA Committee focused its deliberations on four broad issue areas: identification and listing of waterbodies; development and approval of TMDLs; EPA management and oversight; and science and tools. On July 28, 1998, the TMDL FACA Committee submitted its final report to EPA containing more than 100 consensus recommendations for changes and improvements to TMDLs. As explained throughout this preamble, EPA carefully reviewed the TMDL FACA Committee's consensus recommendations and incorporated, in whole or in part, most of those recommendations in this proposal.

Following completion of the FACA Committee process, EPA continued to meet with State and local government officials to seek their views on needed changes to the Water Quality Planning and Management (TMDL) regulations. While expressing support for many of the proposed changes being considered by EPA, State officials and their representatives also expressed some general concerns about the capacity of State governments to carry out the new requirements proposed today. In particular, States were concerned about the capacity of the state governments to carry out any new requirements beyond those in the current regulations. Local government officials expressed concerns in particular about any TMDL allocation approaches that could in their view, result in municipal point sources having to bear an inequitable share of the pollutant load reductions need to attain water quality standards. In developing today's proposal, EPA considered the concerns of State, local and tribal governments and determined the need to revise the TMDL regulations to provide States, Territories and Tribes with clear, consistent, and balanced direction for listing waters and developing TMDLs and thereby improve the effectiveness, efficiency and pace of TMDL establishment and water quality improvement.

Finally, while there is a new executive order on federalism (Executive Order 13132), it will not go into effect for ninety days. In the interim, under the current Executive Order 12612 on federalism, this rule does not have a substantial direct effect upon States, upon the relationship between the national government and the States, or upon the distribution of power and responsibilities among the various levels of government. The proposed regulations will not have a substantial direct effect on the relationship between the national government and the States or upon the distribution of power and responsibilities among the various levels of government because the proposed regulations reflect the statutory scheme that places primary responsibility with the States while EPA retains oversight authority. States continue to have primary responsibility for identifying impaired waters, setting priorities, and developing TMDLs. EPA's role continues to be one of reviewing state actions and exercising its authority to identify waters and develop TMDLs only in the face of inadequate state action.

The proposed regulations also should not have a substantial direct effect upon States because the provisions in the proposed regulations include many requirements and recommendations currently contained in EPA's existing regulations and guidance. While the proposed regulations provide additional detail that EPA believes is necessary to ensure consistency and effective implementation of the program, the statutory and current regulatory framework is not altered. Even the new provision for States to include implementation plans as a component of TMDLs reflects EPA's existing guidance and expectation that States would develop implementation plans as part of the TMDL process although not as a required component of the TMDL. Accordingly, these provisions should not have a substantial direct effect on States or on intergovernmental relationships or responsibilities.

F. Executive Order 13084: Consultation and Coordination With Indian Tribal Governments

Under Executive Order 13084, EPA may not issue a regulation that is not required by statute, that significantly or uniquely affects the communities of Indian tribal governments, and that imposes substantial direct compliance costs on those communities, unless the Federal government provides the funds necessary to pay the direct compliance costs incurred by the tribal governments, or EPA consults with those governments. If EPA complies by consulting, Executive Order 13084 requires EPA to provide to OMB, in a separately identified section of the preamble to the rule, a description of the extent of EPA's prior consultation with representatives of affected tribal governments, a summary of the nature of their concerns, and a statement supporting the need to issue the regulation. In addition, Executive Order 13084 requires EPA to develop an effective process permitting elected and other representatives of Indian tribal governments ''to provide meaningful and timely input in the development of regulatory policies on matters that significantly or uniquely affect their communities.''

As explained above in the discussion of UMRA requirements, today's rule proposal does not significantly or uniquely affect the communities of Indian tribal governments nor does it impose substantial direct compliance costs on them since currently there are no Tribes authorized to establish TMDLs. Accordingly, the requirements of section 3(b) of Executive Order 13084 do not apply to today's proposal.

G. Executive Order 13045: Protection of Children From Environmental Health Risks and Safety Risks

Executive Order 13045 (62 FR 19885, April 23, 1997) applies to any rule that: (1) Is determined to be ''economically significant'' as defined under Executive Order 12866, and (2) concerns an environmental health or safety risk that

EPA has reason to believe may have a disproportionate effect on children. If the regulatory action meets both criteria, the EPA must evaluate the environmental health or safety effects of the planned rule on children, and explain why the planned regulation is preferable to other potentially effective and reasonably feasible alternatives considered by EPA.

EPA interprets Executive Order 13045 as applying only to those regulatory actions that are based on health or safety risks, such that the analysis required under section 5–501 of the Order has the potential to influence the regulation. This proposed rule is not subject to Executive Order 13045 because it is not ''economically significant'' and it does not establish an environmental standard intended to mitigate health or safety risks. Today's proposal is a procedural rule.

H. National Technology Transfer and Advancement Act

Section 12(d) of the National Technology Transfer and Advancement Act of 1995 (''NTTAA''), Pub L. 104–113, § 12(d) (15 U.S.C. 272 note) directs EPA to use voluntary consensus standards in its regulatory activities unless to do so would be inconsistent with applicable law or otherwise impractical. Voluntary consensus standards are technical standards (e.g., materials specifications, test methods, sampling procedures, and business practices) that are developed or adopted by voluntary consensus standards bodies. The NTTAA directs EPA to provide Congress, through OMB, explanations when the Agency decides not to use available and applicable voluntary consensus standards.

This proposed rulemaking does not involve technical standards. Therefore, EPA is not considering the use of any voluntary consensus standards.

EPA welcomes comments on this aspect of the proposed rulemaking and, specifically, invites the public to identify potentially-applicable voluntary consensus standards and to explain why such standards should be used in this regulation.

List of Subjects in 40 CFR Part 130

Environmental protection, Intergovernmental relations, Reporting and recordkeeping requirements, Water pollution control.

Dated: August 12, 1999.

Carol Browner,

Administrator.

For the reasons set out in the preamble, title 40, chapter I of the Code of Federal Regulations is proposed to be amended by revising part 130 as follows:

PART 130—WATER QUALITY PLANNING AND MANAGEMENT

Subpart A—Summary, Purpose and Definitions

Sec.
130.0 Program summary and purpose.
130.1 Applicability.
130.2 Definitions.

Subpart B—Water Quality Monitoring and Reporting

130.10 Water quality monitoring.
130.11 Water quality report.

Subpart C—Identifying Impaired and Threatened Waterbodies and Establishing Total Maximum Daily Loads (TMDLs)

What This Subpart Covers

130.20 Who must comply with subpart C of this rule?
130.21 What is the purpose of this subpart?

Identifying and Listing Impaired or Threatened Waterbodies, Documenting Your Approach for Making Listing Decisions, and Establishing a Schedule for TMDL Development

130.22 What data and information must you assemble to identify and list impaired or threatened waterbodies?
130.23 How do you document your approach for considering and evaluating all existing and readily available data and information to develop your list and priority rankings?
130.24 When must your methodology be submitted to EPA?
130.25 What is the scope of your list of impaired or threatened waterbodies?
130.26 How do you apply your water quality standards antidegradation policy to the listing of impaired and threatened waterbodies?
130.27 How must you format your list of impaired or threatened waterbodies?
130.28 How do you prioritize the waterbodies on Part 1 of your list?
130.29 When can you remove a waterbody from your list?
130.30 When must you submit your list of impaired or threatened waterbodies and priority rankings to EPA and what will EPA do with it?
130.31 What must your schedule for submitting TMDLs to EPA contain and when must you submit it to EPA?

Establishment and Review of TMDLs

130.32 Must you establish TMDLs?
130.33 What are the minimum elements of a TMDL submitted to EPA?
130.34 How are TMDLs expressed?
130.35 What actions must EPA take on TMDLs that are submitted for review?
130.36 Can EPA establish a TMDL if you fail to do so?

