"Implementation Ready" TMDLs for Reducing Toxic Pollutants in Oregon Waters from Nonpoint Sources

Draft Issue Paper

I. Introduction

A. Context

The EQC has directed DEQ to review existing rules and implementation strategies to identify gaps and propose strategies including rule changes that would reduce toxics in Oregon waters that come from nonpoint sources and other sources not regulated by permits under section 402 of the federal Clean Water Act. Pursuant to this directive, DEQ is considering a number of items for inclusion in the toxics standards rulemaking package, including revisions to the way DEQ and its partners develop and implement Total Maximum Daily Loads (TMDLs). TMDLs are watershed scale water quality and pollutant source analyses and associated pollution reduction plans for maintaining and restoring impaired uses of surface water. DEQ is also considering many more suggestions as it develops an agency-wide Toxics Reduction Strategy.

B. Purpose, Why we are doing this now

The purpose of considering changes to TMDL development and implementation is to determine whether such changes would further the goal of reducing and preventing toxic pollutants in waters of the state. As part of the current review of Oregon's human health toxics criteria, DEQ is working with a stakeholder group, and the members of this group have asked DEQ to consider a number of strategies in order reduce toxics from nonpoint sources. DEQ has agreed to consider those strategies and also to come up with its own recommendations to develop a rulemaking package that would accomplish the EQC's directive.

II. Background

A. History

Under the Clean Water Act (CFR 130.7) and state statute (ORS 468) DEQ is authorized to develop, implement and enforce the Total Maximum Daily Loads. TMDLs have been developed and implemented since late 80's, and TMDL rule was adopted by the EQC in 2002.

B. Problem Description

Concerns about the level and variety of toxics that may be in Oregon waters have been highlighted in various studies by governmental agencies such as USGS and DEQ, and have been raised as an issue by citizens, environmental groups, DEQ staff, as well as the EQC. Toxic pollutants come from various point sources and nonpoint sources. Toxic pollutants potentially

associated with nonpoint sources include current use and legacy pesticides, metals, fertilizers, urban stormwater, and others. Some are applied by land managers and others get into the soil through air deposition and then travel to water bodies with erosion when the soil is disturbed.

TMDLs have been the main tool to address nonpoint sources of pollution in Oregon for the past two decades. It is due in part by the fact that current implementation plan for the antidegradation policy does not cover nonpoint sources. TMDL program has evolved in the last decade, but there are improvements that could be made to reduce toxics in waters of the state.

The purpose for considering revisions to the TMDL rules and the way the program is being implemented is to ensure that DEQ can effectively work with its partners and regulated community to reduce the loading of toxics to waters of the State.

C. Oregon's TMDL Program and Toxics TMDLs

When rivers or streams are listed as impaired, DEQ is required to undergo technical analyses and develop total maximum daily load (TMDL) which defines how much of a pollutant a waterbody can receive and still meet water quality standards. In addition to technical analyses, the TMDL rule describes how the EQC policy will be implemented through TMDLs and their associated implementation plans and requires the designated management agencies to develop those implementation plans.

Oregon has developed TMDLs for toxic pollutants mainly legacy pesticides and heavy metals, and to date they have all been approved by EPA.
To support DEQ has developed an Internal Management Directive titled: "TMDL Implementation Plan Guidance for State and Local Government Designated Management Agencies ".
http://www.deq.state.or.us/WQ/TMDLs/docs/impl/07wq004tmdlimplplan.pdf
The IMD includes directions to DEQ staff for providing technical assistance to DMAS for development of TMDL Implementation Plans.

The complete TMDL rule is provided in Attachment A.

D. Federal TMDL Regulation

When rivers or streams are listed as impaired, states are required to develop total maximum daily load (TMDL) which defines how much of a pollutant a waterbody can receive and still meet water quality standards. The complete federal TMDL regulation is provided in Attachment B.

