

September 10, 2018

VIA EMAIL ONLY (waterbodycomments@adeq.state.ar.us)

Office of Water Quality
Arkansas Department of Environmental Quality
5301 Northshore Dr.
North Little Rock, AR 72118

Re: *2018 Draft 303(d) list Public Comment*

To Whom It May Concern:

Please accept this comment on behalf of myself and my client, the Arkansas Public Policy Panel. This comment pertains to the July 26, 2018, proposed revisions to the 2018 Arkansas Integrated Water Quality Monitoring and Assessment list (“proposed list”) issued by ADEQ.

1. The Draft 303(d) List Does not Account for Antidegradation

The Clean Water Act requires state water quality standards to include three parts: designated uses, water quality criteria, and an antidegradation policy. The proposed list shows, under the heading “Designated Uses Not Supported,” waters where a designated use is not attained. The proposed list, under the heading “Water Quality Standard Non-Attainment,” defines waters which do not meet water quality criteria. There is no heading showing antidegradation non-attainment. Federal regulations require an accounting of antidegradation violations:

For the purposes of listing waters under §130.7(b), the term “water quality standard applicable to such waters” and “applicable water quality standards” refer to those water quality standards established under section 303 of the Act, ***including*** numeric criteria, narrative criteria, waterbody uses, and ***antidegradation requirements***.¹

Antidegradation policy prevents the degradation of high-quality waters. Water quality in Tier III, or Outstanding Resources Waters, “shall be protected” without permanent degradation.² Tier II High Quality Waters may suffer limited degradation only where an important economic or social need is proven.³ ADEQ must maintain existing uses in Tier I waters.⁴

¹ 40 C.F.R. § 130.7(b)(3)(emphasis added).

² APCEC Reg. 2.203.

³ APCEC Reg. 2.202.

Thus, the proposed list needs an additional heading for waters degraded in violation of the state's antidegradation policy, with a column for each of the three tiered classes of waters defined by APCEC Reg. 2.201 *et seq.* The Tier III column must identify any Tier III waters suffering any level of degradation, while the Tier II column should identify waters suffering degradation in the absence of a proven economic or social need. Finally, the Tier I column must show waters degraded to the point water quality no longer protects and maintains existing uses. The proposed list is missing one-third of the necessary analysis, thus violating 40 C.F.R. § 130.7(b)(3).

2. The Category 4b Purported Alternative Pollution Controls are not "Required"

ADEQ seeks to avoid listing several impaired waters under Category 5 of its proposed list by placing those waters in Category 4b. Category 5 waters require prioritization for development of a TMDL, whereas Category 4 waters, despite being impaired, are not prioritized for TMDL development. Category 4b listing for impaired waters is appropriate where alternative pollution controls are required and actively working, as stated by EPA:

EPA will consider a number of factors in evaluating whether a particular set of pollution controls are in fact "requirements" as specified in EPA's regulations, including: (1) authority (local, State, Federal) under which the controls are required and will be implemented with respect to sources contributing to the water quality impairment (examples may include: self-executing State or local regulations, permits, and contracts and grant/funding agreements that require implementation of necessary controls); (2) existing commitments made by the sources to implement the controls (including an analysis of the amount of actual implementation that has already occurred); (3) availability of dedicated funding for the implementation of the controls; and (4) other relevant factors as determined by EPA depending on case-specific circumstances.⁵

This guidance relies on (or is the converse of) federal regulations which state a TMDL is necessary where "other pollution control requirements (e.g., best management practices) required by local, State, or Federal authority are not stringent enough to implement any water quality standards applicable to such waters."⁶

⁴ APCEC Reg. 2.201.

⁵ See "Information Concerning 2008 Clean Water Act Sections 303(d), 305(b), and 314 Integrated Reporting and Listing Decisions," attachment 2, pg. 3, available at https://www.epa.gov/sites/production/files/2015-10/documents/2006_10_27_tmdl_2008_ir_memoandum.pdf.

⁶ 40 C.F.R. § 130.7 (b)(1)(iii).

ADEQ sets forth three management plans for its “Category 4b Related Documents.” It is not clear, nor is there any justification in the record, that these management plans rise to the level of “requirements” for the purposes of Category 4b listing. For example, the recently issued Buffalo River Watershed Management Plan states on page 7-12 that it recommends voluntary implementation of nonpoint source management practices, and on page 7-13, that the plan carries “no legal requirement.”

It is possible for a management plan with “incentive-based” programs to qualify as an alternative control when that management plan requires “attainment of [water quality standards] within a reasonable period of time,” or such controls “have already been implemented” and there is “sufficient certainty that implementation will continue until [water quality standards] are achieved.”⁷ All such alternative pollution controls must still contain an element which crosses the line to being a requirement. Guidance provides examples of what alternatives rise to a requirement, including individual permits, state regulations, a contract, a Clean Water Act § 319 grant, and a federal management plan.⁸ The common thread is that each is enforceable, if not by law, through contract or other agreement in a defined period of time.

Here, the plans, especially the one for the Buffalo River, carry no binding requirements or timeline for water quality standards attainment, nor has any entity implemented the plan to a degree necessary to show that it is working, with sufficient contracts, agreements, and programs in place, to rise to the level of a “requirement” for Category 4b purposes. Aspirational goals or unimplemented future plans do not qualify under Category 4b as requirements for pollution control. The record is insufficient to support listing waters in Category 4b instead of 5.

3. The Category 4b Determinations Document is Deficient

ADEQ provides one and a half pages for the entirety of its Category 4b determinations. This document does not meet the necessary elements of a Category 4b determination document:

1. Identification of segment and statement of problem causing the impairment;
2. Description of pollution controls and how they will achieve water quality standards;
3. An estimate or projection of the time when WQS will be met;
4. Schedule for implementing pollution controls;

⁷ See “Guidance for 2006 Assessment, Listing and Reporting Requirements Pursuant to Sections 303(d), 305(b) and 314 of the Clean Water Act,” pg. 55, available at <https://www.epa.gov/sites/production/files/2015-10/documents/2006irg-report.pdf>.

⁸ *Id.* at pg. 56.

5. Monitoring plan to track effectiveness of pollution controls; and
6. Commitment to revise pollution controls, as necessary.⁹

Assumedly, ADEQ is relying on the watershed management plans to satisfy these requirements, despite EPA's preference that "demonstrations should be submitted as a stand-alone document."¹⁰ It is unclear, if not impossible, how ADEQ can justify its Category 4b determinations in the absence of actual pollution control requirements (as discussed above) necessary to show how, when, and where pollution control requirements are implemented and monitored. To inform the public, comply with relevant guidance, and conform with EPA's preference for a stand-alone document, ADEQ should re-write its Category 4b determinations to specifically and clearly address each of the 6 categories listed above for every Category 4b water.

Thank you for considering and accepting this comment.

Sincerely,

/s Ross Noland

Ross Noland

⁹ 2008 Integrated Reporting Guidance, Attachment 2, pg. 1.

¹⁰ *Id.*