Public Participation

130.37 What public participation requirements apply to the list, priority rankings, schedule, and TMDLs?

Transitional TMDLs

130.38 What is the effect of the proposed rule on transitional TMDLs?

Subpart D—Water Quality Planning and Implementation

130.50 Continuing planning process.
130.51 Water quality management plans.

Subpart E—Miscellaneous Provisions

130.60 Designation and de-designation.
130.61 State submittal to EPA.
130.62 Program management.
130.63 Coordination with other programs.
130.64 Processing application for Indian Tribes.
130.65 Petitions to EPA to undertake actions under section 303(d).

Authority: 33 U.S.C. 1251 *et seq.*

Subpart A—Summary, Purpose and Definitions

§ 130.0 Program summary and purpose.

(a) This subpart establishes policies and program requirements for water quality planning, management and implementation under sections 106, 205(j), non-construction management 205(g), 208, 303 and 305 of the Clean Water Act. The Water Quality Management (WQM) process described in the Act and in this regulation provides the authority for a consistent national approach for maintaining, improving and protecting water quality while allowing States to implement the most effective individual programs. The process is implemented jointly by EPA, the States, interstate agencies, and areawide, local and regional planning organizations. This regulation explains the requirements of the Act, describes the relationships between the several components of the WQM process and outlines the roles of the major participants in the process. The components of the WQM process are discussed below.

(b) Water quality standards (WQS) are the State's goals for individual waterbodies and provide the legal basis for control decisions under the Act. Water quality monitoring activities provide the chemical, physical and biological data needed to determine the present quality of a State's waters and to identify the sources of pollutants in those waters. The primary assessment of the quality of a State's water is contained in its biennial Report to Congress required by section 305(b) of the Act.

(c) This report and other assessments of water quality are used in the State's WQM plans to identify priority water

quality problems. These plans also contain the results of the State's analyses and management decisions which are necessary to control specific sources of pollution. The plans recommend control measures and designated management agencies (DMAs) to attain the goals established in the State's water quality standards.

(d) These control measures are implemented by issuing permits, building publicly-owned treatment works (POTWs), instituting best management practices for nonpoint sources of pollution and other means. After control measures are in place, the State evaluates the extent of the resulting improvements in water quality, conducts additional data gathering and planning to determine needed modifications in control measures and again institutes control measures.

(e) This process is a dynamic one, in which requirements and emphases vary over time. At present, States have completed WQM plans which are generally comprehensive in geographic and programmatic scope. Technology based controls are being implemented for most point sources of pollution. However, WQS have not been attained in many water bodies and are threatened in others.

(f) Present continuing planning requirements serve to identify these critical water bodies, develop plans for achieving higher levels of abatement and specify additional control measures. Consequently, this regulation reflects a programmatic emphasis on concentrating planning and abatement activities on priority water quality issues and geographic areas. EPA will focus its grant funds on activities designed to address these priorities. Annual work programs negotiated between EPA and State and interstate agencies will reflect this emphasis.

§ 130.1 Applicability.

(a) This subpart and § 130.51(a) of subpart D applies to all State, eligible Indian Tribe, interstate, areawide and regional and local CWA water quality planning and management activities undertaken on or after February 11, 1985 including all updates and continuing certifications for approved Water Quality Management (WQM) plans developed under sections 208 and 303 of the Act.

(b) Planning and management activities undertaken prior to February 11, 1985 are governed by the requirements of the regulations in effect at the time of the last grant award.

§ 130.2 Definitions.

(a) *The Act.* The Clean Water Act, as amended, 33 U.S.C. 1251 et seq.

(b) *Indian Tribe.* Any Indian Tribe, band, group, or community recognized by the Secretary of the Interior and exercising governmental authority over a Federal Indian reservation.

(c) *Pollution.* The man-made or man-induced alteration of the chemical, physical, biological, and radiological integrity of water. (See Clean Water Act section 502(19).)

(d) *Pollutant.* Dredged spoil, solid waste, incinerator residue, sewage, garbage, sewage sludge, munitions, chemical wastes, biological materials, radioactive materials, heat, wrecked or discarded equipment, rock, sand, cellar dirt, and industrial, municipal, and agricultural waste discharged into water. This term does not mean : ''sewage from vessels'' within the meaning of section 312 of the Clean Water Act; or water, gas, or other material that is injected into a well to facilitate production of oil or gas, or water derived in association with oil or gas production and disposed of in a well, if the well used either to facilitate production or for disposal purposes is approved by authority of the State in which the well is located, and if the State determines that such injection or disposal will not result in the degradation of ground or surface water resources. (See Clean Water Act section 502(6).) This definition encompasses drinking water contaminants that are regulated under section 1412 of the Safe Drinking Water Act and may be discharged to waters of the U. S. that are source waters of one or more public water systems. For public water systems served by surface water, source water is any water reaching the intake.

(e) *Load or loading.* An amount of matter or thermal energy that is introduced into a receiving water; to introduce matter or thermal energy into a receiving water. Loading of pollutants may be either man-caused or natural (natural background loading).

(f) *Load allocation.* The portions of a TMDL's pollutant load allocated to nonpoint sources of a pollutant, including atmospheric deposition or natural background sources.

(g) *Wasteload allocation.* The portions of a TMDL's pollutant load allocated to a point source of a pollutant.

(h) *Total maximum daily load (TMDL).* TMDLs are written plans and analyses established to ensure that the waterbody will attain and maintain water quality standards (as defined in 40 CFR 131) including consideration of reasonably foreseeable increases in pollutant loads. TMDLs must be established for waterbodies on Part 1 of your list of impaired and threatened waterbodies and must contain the following ten elements:

(1) The name and geographic location of the impaired or threatened waterbody for which the TMDL is being established;

(2) Identification of the pollutant and quantification of the pollutant load that may be present in the waterbody and still allow attainment and maintenance of water quality standards;

(3) Identification of the amount or degree by which the pollutant load in the waterbody deviates from the load representing attainment or maintenance of water quality standards;

(4) Identification of source categories, source subcategories or individual sources of the pollutant for which wasteload and load allocations are being established;

(5) Wasteload allocations for pollutants from point sources;

(6) Load allocations for pollutants from nonpoint sources;

(7) A margin of safety;

(8) Consideration of seasonal variation;

(9) An allowance for future growth which accounts for reasonably foreseeable increases in pollutant loads; and

(10) An implementation plan.

(i) *Water quality management (WQM) plan.* A State or areawide waste treatment management plan developed and updated in accordance with the provisions of sections 205(j), 208 and 303 of the Act and this regulation.

(j) *Areawide agency.* An agency designated under section 208 of the Act, which has responsibilities for WQM planning within a specified area of a State.

(k) *Best Management Practice (BMP).* Methods, measures or practices selected by an agency to meet its nonpoint source control needs. BMPs include but are not limited to structural and nonstructural controls and operation and maintenance procedures. BMPs can be applied before, during and after pollutant- or pollution-producing activities to reduce or eliminate the introduction of pollutants into or pollution of receiving waters.

(l) *Designated management agency (DMA).* An agency identified by a WQM plan and designated by the Governor to implement specific control recommendations.

(m) *Impaired waterbody.* Any waterbody of the United States that does not attain water quality standards (as defined in 40 CFR part 131) due to an individual pollutant, multiple pollutants, pollution, or an unknown

cause of impairment. Where a waterbody receives a thermal discharge from one or more point sources, impaired means that the waterbody does not have or maintain a balanced indigenous population of shellfish, fish, and wildlife.

(n) *Threatened waterbody.* Any waterbody of the United States that currently attains water quality standards, but for which existing and readily available data and information on adverse declining trends indicate that water quality standards will likely be exceeded by the time the next list of impaired or threatened waterbodies is required to be submitted to EPA. Where a waterbody is threatened by a thermal discharge, threatened means that the waterbody has a balanced indigenous population of shellfish, fish, and wildlife, but adverse declining trends indicate that a balanced indigenous population of shellfish, fish, and wildlife will not be maintained by the time the next list of impaired or threatened waterbodies is required to be submitted to EPA.