In addition, EPA provides a number of guidance documents for TMDL development and watershed planning for implementation.
http://www.epa.gov/owow/TMDL/guidance.html

III. Addressing existing issues and gaps with TMDLs through "Implementation Ready" TMDLs

DEQ is evaluating different approaches to modifying its way of developing and implementing TMDLs, based on ideas raised within DEQ and by stakeholders. For any changes adopted, DEQ would need to develop guidance as to how those changes will be implemented in order to meet the federal requirement to have TMDL implementation plans. Guidance would need to ensure that changes are understood and implemented consistently by DEQ's regional staff.

DEQ is considering the following points in its evaluation of TMDL program modification options:

- Would the approach be a cost-effective means to reduce toxic pollutant loading to streams from nonpoint sources?
- Are other current programs more efficient to reduce toxics from nonpoint sources?
- Does the EQC have the authority to adopt the provision and does DEQ have the authority to implement it?
- Does DEQ have the capability to implement the new requirements, considering the resources that would be required?

A. TMDL Development

1. Due in part to resource constraints, source identification for TMDLs is not done at a scale that supports DMAs to develop detailed implementation plans.

Proposed solution / rule language

Conduct source identification monitoring and analysis at a finer scale during TMDL development.

Applicability/Scope

This solution will be applied statewide, beginning with basins where TMDLs will be developed in the near future.

DEQ Recommendation

Develop Internal Management Directive for "Implementation Ready" TMDLs and provide guidance to conduct source identification monitoring and analysis at a finer scale.

Policy objective

Identify sources of toxic pollutants to Oregon waters in order to prevent further impairment and move toward attainment of water quality standards.

Policy evaluation

If this strategy is implemented, source identification monitoring and analyses will be done at a scale that facilitates DMAs to develop implementation plans with specificity as to where and when management measures and restoration projects will be implemented.

Advantages and disadvantages

Conducting a finer scale source analyses for TMDLs will allow DEQ to provide guidance to DMAs as to what they need to do to achieve TMDL goals. It will be a significant added workload for DEQ to develop TMDLs. Providing added guidance through a development of IMD will also require additional resources.

Summary of RWG discussion and views

To be added

Authority and precedence

DEQ already has authority to conduct source identification under TMDL rule.

2. Although DEQ has authority to do so already, its ability to identifying significant air and land sources and assign waste load allocations is not explicit in Division 42 TMDL rule.

Proposed solution / rule language

Revise rule to explicitly allow DEQ to assign an individual load allocation to significant air deposition and land sources in TMDLs.

Proposed rule language to be added 340-42-0040 (4)

(g) Wasteload allocations. This element determines the portions of the receiving water's loading capacity that are allocated to existing point sources of pollution, including all point source discharges regulated under the Federal Water Pollution Control Act Section 402 (33 USC Section 1342) as well as air deposition and land sources.

Applicability/Scope

This solution will be applied statewide, beginning with basins where TMDLs will be developed in the near future.

DEQ Recommendation

Change Division 42 by adding explicit language to assign an individual load allocation to significant air deposition and land sources in TMDLs.

Rule objective

Assign load allocations to require pollution control in order to prevent further impairment and move toward attainment of water quality standards

Rule evaluation

If this strategy is implemented, DEQ will determine waste load allocations for air and land sources in TMDLs, and work with the Air Quality and Land Quality Divisions to meet those allocations.

Advantages and disadvantages

Assigning waste load allocation to significant air and land sources could reduce toxic pollution in Oregon's waters through reduction in air deposit and runoff. It may add workload for DEQ in both Water Quality and Air Quality Divisions. Providing added guidance through a development of IMD will also require additional resources. Air Quality Division may subsequently need to modify air rules to be able to fully implement the waste load allocations when air sources are identified as a source in TMDLs.

Summary of RWG discussion and views

To be added

Authority and precedence

DEQ already has authority to assign load allocations to land and air sources. Additional rulemaking in air rules maybe needed for DEQ to fully implement the waste load allocation when air sources are identified as a source in TMDLs.

3. DEQ is required to specify timeline and schedule for implementing the TMDLs in WQMPs, but does not currently set specific timeline and associated milestones.