(o) *Thermal discharge.* The discharge of the pollutant heat from a point source.

(p) *Reasonable assurance.* Reasonable assurance means that you demonstrate that each wasteload allocation and load allocation in a TMDL will be implemented. For point sources regulated under section 402 of the Clean Water Act you must demonstrate reasonable assurance by procedures that ensure that enforceable NPDES permits (including coverage to individual sources under a general NPDES permit) will be issued expeditiously to implement applicable wasteload allocations for point sources. For nonpoint sources you must demonstrate reasonable assurance by specific procedures and mechanisms that ensure load allocations for nonpoint sources will be implemented for that waterbody. Specific procedures and mechanisms for nonpoint sources must apply to the pollutant for which the TMDL is being established, must be implemented expeditiously and must be supported by adequate funding. Examples of specific procedures and mechanisms which may provide reasonable assurance for nonpoint sources include State, Territorial, and authorized Tribal regulations, local ordinances, performance bonds, contracts, cost-share agreements, memorandums of understanding, site-specific or watershed-specific voluntary actions, and compliance audits of best management practices.

(q) *Waterbody.* A geographically defined portion of navigable waters, waters of the contiguous zone, and ocean waters under the jurisdiction of the United States, including segments of rivers, streams, lakes, wetlands, coastal waters and ocean waters.

(r) *List of Impaired or Threatened Waterbodies or "List".* The list of impaired or threatened waterbodies that States, Territories and authorized Tribes are required to submit to EPA pursuant to section 303(d) of the CWA and this part 130.

Subpart B—Water Quality Monitoring and Reporting

§ 130.10 Water quality monitoring.

(a) In accordance with section 106(e)(1), States must establish appropriate monitoring methods and procedures (including biological monitoring) necessary to compile and analyze data on the quality of waters of the United States and, to the extent practicable, ground-waters. This requirement need not be met by Indian Tribes. However, any monitoring and/or analysis activities undertaken by a Tribe must be performed in accordance with EPA's quality assurance/quality control guidance (*Policy and Program Requirements to Implement the Mandatory Quality Assurance Program,* EPA Order 5360.1, April 3, 1984 as updated on July 16, 1998; available from: http//ES.epa.gov/ncerqa/qa/qa__docs.html).

(b) The State's water monitoring program shall include collection and analysis of physical, chemical and biological data and quality assurance and control programs to assure scientifically valid data. The uses of these data include determining abatement and control priorities; developing and reviewing water quality standards, total maximum daily loads, wasteload allocations and load allocations; assessing compliance with National Pollutant Discharge Elimination System (NPDES) permits by dischargers; reporting information to the public through the section 305(b) report and reviewing site-specific monitoring efforts and source water assessments conducted under the Safe Drinking Water Act.

§ 130.11 Water quality report.

(a) Each State shall prepare and submit biennially to the Regional Administrator a water quality report in accordance with section 305(b) of the Act. The water quality report serves as the primary assessment of State water quality. Based upon the water quality data and problems identified in the 305(b) report, States develop water quality management (WQM) plan elements to help direct all subsequent control activities. Water quality problems identified in the 305(b) report should be analyzed through water quality management planning leading to the development of alternative controls and procedures for problems identified in the latest 305(b) report. States may also use the 305(b) report to describe ground-water quality and to guide development of ground-water plans and programs. Water quality problems identified in the 305(b) report should be emphasized and reflected in the State's WQM plan and annual work program under sections 106 and 205(j) of the Clean Water Act and where the designated use includes public water supply, in the source water assessment conducted under the SDWA.

(b) Each such report shall include but is not limited to the following:

(1) A description of the water quality of all waters of the United States and the extent to which the quality of waters provides for the protection and propagation of a balanced population of shellfish, fish, and wildlife and allows recreational activities in and on the water.

(2) An estimate of the extent to which CWA control programs have improved water quality or will improve water quality for the purposes of paragraph (b)(1) of this section, and recommendations for future actions necessary and identifications of waters needing action.

(3) An estimate of the environmental, economic and social costs and benefits needed to achieve the objectives of the CWA and an estimate of the date of such achievement.

(4) A description of the nature and extent of nonpoint source pollution and recommendations of programs needed to control each category of nonpoint sources, including an estimate of implementation costs.

(5) An assessment of the water quality of all publicly owned lakes, including the status and trends of such water quality as specified in section 314(a)(1) of the Clean Water Act.

(c) States may include a description of the nature and extent of ground-water pollution and recommendations of State plans or programs needed to maintain or improve ground-water quality.

(d) In the years in which it is prepared the biennial section 305(b) report satisfies the requirement for the annual water quality report under section 205(j). In years when the 305(b) report is not required, the State may satisfy the annual section 205(j) report requirement by certifying that the most recently submitted section 305(b) report is current or by supplying an update of the

sections of the most recently submitted section 305(b) report which require updating.

Subpart C: Identifying Impaired and Threatened Waterbodies and Establishing Total Maximum Daily Loads (TMDLs)

What This Subpart Covers

§ 130.20 Who must comply with subpart C of this rule?

(a) Subpart C applies to States, Territories, and authorized Tribes. The term ''you'' in this rule refers to these three governmental entities.

(b) Portions of this subpart apply to the United States Environmental Protection Agency (EPA). When this is the case, the rule specifies EPA's responsibilities and obligations.

§ 130.21 What is the purpose of this subpart?

This rule explains how you must identify and list impaired or threatened waterbodies and establish TMDLs in accordance with section 303(d) of the Clean Water Act. The rule also explains how EPA reviews and approves or disapproves your lists and TMDLs. Specifically, the rule explains how:

(a) You must assemble all existing and readily available data and information;

(b) You must document your methodology for considering and evaluating all existing and readily available data and information to make listing decisions, including priority ranking, and provide the methodology to EPA and the public;

(c) You must identify the impaired and threatened waterbodies to be included on the list and decide which of those waterbodies will have TMDLs established for them;

(d) You must identify the pollutant or pollutants causing the impairment or threat of impairment for all waterbodies on your list that will have TMDLs established for them;

(e) You must assign a priority ranking to all waterbodies on your list that will have TMDLs established for them;

(f) You must establish a schedule for establishing all TMDLs;

(g) EPA must review and approve or disapprove your list of impaired and threatened waterbodies, identification of pollutants, and priority ranking;

(h) You must establish TMDLs and submit them to EPA for review;

(i) EPA must review and approve or disapprove your TMDLs;

(j) You must provide for public notice and comment on your list, priority ranking, schedule, and TMDLs prior to final submission to EPA.

Identifying and Listing Impaired or Threatened Waterbodies, Documenting Your Approach for Making Listing Decisions, and Establishing a Schedule for TMDL Development

§ 130.22 What data and information must you assemble to identify and list impaired or threatened waterbodies?

(a) You must assemble and consider all existing and readily available data and information when you develop your list of impaired or threatened waterbodies.

(b) Existing and readily available data and information, includes but is not limited to, the data and information in the following:

(1) Your most recent EPA approved section 303(d) list;

(2) Your most recent Clean Water Act section 305(b) report;

(3) Clean Water Act section 319 nonpoint source assessments;

(4) Drinking water source water assessments under section 1453 of the Safe Drinking Water Act;

(5) Dilution calculations, trend analyses, or predictive models for determining the physical, chemical or biological integrity of streams, rivers, lakes, and estuaries; and

(6) Data, information, and water quality problems reported from local, State, Territorial, or Federal agencies (especially the U.S. Geologic Survey National Water Quality Assessment (NAWQA) and National Stream Quality Accounting Network (NASQAN)), Tribal governments, members of the public, and academic institutions.

§ 130.23 How do you document your approach for considering and evaluating all existing and readily available data and information to develop your list and priority rankings?

(a) You must develop a methodology that explains how you will consider and evaluate all existing and readily available data and information to determine which waterbodies you will include on your list, and to determine priority rankings for those waterbodies. You must develop a draft methodology, notify the public of the availability of the draft methodology, take comments on the draft methodology for no less than 60 days, and provide a summary of all comments received and your responses when you submit the final methodology to EPA, as required by § 130.24 of this subpart.

(b) The methodology must include the factors you use to consider and evaluate the following types of data and information when you make listing decisions:

(1) Physical/chemical data and information;

(2) Biological data and information;

(3) Aquatic and riparian habitat data and information; and

(4) Waterbody impairment and drinking water susceptibility analyses required under § 130.22(b).

(c) Your methodology must, at a minimum, identify those types of data and information that you will treat as ''existing and readily available'' and explain how you consider the following factors in making listing and priority ranking decisions:

(1) Data quality and age;

(2) Degree of confidence you have in the information you use to determine whether waterbodies are impaired or threatened; and

(3) Number and degree of exceedances of numeric or narrative criteria and designated uses used to determine whether waterbodies are impaired or threatened.

(d) Your methodology must, at a minimum, also include the following:

(1) A description of the selection factors you will use to include waterbodies on your list;

(2) A process for resolving disagreements with other jurisdictions involving waterbodies crossed by State or authorized Tribal or international boundaries; and

(3) A description of the method and factors you use to assign a priority ranking to the waterbodies on your list.

(e) Your methodology must describe how and for what reasons you will remove previously listed waterbodies from your list.

§ 130.24 When must your methodology be submitted to EPA?

(a) You must submit the final methodology described in § 130.23 to EPA by January 31 of every [second], [fourth], [fifth] year, beginning in the year 2000.

(b) Following submittal, EPA will review your methodology and may, as appropriate, provide you with comments in advance of your list submission.

(c) EPA will not approve or disapprove your methodology, but will consider your methodology in its review and approval or disapproval of your list and priority rankings.

§ 130.25 What is the scope of your list of impaired or threatened waterbodies?

(a) Your list must include all waterbodies that, based on all existing and readily available data and information, are impaired or threatened by individual pollutants, multiple pollutants, or pollution from any source.

(b) Your list must include impaired or threatened waterbodies regardless of whether:

(1) The waterbodies are impaired or threatened by a pollutant which is unknown at the time of the listing;

(2) The waterbodies are impaired or threatened by atmospheric deposition;

(3) The waterbodies are impaired or threatened only by point sources, only by nonpoint sources, or by a combination of point and nonpoint sources.

§ 130.26 How do you apply your water quality standards antidegradation policy to the listing of impaired and threatened waterbodies?

(a) Water quality standards as defined at 40 CFR part 131 include several requirements, including one for a State antidegradation policy. Your list must include waterbodies consistent with your antidegradation policy as follows:

(1) Any Tier 3 waterbody is impaired and must be listed when the level of water quality that existed at the time the waterbody was designated as Tier 3 has declined.

(2) Any Tier 2 waterbody is threatened and must be listed when adverse trend data and information indicates that a designated use will no longer be attained by the time of the next listing cycle.

(3) Any Tier 1 waterbody is impaired and must be listed if it is not maintaining a designated or more protective existing use. Any Tier 1 waterbody is threatened and must be listed when an adverse trend indicates that a designated use or a more protective existing use will no longer be attained at the time of the next listing cycle.

§ 130.27 How must you format your list of impaired or threatened waterbodies?

(a) Your list of impaired and threatened waterbodies must include the following parts:

(1) Part 1—Waterbodies impaired or threatened by one or more pollutant(s) as defined by 40 CFR 130.2(d) or by an unknown cause unless listed in Part 3 or 4 of the list. Where the cause of the impairment or threat is unknown, identification of the pollutant(s) causing the impairment or threat is required as the first step in establishing the TMDL. A TMDL is required for waterbodies on Part 1 of the list impaired by pollutants.

(2) Part 2—Waterbodies impaired or threatened by pollution as defined by 40 CFR 130.2(c) but not impaired or threatened by one or more pollutants. A TMDL is not required for waterbodies on Part 2 of the list.

(3) Part 3—Waterbodies for which EPA has approved or established a TMDL and water quality standards have not yet been attained.

(4) Part 4—Waterbodies that are impaired, for which implementation of best practicable control technology for point sources and secondary treatment for publicly owned treatment works or controls enforceable by State, Territorial or authorized Tribal or Federal law or regulation are expected to result in attainment of water quality standards by the next listing cycle. A TMDL is not required for waterbodies on part 4 of the list. If a waterbody listed on part 4 does not attain water quality standards by the time the next list is required to be submitted to EPA, such waterbody must be included on part 1 of the list unless you can document that the failure to attain water quality standards is due to failure to comply with applicable technology-based requirements.

(b) You must identify the pollutant or pollutants causing the impairment or threat of impairment for each waterbody on Parts 1, 3 and 4 of the list. If the specific pollutant is unknown at the time of listing, you must, to the extent possible, identify the class of pollutants, e.g., metals, pesticides, industrial chemicals, or nutrients. You must identify the type of pollution causing the impairment or threat of impairment for each waterbody on Part 2 of the list. If you do not know whether the cause of impairment is a pollutant or some type of pollution, the waterbody must be included on Part 1 of the list.

(c) You must identify the geographical location of each waterbody on the list, using a nationally recognized georeferencing system as agreed to by you and EPA.

§ 130.28 How do you prioritize the waterbodies on Part 1 of your list?

(a) You must assign a high, medium, or low priority ranking to each waterbody and pollutant combination on Part 1 of the list, taking into account the severity of the impairment or threatened impairment and the designated uses of the waterbody.

(b) You must assign a high priority to waterbody and pollutant combinations on Part 1 of the List if:

(1) The waterbody is designated in water quality standards as a public drinking water supply, used as a source of drinking water and the pollutant for which the waterbody is listed as impaired is contributing to a violation of an MCL; or

(2) species listed as threatened or endangered under section 4 of the Endangered Species Act are present in the waterbody unless the State, Territory or authorized Tribe shows that the impairment does not affect the listed threatened or endangered species.

(3) When identifying your high priority waterbodies, you may also consider the presence of sensitive aquatic species and secondary factors such as the historical, cultural, economic and aesthetic uses of the waterbody.

(c) You must explain how you considered the severity of the impairment or threat of impairment and the designated use to be made of the waterbody in assigning each priority ranking.

(d) You may consider other factors in assigning each priority ranking, including efficiencies gained by developing TMDLs for waterbodies located in the same watershed; the value and vulnerability of particular waterbodies; the recreational, economic, and aesthetic importance of particular waterbodies; TMDL complexity; the degree of public interest and support; State, Territorial and authorized Tribal policies and priorities; or national policies and priorities.

(e) If you consider other factors, you must identify each factor and explain how you used each factor in assigning each priority ranking.

§ 130.29 When can you remove a waterbody from your list?

(a) Once listed, you must keep each impaired waterbody on the list until water quality standards are attained for that waterbody.

(b) You may remove a previously listed impaired waterbody when you develop your next list if new data or information indicates that the waterbody has attained water quality standards.

(c) You must keep each threatened waterbody on the list until the waterbody is no longer threatened.

(d) You may remove a previously listed threatened waterbody from the list if new data or information indicates that the waterbody is no longer threatened.

§ 130.30 When must you submit your list of impaired or threatened waterbodies and priority rankings to EPA and what will EPA do with it?

(a) You must submit your list of impaired and threatened waterbodies as required by §§ 130.25, 130.26, and 130.27, and the priority rankings required by § 130.28, to EPA by October 1 of every [second] [fourth] [fifth] year, beginning in the year 2000.