Proposed solution / rule language

Provide internal guidance and require TMDLs to have specific timelines and associated milestones in TMDLs. The document will also include guidance on ensuring that timelines are met and what actions DEQ can take if timelines and milestones are not met.

Applicability/Scope

This solution will be applied statewide, beginning with basins where TMDLs will be developed in the near future.

DEQ Recommendation

Develop "Implementation Ready" TMDL Internal Management Directive and provide guidance to set more specific timeline and associated milestones.

Policy objective

Set more specific timeline and milestones in TMDLs in order to measure against DMA implementation efforts and track progress toward attainment of water quality standards.

Policy evaluation

If this strategy is implemented, DEQ will include more specific timeline and associated milestones in TMDLs for implementation efforts and instream water quality goals.

Advantages and disadvantages

Having specific timelines and associated milestones will clarify DEQ's expectations, and allow DMAs and other sources within a TMDL basin to plan their activities and measure progress. It increases accountability of DMAs and promotes equitable efforts among those DMAs. It may add workload for DEQ in the Water Quality Division to determine timelines and milestones. Providing added guidance through a development of IMD will also require additional resources.

Summary of RWG discussion and views

To be added

Authority and precedence

DEQ currently has authority to set timelines and milestoes in TMDLs.

4. DEQ provides Reasonable Assurance that TMDLs will be implemented in the WQMPs, however, concerns have been expressed that the information in WQMPs is not adequate to ensure that TMDLs will be implemented.

   <u>DEQ would like to discuss with the stakeholder group about this issue.</u>

B. TMDL Implementation

1. The process and standards to evaluate adequacy of regulations and programs for implementing TMDLs are not clear for Agriculture and Forestry. Clarification is needed for the DEQ process for evaluating BMP effectiveness in meeting TMDL load allocations, as well as explicit steps for elevating issues up to EQC in case there are disagreements between agencies.

Proposed solution / rule language

Clarify how to evaluate the adequacy of ODA and ODF's regulations and programs for achieving TMDL goals. Work with ODA and ODF to decide how they should be involved in the evaluation process.

Applicability/Scope

This solution will be applied statewide, beginning with basins where TMDLs will be developed in the near future.

DEQ Recommendation

Include process and standards for evaluating ODA and ODF's regulations and programs for achieving TMDL load allocations in "Implementation Ready" TMDL Internal Management Directive.

Policy objective

Clarify the process and standards for evaluating the adequacy of regulations and programs for forestry and agriculture to meet TMDL load allocations and meeting water quality standards in order to prevent further impairment and move toward attainment of water quality standards.

Policy evaluation

Having a clear process for evaluating adequacy of FPA and AgWQMAP as well as a process for issue resolution should allow TMDL implementation to move forward.

Advantages and disadvantages

Having a clear process allows consistent and timely implementation of TMDLs, thus could ensure reduction of toxics in Oregon's waters.

Summary of RWG discussion and views

To be added

Authority and precedence

The processes for resolving issues between EQC, ODA, and the Board of Forestry are explicitly described in statutes. There is no clear process for DEQ, however, for elevating issues up to EQC.

2. The process for addressing stormwater in TMDL development and its relationship to stormwater permits and expectations for Designated Management Agencies is unclear.

Proposed solution / rule language

Clarify that where a TMDL implementation plan identifies best management practices for reducing stormwater discharges, the BMPs will be the surrogates for the WLA/LA.

Applicability/Scope

This solution will be applied statewide, beginning with basins where TMDLs will be developed in the near future.

DEQ Recommendation

"Implementation Ready" TMDL guidance will clarify that where a TMDL implementation plan identifies best management practices for reducing stormwater discharges, the BMPs will be the surrogates for the WLA/LA.

Policy objective

Clarify the process and standards for evaluating the adequacy of regulations and programs for urban stormwater to meet TMDL waste load allocations and meeting water quality standards in order to prevent further impairment and move toward attainment of water quality standards to the Maximum Extent Practicable. (MEP)

Policy evaluation

Advantages and disadvantages

To be added

Summary of RWG discussion and views

To be added

Authority and precedence

DEQ has authority to regulate local governments for urban stormwater under TMDL rules.

3. Currently DEQ does not evaluate effectiveness of BMPs to meet TMDL allocations. Stakeholders have expressed concerns that without explicit BMPs and monitoring requirements, it is not possible to determine compliance with TMDLs.

Proposed solution / rule language

a. Develop design specifications for riparian buffer strips and require in Water Quality rules (stakeholder recommendation #11)

b. Require that surrogate measures be clear and easily applied as to how to meet TMDL load allocations
c. Add that agricultural land owners must implement specific practices to be in compliance Implementation Plan Approval

Applicability/Scope

This solution will be applied statewide, beginning with basins where TMDLs will be developed in the near future.

DEQ Recommendation

Develop Internal Management Directive for "Implementation Ready" TMDLs and provide guidance to include additional information such as design specifications, suggested or required BMPs, and surrogate measures such as Safe Harbor BMPs in TMDLs. The IMD will include guidance on the monitoring of BMP installation and effectiveness and a process for evaluating BMPs and updating them, if necessary.

Policy objective

Clarify what management and restoration practices need to be implemented where and when in order to prevent further impairment and attain water quality standards.

Policy evaluation

Having specific requirements clarifies expectations for the regulated community and reduces regulatory uncertainty.

Advantages and disadvantages

Working with other state agencies to determine the appropriate Safe Harbor BMPs and design specifications could add significant workload to DEQ staff as well as other agencies such as ODF and ODA. Providing added guidance through a development of IMD will also require additional resources.

Summary of RWG discussion and views

To be added

Authority and precedence

DEQ already has authority to specify actions that are needed to meet TMDL load allocations under TMDL rule.

Attachment A

DIVISION 42

TOTAL MAXIMUM DAILY LOADS (TMDLS)

340-042-0025

Policy, Purpose and Effect

(1) The public policy of the State of Oregon is to protect, maintain and improve the quality of waters of the state for beneficial uses and to provide for prevention, abatement and control of water pollution. To achieve and maintain water quality standards, the Environmental Quality Commission may impose limitations and controls including Total Maximum Daily Loads (TMDLs), wasteload allocations for point sources and load allocations for nonpoint sources.

(2) The policy of the Environmental Quality Commission is to have the Department of Environmental Quality establish TMDLs, including wasteload and load allocations, and have responsible sources meet these allocations through compliance with discharge permits or other strategies developed in sector or source-specific implementation plans. These measures must achieve and maintain water quality standards and restore waters of the state that are water quality limited.

(3) These rules establish procedures for developing, issuing and implementing TMDLs as required by the Federal Water Pollution Control Act Section 303(d) (33 USC Section 1313(d)) and authorized by Oregon statutes to ensure that state water quality standards are met and beneficial uses protected.

(4) The Department of Environmental Quality will review any changes to Federal Water Pollution Control Act Section 303(d) or implementing regulations in 40 CFR Part 130 promulgated after the effective date of these rules. The Department may subsequently recommend that the Environmental Quality Commission amend, repeal or adopt new rules. Rules adopted by the Commission remain in effect until the Commission takes action on the recommendations.

[Publications: Publications referenced are available from the agency.]

Stat. Auth.: ORS 468.020, ORS 468B.020, ORS 468B.030, ORS 468B.035 & ORS 468B.110
Stats. Implemented: ORS 468B.020, ORS 468B.110
Hist.: DEQ 18-2002, f. & cert. ef. 12-20-02

340-042-0030

Definitions

In addition to the definitions provided in ORS 468.005, 468B.005, OAR 340-041-0006 and 340-045-0010, unless otherwise required by context, the following definitions apply to OAR chapter 340, division 42.

(1) "Background Sources" include all sources of pollution or pollutants not originating from human activities. In the context of a TMDL, background sources may also include anthropogenic sources of a pollutant that the Department or another Oregon state agency does not have authority to regulate, such as pollutants emanating from another state, tribal lands or sources otherwise beyond the jurisdiction of the state.