(b) Within 30 days of receipt, EPA will issue an order approving or disapproving all or a portion of your list and priority ranking.

(c) You must incorporate into your water quality management plan, as

required by § 130.51, those portions of your list and priority ranking that EPA approves.

(d) If EPA disapproves a portion of your list, including your identification of particular waterbodies and pollutant/pollution combinations, or your priority rankings, EPA will, within 30 days, issue an order identifying all waterbodies and pollutant/pollution combinations or priority rankings needed to make the list consistent with this subpart. EPA will publish this order in the **Federal Register** and a general circulation newspaper and request public comment for at least 30 days. If appropriate, EPA will write an order revising the list after the close of the public comment period. EPA will send you a copy of its order identifying additional waterbodies and priority ranking. You must incorporate those waterbodies into your water quality management plan.

(e) EPA may establish a list of impaired and threatened waterbodies, including pollutant/pollution combinations and priority rankings, if you ask EPA to do so, or if EPA determines that you have not or are not likely to establish such list consistent with the schedule specified in paragraph (a) of this section.

§ 130.31 What must your schedule for submitting TMDLs to EPA contain and when must you submit it to EPA?

(a) You must submit a schedule to EPA for establishing TMDLs for all waterbody and pollutant combinations on Part 1 of your list, as described in § 130.27, including waterbodies for which the cause of the impairment or threat was not known at the time of listing.

(1) You must schedule establishment of TMDLs as expeditiously as practicable, but no later than 15 years from the date of the initial listing on Part 1 of your list.

(2) Your schedule for establishment of TMDLs must reasonably pace the workload for TMDL establishment over the entire duration of the schedule.

(3) You should schedule establishment of TMDLs in accordance with the priority rankings required in § 130.28. For example, TMDLs for high-priority waterbodies and pollutant combinations should be established before medium and low-priority waterbody and pollutant combinations. Your schedule may consider other factors including those identified in § 130.28(d).

(b) You must submit your schedule for establishing TMDLs to EPA by October 1 of every [second] [fourth] [fifth] year, beginning in the year 2000, along with your list of impaired and threatened waterbodies and priority rankings.

(c) EPA will not approve or disapprove your schedule, but will consider your schedule in its review of your list and priority ranking.

Establishment and EPA Review of TMDLs

§ 130.32 Must you establish TMDLs?

(a) You must establish a TMDL for all waterbodies and pollutant combinations on Part 1 of your list. You do not need to establish TMDLs for waterbodies on Parts 2, 3, and 4 of your list.

(b) You must establish TMDLs in accordance with the priority rankings established in accordance with § 130.28.

(c) You may establish TMDLs in a different order than the sequence in your most recently submitted schedule as long as you establish TMDLs consistent with the scheduling requirements of § 130.31(a)(1) through (a)(3).

§ 130.33 What are the minimum elements of a TMDL submitted to EPA?

(a) TMDLs are written plans and analyses for achieving water quality standards for waterbodies on Part 1 of your list of impaired and threatened waterbodies. TMDLs provide the opportunity to compare relative contributions from all sources and consider technical and economic trade-offs between point and nonpoint sources.

(b) You must include the following minimum elements in any TMDL submitted to EPA. EPA will not approve a TMDL which does not contain each of these elements.

(1) The name and geographic location, as required by § 130.27(c), of the impaired or threatened waterbody for which the TMDL is being established and the names and geographic locations of the waterbodies upstream of the impaired waterbody that contribute significant amounts of the pollutant for which the TMDL is being established;

(2) Identification of the pollutant for which the TMDL is being established and quantification of the pollutant load that may be present in the waterbody and still ensure attainment and maintenance of water quality standards;

(3) Identification of the amount or degree by which the current pollutant load in the waterbody deviates from the pollutant load needed to attain or maintain water quality standards;

(4) Identification of the source categories, source subcategories, or individual sources of the pollutant for which the wasteload allocations and load allocations are being established consistent with § 130.2(f) and (g);

(5) Wasteload allocations to each industrial and municipal point source permitted under section 402 of the Clean Water Act discharging the pollutant for which the TMDL is being established; wasteload allocations for discharges subject to a general permit, such as storm water, combined sewer overflows, abandoned mines, or combined animal feeding operations, may be allocated to categories of sources, subcategories of sources or individual sources; pollutant loads that do not need to be reduced to attain or maintain water quality standards may be included within a category of sources, subcategory of sources or considered as part of background loads; and supporting technical analyses demonstrating that wasteload allocations when implemented, will attain and maintain water quality standards;

(6) Load allocations, ranging from reasonably accurate estimates to gross allotments, to nonpoint sources of a pollutant, including atmospheric deposition or natural background sources; if possible, a separate load allocation must be allocated to each source of a pollutant, natural background or atmospheric deposition; where this is not possible, load allocations may be allocated to categories of sources or subcategories of sources; pollutant loads that do not need to be reduced for the waterbody to meet water quality standards may be included within a category of sources, subcategory of sources or considered as part of background loads; and supporting technical analyses demonstrating that load allocations, when implemented, will attain and maintain water quality standards;

(7) A margin of safety expressed as unallocated assimilative capacity or conservative analytical assumptions used in establishing the TMDL; e.g., derivation of numeric loads, modeling assumptions, or effectiveness of proposed management actions which ensures attainment and maintenance of water quality standards for the allocated pollutant;

(8) Consideration of seasonal variations and environmental factors that affect the relationship between pollutant loadings and water quality impacts;

(9) An allowance for future growth, if any, which accounts for reasonably foreseeable increases in pollutant loads; and

(10) An implementation plan, which may be developed for one or a group of

TMDLs. Each implementation plan must, at a minimum, include the following:

(i) A description of the control actions and/or management measures which will be implemented to achieve the wasteload allocations and load allocations, and a demonstration that the control actions and/or management measures are expected to achieve the required pollutant loads;

(ii) A timeline, including interim milestones, for implementing the control actions and/or management measures, including when source-specific activities will be undertaken for categories and subcategories of individual sources and a schedule for revising NPDES permits;

(iii) A discussion of your reasonable assurances, as defined at § 130.2(p), that wasteload allocations and load allocations will be implemented;

(iv) A description of the legal authority under which the control actions will be carried out;

(v) An estimate of the time required to attain and maintain water quality standards and discussion of the basis for that estimate;

(vi) A monitoring and/or modeling plan designed to determine the effectiveness of the control actions and/or management measures and whether allocations are being met;

(vii) A description of measurable, incremental milestones for the pollutant for which the TMDL is being established for determining whether the control actions and/or management measures are being implemented and whether water quality standards are being attained; and

(viii) A description of your process for revising TMDLs if the milestones are not being met and projected progress toward attaining water quality standards is not demonstrated.

(c) For waterbodies impaired by thermal discharges from point sources you must estimate the total maximum daily thermal load required to ensure protection and propagation of a balanced indigenous population of shellfish, fish, and wildlife, taking into account the normal water temperatures, flow rates, seasonal variations, existing sources of heat input, and dissipative capacity of the waterbody for which the TMDL is being established. Estimates must include a calculation of the maximum heat input and a margin of safety that takes into account any lack of knowledge concerning the development of thermal water quality criteria.

(d) A TMDL must not be likely to jeopardize the continued existence of an endangered or threatened species listed under section 4 of the Endangered Species Act or result in the destruction or adverse modification of its designated critical habitat.

§ 130.34 How are TMDLs expressed?

(a) A TMDL must contain an expression of the pollutant load or load reduction necessary to ensure that the waterbody will attain and maintain water quality standards, or, as appropriate, the pollutant load or load reduction required to attain and maintain aquatic or riparian habitat, biological, channel or geomorphological or other conditions that represent attainment and maintenance of water quality standards.