(2) "Designated Management Agency (DMA)" means a federal, state or local governmental agency that has legal authority over a sector or source contributing pollutants, and is identified as such by the Department of Environmental Quality in a TMDL.

(3) "Director" means the Director of the Department of Environmental Quality or the Director's authorized designee.

(4) "Hydrologic Unit Code (HUC)" means a multi-scale numeric code used by the U.S. Geological Survey to classify major areas of surface drainage in the United States. The code includes fields for geographic regions, geographic subregions, major river basins and subbasins. The third field of the code generally corresponds to the major river basins named in OAR chapter 340, division 41. The fourth field generally corresponds to the subbasins typically addressed in TMDLs.

(5) "Local Advisory Group" means a group of people with experience and interest in a specific watershed or subbasin that is designated by the Department to provide local input during TMDL development.

(6) "Management Strategies" means measures to control the addition of pollutants to waters of the state and includes application of pollutant control practices, technologies, processes, siting criteria, operating methods, best management practices or other alternatives.

(7) "Performance Monitoring" means monitoring implementation of management strategies, including sector-specific and source-specific implementation plans, and resulting water quality changes.

(8) "Pollutant" has the meaning provided in the Federal Water Pollution Control Act Section 502 (33 USC Section 1362).

(9) "Reasonable Assurance" means a demonstration that a TMDL will be implemented by federal, state or local governments or individuals through regulatory or voluntary actions including management strategies or other controls.

(10) "Sector" means a category or group of similar nonpoint source activities such as forestry, agriculture, recreation, urban development or mining.

(11) "Sector-Specific Implementation Plan" or "Source-Specific Implementation Plan" in the context of a TMDL means a plan for implementing a Water Quality Management Plan for a specific sector or source not subject to permit requirements in ORS 486.050. The elements of an implementation plan are described in OAR 340-042-0080.

(12) "Source" means any process, practice, activity or resulting condition that causes or may cause pollution or the introduction of pollutants to a waterbody.

(13) "Subbasin" means the designation in the fourth field of the U.S. Geological Survey Hydrologic Unit Code.

(14) "Surrogate Measures" means substitute methods or parameters used in a TMDL to represent pollutants.

(15) "Total Maximum Daily Load (TMDL)" means a written quantitative plan and analysis for attaining and maintaining water quality standards and includes the elements described in OAR 340-042-0040. These elements include a calculation of the maximum amount of a pollutant that a waterbody can receive and still meet state water quality standards, allocations of portions of that amount to the pollutant sources or sectors, and a Water Quality Management Plan to achieve water quality standards.

(16) "Waterbody" means any surface waters of the state.

(17) "Water Quality Management Plan (WQMP)" means the element of a TMDL describing strategies to achieve allocations identified in the TMDL to attain water quality standards. The elements of a WQMP are described in OAR 340-042-0040(4)(l).

[Publications: Publications referenced are available from the agency.]

Stat. Auth.: ORS 468.020, ORS 468B.020, ORS 468B.030, ORS 468B.035 & ORS 468B.110
Stats. Implemented: ORS 468B.020, ORS 468B.110
Hist.: DEQ 18-2002, f. & cert. ef. 12-20-02

340-042-0040

Establishing Total Maximum Daily Loads (TMDLs)

(1) The Department will establish TMDLs for pollutants in waters of the state that are listed in accordance with the Federal Water Pollution Control Act Section 303(d) (33 USC Section 1313(d)).

(2) The Department will group stream segments and other waterbodies geographically by subbasin and develop TMDLs for those subbasins, unless it determines another approach is warranted.

(3) The Department will prioritize and schedule TMDLs for completion considering the following factors:

(a) Severity of the pollution,

(b) Uses of the water,

(c) Availability of resources to develop TMDLs,

(d) Specific judicial requirements, and

(e) Any other relevant information.

(4) A TMDL will include the following elements:

(a) Name and location. This element describes the geographic area for which the TMDL is developed and includes maps as appropriate.