(b) As appropriate to the characteristics of the waterbody and pollutant, the pollutant load may be expressed as daily, monthly, seasonal or annual averages in one or more of the following ways:

(1) The pollutant load that can be present in the waterbody and ensure that it attains and maintains water quality standards;

(2) The reduction from current pollutant loads required to attain and maintain water quality standards;

(3) The pollutant load or reduction of pollutant load required to attain and maintain riparian, biological, channel or geomorphological measures so that water quality standards are attained and maintained; or

(4) The pollutant load or reduction of pollutant load that results from modifying a characteristic of the waterbody, e.g., riparian, biological, channel, geomorphological, or chemical characteristics, so that water quality standards are attained and maintained.

§ 130.35 What actions must EPA take on TMDLs that are submitted for review?

(a) EPA will review each TMDL you submit to determine if it includes all the minimum elements specified in § 130.33(b). A TMDL which does not include all minimum elements will be disapproved.

(b) EPA will review each TMDL you submit to determine if those elements meet the requirements of §§ 130.32, 130.33 and 130.34. EPA will approve the TMDL if it meets those requirements. EPA will issue an order approving or disapproving each TMDL you submit within 30 days after you submit it.

(c) If EPA approves a TMDL you submit, you must incorporate the TMDL into your water quality management plan.

(d) If EPA disapproves a TMDL you submit, EPA will issue an order establishing a new TMDL for that waterbody and pollutant within 30 days of its disapproval.

(1) EPA will publish this order in the **Federal Register** and a general circulation newspaper and request public comment for at least 30 days. If appropriate, EPA will issue an order revising the TMDL after the close of the public comment period.

(2) EPA will send you the final TMDL it establishes. You must incorporate the EPA-established TMDL into your water quality management plan.

§ 130.36 Can EPA establish a TMDL if you fail to do so?

EPA may establish TMDLs for waterbodies and pollutants identified on Part 1 of your list if you ask EPA to do so, or if EPA determines that you have not or are not likely to establish TMDLs consistent with your schedule, or if EPA determines that it should establish TMDLs for interstate or boundary waterbodies.

Public Participation

§ 130.37 What public participation requirements apply to your lists, priority rankings, schedule, and TMDLs?

(a) You must provide the public with no less than 30 days to review and comment on your list of impaired or threatened waterbodies, priority rankings, schedule, and TMDLs prior to submission to EPA.

(b) At the time you make your submission to EPA, you must provide EPA with a summary of all public comments received on your list of impaired or threatened waterbodies, priority rankings, schedule, and TMDLs and your response to all comments, indicating how the comments were considered in your final decision. Your response to each comment must indicate whether you agreed or disagreed with the comment. If you disagreed with the comment, your response must explain why you disagreed and why you believe it was reasonable to act despite the comment.

(c) You must provide for public participation in developing your listing methodology according to the requirements in § 130.23(a).

(d)(1) Prior to your submission to EPA and at the time that you provide the public the opportunity to review and comment on your list of impaired or threatened waterbodies, priority rankings, schedules, and TMDLs, you must provide a copy of each of these documents to EPA, US Fish and Wildlife Services, and to National Marine Fisheries Service where appropriate (e.g., coastal areas), unless you request EPA to provide these documents to the Services, in which case EPA will do so.

(2) You are encouraged to establish processes with both the US Fish and Wildlife and Wildlife Service and the National Marine Fisheries that will provide for the early identification and resolution of threatened and endangered species concerns as they relate to your list of impaired or threatened waterbodies, priority rankings, schedule, and TMDLs. To facilitate consideration of endangered and threatened species in the listing and TMDL process, EPA will ask U.S. Fish and Wildlife and National Fisheries Services, where appropriate, to provide you and EPA with any comments that they may have on your lists, priority rankings, schedule and TMDLs

(3) You must consider any comments from EPA, US Fish and Wildlife Service, or National Marine Fisheries Service and document your consideration in accordance with paragraph (b) of the section.

(4) EPA will review any comments submitted by US Fish Service or National Marine Fisheries and consider how you addressed EPA, US Fish and Wildlife Service, and National Marine Fisheries Service comments prior to EPA's approval or disapproval of your submission.

Transitional TMDLs

§ 130.38 What is the effect of the proposed rule on transitional TMDLs?

(a) EPA will approve any TMDL submitted to it for review within 12 months of the effective date of the final rule if the TMDL meets either the pre-amendment requirements in § 130.7 or the post-amendment requirements in §§ 130.32, 130.33 and 130.34.

(b) EPA may establish TMDLs within 12 months of the effective date of the final rule either according to the pre-amendment requirements in § 130.7 or the post-amendment requirements in §§ 130.32, 130.33 and 130.34.

Subpart D—Water Quality Planning and Implementation

§ 130.50 Continuing planning process

(a) *General.* Each State shall establish and maintain a continuing planning process (CPP) as described under section 303(e)(3)(A)–(H) of the Act. Each State is responsible for managing its water quality program to implement the processes specified in the continuing planning process. EPA is responsible for periodically reviewing the adequacy of the State's CPP.

(b) *Content.* The State may determine the format of its CPP as long as the minimum requirements of the CWA and this regulation are met. A State CPP need not be a single document, provided the State identifies in one document, i.e., an index, the other documents, statutes, rules, policies and guidance that comprise its CPP. The following processes must be described in each State CPP and the State may include other processes, including watershed-based planning and implementation, at its discretion.

(1) The process for developing effluent limitations and schedules of compliance at least as stringent as those required by sections 301(b) (1) and (2), 306 and 307, and at least stringent as any requirements contained in applicable water quality standards in effect under authority of section 303 of the Act.

(2) The process for incorporating elements of any applicable areawide waste treatment plans under section 208, and applicable basin plans under section 209 of the Act.

(3) The process for developing total maximum daily loads (TMDLs) and individual water quality based effluent limitations for pollutants in accordance with section 303(d) of the Act and §§ 130.32–36 of this regulation.

(4) The process for updating and maintaining Water Quality Management (WQM) plans, including schedules for revision.

(5) The process for assuring adequate authority for intergovernmental cooperation in the implementation of the State WQM program.

(6) The process for establishing and assuring adequate implementation of new or revised water quality standards, including schedules of compliance, under section 303(c) of the Act.

(7) The process for assuring adequate controls over the disposition of all residual waste from any water treatment processing.

(8) The process for developing an inventory and ranking, in order of priority of needs for construction of waste treatment works required to meet the applicable requirements of sections 301 and 302 of the Act.

(9) The process for determining the priority of permit issuance.

(c) *Regional Administrator review.* The Regional Administrator shall review approved State CPPs from time to time to ensure that the planning processes are consistent with the Act and this regulation. The Regional Administrator shall not approve any permit program under Title IV of the Act for any State which does not have an approved continuing planning process.

§ 130.51 Water quality management plans

(a) *Water quality management plans.* You must base continuing water quality planning on initial water quality management plans. Your annual water quality planning should focus on priority issues and geographic areas and have a watershed focus. Water quality planning should be directed at the removal of conditions placed on previously certified and approved water quality management plans and updates to support the implementation of wasteload allocations and load allocations contained in TMDLs.

(b) *Use of WQM plans.* WQM plans are used to direct implementation. WQM plans draw upon the water quality assessments to identify priority point and nonpoint water quality problems, consider alternative solutions and recommend control measures, including the financial and institutional measures necessary for implementing recommended solutions. State annual work programs shall be based upon the priority issues identified in the State WQM plan.

(c) *WQM plan elements.* Sections 205(j), 208 and 303 of the Act specify water quality planning requirements. The following plan elements shall be included in the WQM plan or referenced as part of the WQM plan if contained in separate documents when they are needed to address water quality problems.

(1) *Total Maximum Daily Loads.* TMDLs in accordance with § 303(d) and (e)(3)(C) of the Act and §§ 130.2 and 130.32–36.

(2) *Effluent limitations.* Effluent limitations including water quality based effluent limitations and schedules of compliance in accordance with section 303(e)(3)(A) of the Act and § 130.50 of this part.

(3) *Municipal and industrial waste treatment.* Identification of anticipated municipal and industrial waste treatment works, including facilities for treatment of stormwater-induced combined sewer overflows; programs to provide necessary financial arrangements for such works; establishment of construction priorities and schedules for initiation and completion of such treatment works including an identification of open space and recreation opportunities from improved water quality in accordance with section 208(b)(2) (A) and (B) of the Act.

(4) *Nonpoint source management and control.* (i) The plan shall describe the regulatory and non-regulatory programs, activities and Best Management Practices (BMPs) which the agency has selected as the means to control nonpoint source pollution where necessary to protect or achieve approved water uses. Economic,

institutional, and technical factors shall be considered in a continuing process of identifying control needs and evaluating and modifying the BMPs as necessary to achieve water quality goals.

(ii) Regulatory programs shall be identified where they are determined to be necessary by the State to attain or maintain an approved water use or where non-regulatory approaches are inappropriate in accomplishing that objective.

(iii) BMPs shall be identified for the nonpoint sources identified in section 208(b)(2)(F)–(K) of the Act and other nonpoint sources as follows:

(A) *Residual waste.* Identification of a process to control the disposition of all residual waste in the area which could affect water quality in accordance with section 208(b)(2)(J) of the Act.

(B) *Land disposal.* Identification of a process to control the disposal of pollutants on land or in subsurface excavations to protect ground and surface water quality in accordance with section 208(b)(2)(K) of the Act.

(C) *Agricultural and silvicultural.* Identification of procedures to control agricultural and silvicultural sources of pollution in accordance with section 208(b)(2)(F) of the Act.

(D) *Mines.* Identification of procedures to control mine-related sources of pollution in accordance with section 208(b)(2)(G) of the Act.

(E) *Construction.* Identification of procedures to control construction related sources of pollution in accordance with section 208(b)(2)(H) of the Act.

(F) *Saltwater intrusion.* Identification of procedures to control saltwater intrusion in accordance with section 208(b)(2)(i) of the Act.

(G) *Urban stormwater.* Identification of BMPs for urban stormwater control to achieve water quality goals and fiscal analysis of the necessary capital and operations and maintenance expenditures in accordance with section 208(b)(2)(A) of the Act.

(iv) The nonpoint source plan elements outlined in § 130.51(c)(4)(iii)(A)–(G) of this regulation shall be the basis of water quality activities implemented through agreements or memoranda of understanding between EPA and other departments, agencies or instrumentalities of the United States in accordance with section 304(k) of the Act.

(5) *Management agencies.* Identification of agencies necessary to carry out the plan and provision for adequate authority for intergovernmental cooperation in accordance with sections 208(b)(2)(D) and 303(e)(3)(E) of the Act. Management agencies must demonstrate the legal, institutional, managerial and financial capability and specific activities necessary to carry out their responsibilities in accordance with section 208(c)(2)(A) through (I) of the Act.

(6) *Implementation measures.* Identification of implementation measures necessary to carry out the plan, including financing, the time needed to carry out the plan, and the economic, social and environmental impact of carrying out the plan in accordance with section 208(b)(2)(E).

(7) *Dredge or fill program.* Identification and development of programs for the control of dredge or fill material in accordance with section 208(b)(4)(B) of the Act.

(8) *Basin plans.* Identification of any relationship to applicable basin plans developed under section 209 of the Act.

(9) *Ground water.* Identification and development of programs for control of ground-water pollution including the provisions of section 208(b)(2)(K) of the Act. States are not required to develop ground-water WQM plan elements beyond the requirements of section 208(b)(2)(K) of the Act, but may develop a ground-water plan element if they determine it is necessary to address a ground-water quality problem. If a State chooses to develop a ground-water plan element, it should describe the essentials of a State program and should include, but is not limited to:

(i) Overall goals, policies and legislative authorities for protection of ground-water.

(ii) Monitoring and resource assessment programs in accordance with section 106(e)(1) of the Act.

(iii) Programs to control sources of contamination of ground-water including Federal programs delegated to the State and additional programs authorized in State statutes.

(iv) Procedures for coordination of ground-water protection programs among State agencies and with local and Federal agencies.

(v) Procedures for program management and administration including provision of program financing, training and technical assistance, public participation, and emergency management.

(d) *Indian Tribes.* An Indian Tribe is eligible for the purposes of this rule and the Clean Water Act assistance programs under 40 CFR part 35, subparts A and H if:

(1) The Indian Tribe has a governing body carrying out substantial governmental duties and powers;

(2) The functions to be exercised by the Indian Tribe pertain to the management and protection of water resources which are held by an Indian Tribe, held by the United States in trust for Indians, held by a member of an Indian Tribe if such property interest is subject to a trust restriction on alienation, or otherwise within the borders of an Indian reservation; and

(3) The Indian Tribe is reasonably expected to be capable, in the Regional Administrator's judgment, of carrying out the functions to be exercised in a manner consistent with the terms and purposes of the Clean Water Act and applicable regulations.

(e) *Update and certification.* State and/or areawide agency WQM plans shall be updated as needed to reflect changing water quality conditions, results of implementation actions, new requirements or to remove conditions in prior conditional or partial plan approvals. Regional Administrators may require that State WQM plans be updated as needed. State Continuing Planning Processes (CPPs) shall specify the process and schedule used to revise WQM plans. The State shall ensure that State and areawide WQM plans together include all necessary plan elements and that such plans are consistent with one another. The Governor or the Governor's designee shall certify by letter to the Regional Administrator for EPA approval that WQM plan updates are consistent with all other parts of the plan. The certification may be contained in the annual State work program.

(f) *Consistency.* Construction grant and permit decisions must be made in accordance with certified and approved WQM plans as described in §§ 130.63(a) and 130.63(b).

Subpart E—Miscellaneous Provisions

§ 130.60 Designation and de-designation.

(a) *Designation.* Areawide planning agencies may be designated by the Governor in accordance with section 208(a) (2) and (3) of the Act or may self-designate in accordance with section 208(a)(4) of the Act. Such designations shall subject to EPA approval in accordance with section 208(a)(7) of the Act.

(b) *De-designation.* The Governor may modify or withdraw the planning designation of a designated planning agency other than an Indian tribal organization self-designated § 130.51(c)(2) if:

(1) The areawide agency requests such cancellation; or

(2) The areawide agency fails to meet its planning requirements as specified

in grant agreements, contracts or memoranda of understanding; or

(3) The areawide agency no longer has the resources or the commitment to continue water quality planning activities within the designated boundaries.

(c) *Impact of de-designation.* Once an areawide planning agency's designation has been withdrawn the State agency shall assume direct responsibility for continued water quality planning and oversight of implementation within the area.

(d) *Designated management agencies* (DMA). In accordance with section 208(c)(1) of the Act, management agencies shall be designated by the Governor in consultation with the designated planning agency. EPA shall approve such designations unless the DMA lacks the legal, financial and managerial authority required under section 208(c)(2) of the Act. Designated management agencies shall carry out responsibilities specified in Water Quality Management (WQM) plans. Areawide planning agencies shall monitor DMA activities in their area and recommend necessary plan changes during the WQM plan update. Where there is no designated areawide planning agency, States shall monitor DMA activities and make any necessary changes during the WQM plan update.

§ 130.61 State submittal to EPA.

(a) The following must be submitted regularly by the States to EPA:

(1) The section 305(b) report, in FY 84 and every two years thereafter, and the annual section 205(j) certification or update of the 305(b) water quality report.

(2) The annual State work program(s) under sections 106 and 205(j) of the Act.

(3) Revisions or additions to water quality standards (WQS) (303(c)).