(b) Pollutant identification. This element identifies the pollutants causing impairment of water quality that are addressed in the TMDL.

(c) Water quality standards and beneficial uses. This element identifies the beneficial uses in the basin and the relevant water quality standards, including specific basin standards established in OAR 340-041-0202 through 340-041-0975. The beneficial use that is most sensitive to impairment by the pollutant or pollutants addressed in the TMDL will be specified.

(d) Loading capacity. This element specifies the amount of a pollutant or pollutants that a waterbody can receive and still meet water quality standards. The TMDL will be set at a level to ensure that loading capacity is not exceeded. Flow assumptions used in the TMDL will be specified.

(e) Excess load. This element evaluates, to the extent existing data allow, the difference between the actual pollutant load in a waterbody and the loading capacity of that waterbody.

(f) Sources or source categories. This element identifies the pollutant sources and estimates, to the extent existing data allow, the amount of actual pollutant loading from these sources. The TMDL will establish wasteload allocations and load allocations for these sources. The Department will use available information and analyses to identify and document sources.

(g) Wasteload allocations. This element determines the portions of the receiving water's loading capacity that are allocated to existing point sources of pollution, including all point source discharges regulated under the Federal Water Pollution Control Act Section 402 (33 USC Section 1342).

(h) Load allocations. This element determines the portions of the receiving water's loading capacity that are allocated to existing nonpoint sources of pollution or to background sources. Load allocations are best estimates of loading, and may range from reasonably accurate estimates to gross allotments depending on the availability of data and appropriate techniques for predicting loading. Whenever reasonably feasible, natural background and anthropogenic nonpoint source loads will be distinguished from each other.

(i) Margin of safety. This element accounts for uncertainty related to the TMDL and, where feasible, quantifies uncertainties associated with estimating pollutant loads, modeling water quality and monitoring water quality. The TMDL will explain how the margin of safety was derived and incorporated into the TMDL.

(j) Seasonal variation. This element accounts for seasonal variation and critical conditions in stream flow, sensitive beneficial uses, pollutant loading and water quality parameters so that water quality standards will be attained and maintained during all seasons of the year.

(k) Reserve capacity. This element is an allocation for increases in pollutant loads from future growth and new or expanded sources. The TMDL may allocate no reserve capacity and explain that decision.

(l) Water quality management plan (WQMP). This element provides the framework of management strategies to attain and maintain water quality standards. The framework is designed to work in conjunction with detailed plans and analyses provided in sector-specific or source-specific implementation plans. The WQMP will address the following:

(A) Condition assessment and problem description.

(B) Goals and objectives.

(C) Proposed management strategies designed to meet the wasteload allocations and load allocations in the TMDL. This will include a categorization of sources and a description of the management strategies proposed for each source category.

(D) Timeline for implementing management strategies including:

(i) Schedule for revising permits,

(ii) Schedule for achieving appropriate incremental and measurable water quality targets,

(iii) Schedule for implementing control actions, and

(iv) Schedule for completing other measurable milestones.

(E) Explanation of how implementing the management strategies will result in attainment of water quality standards.

(F) Timeline for attainment of water quality standards.

(G) Identification of persons, including Designated Management Agencies (DMAs), responsible for implementing the management strategies and developing and revising sector-specific or source-specific implementation plans.

(H) Identification of sector-specific or source-specific implementation plans that are available at the time the TMDL is issued.

(I) Schedule for preparation and submission of sector-specific or source-specific implementation plans by responsible persons, including DMAs, and processes that trigger revisions to these implementation plans.

(J) Description of reasonable assurance that management strategies and sector-specific or source-specific implementation plans will be carried out through regulatory or voluntary actions.

(K) Plan to monitor and evaluate progress toward achieving TMDL allocations and water quality standards including:

(i) Identification of persons responsible for monitoring, and

(ii) Plan and schedule for reviewing monitoring information and revising the TMDL.

(L) Plan for public involvement in implementing management strategies.

(M) Description of planned efforts to maintain management strategies over time.