(b) The Act also requires that each State initially submit to EPA and revise as necessary the following:

(1) Continuing planning process (CPP) (303(e));

(2) Identification of water quality-limited waters still requiring TMDLs (section 303(d)), pollutants, and the priority ranking including waters targeted for TMDL development within the next two years as required under § 130.7(b) in accordance with the schedule set for in § 130.7(d)(1).

(3) Total maximum daily loads (TMDLs) (303(d)); and

(4) Water quality management (WQM) plan and certified and approved WQM plan updates (208, 303(e)).

(c) The form and content of required State submittals to EPA may be tailored to reflect the organization and needs of the State, as long as the requirements and purposes of the Act, this part and, where applicable, 40 CFR parts 29, 30, 33 and 35, subparts A and J are met. The need for revision and schedule of submittals shall be agreed to annually with EPA as the States annual work program is developed.

§ 130.62 Program management.

(a) State agencies may apply for grants under sections 106, 205(j) and 205(g) to carry out water quality planning and management activities. Interstate agencies may apply for grants under section 106 to carry out water quality planning and management activities. Local or regional planning organizations may request 106 and 205(j) funds from a State for planning and management activities. Grant administrative requirements for these funds appear in 40 CFR parts 25, 29, 30, 33 and 35, subparts A and J.

(b) Grants under section 106 may be used to fund a wide range of activities, including but not limited to assessments of water quality, revision of water quality standards (WQS), development of alternative approaches to control pollution, implementation and enforcement of control measures and development or implementation of ground water programs. Grants under section 205(j) may be used to fund water quality management (WQM) planning activities but may not be used to fund implementation of control measures (see part 35, subpart A). Section 205(g) funds are used primarily to manage the wastewater treatment works construction grants program pursuant to the provisions of 40 CFR part 35, subpart J. A State may also use part of the 205(g) funds to administer approved permit programs under sections 402 and 404, to administer a statewide waste treatment management program under section 208(b)(4) and to manage waste treatment construction grants for small communities.

(c) Grant work programs for water quality planning and management shall describe geographic and functional priorities for use of grant funds in a manner which will facilitate EPA review of the grant application and subsequent evaluation of work accomplished with the grant funds. A State's 305(b) Report, WQM plan and other water quality assessments shall identify the State's priority water quality problems and areas. The WQM plan shall contain an analysis of alternative control measures and recommendations to control specific problems. Work programs shall specify the activities to be carried out during the period of the grant; the cost of specific activities; the outputs, for example, permits issued, intensive surveys, wasteload allocations, to be produced by each activity; and where applicable, schedules indicating when activities are to be completed.

(d) State work programs under sections 106, 205(j) and 205(g) shall be coordinated in a manner which indicates the funding from these grants dedicated to major functions, such as permitting, enforcement, monitoring, planning and standards, nonpoint source implementation, management of construction grants, operation and maintenance of treatment works, ground-water, emergency response and program management. States shall also describe how the activities funded by these grants are used in a coordinated manner to address the priority water quality problems identified in the State's water quality assessment under section 305(b).

(e) EPA, States, areawide agencies, interstate agencies, local and Regional governments, and designated management agencies (DMAs) are joint participants in the water pollution control program. States may enter into contractual arrangements or intergovernmental agreements with other agencies concerning the performance of water quality planning and management tasks. Such arrangements shall reflect the capabilities of the respective agencies and shall efficiently utilize available funds and funding eligibilities to meet Federal requirements commensurate with State and local priorities. State work programs under section 205(j) shall be developed jointly with local, Regional and other comprehensive planning organizations.

§ 130.63 Coordination with other programs.

(a) Relationship to the National Pollutant Discharge Elimination System (NPDES) program. In accordance with section 208(e) of the Act, no NPDES permit may be issued which is in conflict with an approved Water Quality Management (WQM) plan. Where a State has assumed responsibility for the administration of the permit program under section 402, it shall assure consistency with the WQM plan.

(b) Relationship to the municipal construction grants program. In accordance with sections 205(j), 216 and 303(e)(3)(H) of the Act, each State shall develop a system for setting priorities for funding construction of municipal wastewater treatment facilities under section 201 of the Act. The State, or the agency to which the State has delegated WQM planning functions, shall review

each facility plan in its area for consistency with the approved WQM plan. Under section 208(d) of the Act, after a waste treatment management agency has been designated and a WQM plan approved, section 201 construction grant funds may be awarded only to those agencies for construction of treatment works in conformity with the approved WQM plan.

(c) Relationship to Federal activities—Each department, agency or instrumentality of the executive, legislative and judicial branches of the Federal Government having jurisdiction over any property or facility or engaged in any activity resulting, or which may result, in the discharge or runoff of pollutants shall comply with all Federal, State, interstate and local requirements, administrative authority, and process and sanctions respecting the control and abatement of water pollution in the same manner and extent as any non-governmental entity in accordance with section 313 of the CWA.

§ 130.64 Processing application for Indian Tribes.

The Regional Administrator shall process an application of an Indian Tribe submitted under § 130.51(d) in a timely manner. He shall promptly notify the Indian Tribe of receipt of the application.

§ 130.65 Petitions to EPA to undertake actions under section 303(d)

(a) *To whom does this section apply?* As used in this section, ''you'' refers to any person or organization who wants to ask EPA to carry out the actions that States are directed to perform under CWA section 303(d).

(b) *What is the purpose of this section?* (1) This section describes a procedure you should use if you want EPA to carry out the actions that States are directed to perform under CWA section 303(d). Petitioning EPA to undertake activities that States are directed to perform under CWA section 303(d) serves several useful functions. Petitioning EPA to establish TMDLs in the place of a state affords the Agency an opportunity to assemble and analyze the relevant facts, to apply its expertise, exercise the discretion granted to EPA by Congress, and explain the basis for its decision in writing. Petitions will be particularly helpful in instances where the petitioner brings to EPA's attention important facts or analysis the Agency was not aware of or had not conducted on its own.

(2) This petition procedure is intended to be used for requests that EPA intervene to support a State's implementation of CWA section 303(d) based on a substantial failure by the State to establish TMDLs in accordance with the State's schedule. This procedure is not intended to be used to prompt EPA to establish TMDLs for particular waters in cases where you are dissatisfied with the schedule the State has developed for those waters. Rather, if you want a TMDL for a particular waterbody to be established sooner than the State schedule, you should explain to the State why that waterbody warrants earlier attention when the state publishes its section 303(d) list and schedule for public comment.

(c) *What procedures should I follow?* If you want EPA to carry out the actions that States are directed to perform under CWA section 303(d), you should send a petition by certified mail to the EPA Regional Administrator of the Region in which the State is located. See, 40 CFR 1.7.

(d) *What should my petition include?* Your petition should be in writing and it should identify:

(1) The action(s) you want EPA to undertake;

(2) The reasons EPA should perform the action(s);

(3) Any schedule you recommend to EPA for carrying out the desired action(s); and

(4) All information you believe is relevant to your request.

(e) *When will EPA answer my petition?* EPA will answer your petition as quickly as practicable. EPA will notify you and the affected State of its decision in writing.

(f) *How will EPA evaluate my petition?* EPA will consider the information you present in your petition and any other information the Agency obtains from the relevant State regarding its TMDL program. EPA may consider:

(1) The State's schedule for establishing TMDLs;

(2) Progress the State has made in identifying waters needing TMDLs;

(3) Progress the State has made in establishing TMDLs; and

(4) Resources the State has committed for administering its TMDL program.

(g) *What will EPA's decision look like?* EPA may decide to perform any of a variety of actions in response to your petition. For example, EPA could decide to:

(1) Establish TMDLs for a State;

(2) Provide technical or financial assistance;

(3) Work with the State to change its schedule for establishing TMDLs; or

(4) Take other action it determines to be appropriate.

EPA could also decide to deny your petition on the ground that the State is properly implementing section 303(d).

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