(N) General discussion of costs and funding for implementing management strategies. Sector-specific or source-specific implementation plans may provide more detailed analyses of costs and funding for specific management strategies.

(O) Citation of legal authorities relating to implementation of management strategies.

(5) To determine allocations for sources identified in the TMDL, the Department:

(a) Will use water quality data analyses, which may include statistical analyses or mathematical models.

(b) May use surrogate measures to estimate allocations for pollutants addressed in the TMDL. The Department may use one or more surrogate measures for a pollutant that is difficult to measure or highly variable. A surrogate measure will be closely related to the pollutant, and may be easier to monitor and track. The TMDL will establish the correlation between the surrogate measure and pollutant.

(6) The Department will distribute wasteload and load allocations among identified sources and in doing so, may consider the following factors:

(a) Contributions from sources;

(b) Costs of implementing measures;

(c) Ease of implementation;

(d) Timelines for attainment of water quality standards;

(e) Environmental impacts of allocations;

(f) Unintended consequences;

(g) Reasonable assurances of implementation; and

(h) Any other relevant factor.

(7) After issuing the TMDL, the Department may revise the loading capacity and allocations to accommodate changed needs or new information. In making these revisions, the Department will comply with the public notice provisions in OAR 340-042-0050(2) and procedures for issuing TMDL orders in OAR 340-042-0060.

(8) If the Environmental Protection Agency establishes a TMDL addressing waterbodies in Oregon, the Department may prepare a WQMP to implement that TMDL

[Publications: Publications referenced are available from the agency.]

Stat. Auth.: ORS 468.020, ORS 468B.020, ORS 468B.030, ORS 468B.035 & ORS 468B.110
Stats. Implemented: ORS 468B.020, ORS 468B.110
Hist.: DEQ 18-2002, f. & cert. ef. 12-20-02

340-042-0050

Public Participation

(1) The Department will establish a local advisory group or identify an existing group or forum to assist in developing a TMDL.

(2) The Department will provide an opportunity for persons to review and comment on a draft TMDL and on proposals to revise loading capacity or allocations in a TMDL as follows:

(a) The Department will maintain a mailing list for each TMDL.

(b) The Department will provide notice and an opportunity for public comment on a proposed TMDL or revision to loading capacity or allocations in a TMDL. The public comment period will generally be 60 days.

(c) The Department will respond to public comments received during the public comment period and will prepare a written summary of responses.

Stat. Auth.: ORS 468.020, ORS 468B.020, ORS 468B.030, ORS 468B.035 & ORS 468B.110
Stats. Implemented: ORS 468B.020, ORS 468B.110
Hist.: DEQ 18-2002, f. & cert. ef. 12-20-02

340-042-0060

Issuing a Total Maximum Daily Load

(1) The Director will issue a TMDL as an order. If the Environmental Protection Agency establishes a TMDL addressing waterbodies in Oregon, the Director may issue as an order a WQMP to implement that TMDL.

(2) The order will be effective and final on the date signed by the Director.

(3) Following issuance, the Department will submit the TMDL to the Environmental Protection Agency.

(4) Within 20 business days after the Director signs the order, the Department will notify all affected NPDES permittees, nonpoint source DMAs identified in the TMDL and persons who provided formal public comment on the draft TMDL that the order has been issued and the summary of responses to comments is available.

Stat. Auth.: ORS 468.020, ORS 468B.020, ORS 468B.030, ORS 468B.035 & ORS 468B.110
Stats. Implemented: ORS 468B.020, ORS 468B.110
Hist.: DEQ 18-2002, f. & cert. ef. 12-20-02

340-042-0070

Requesting Reconsideration or Appealing a Total Maximum Daily Load

(1) Any person who participated in establishing a TMDL, including those who submitted comments, and any other person entitled to seek judicial review of an order issuing a TMDL may request reconsideration by the Director in accordance with OAR 137-004-0080.

(2) A person may file a petition for judicial review of a final TMDL order as allowed by ORS 183.484.

Stat. Auth.: ORS 468.020, ORS 468B.020, ORS 468B.030, ORS 468B.035 & ORS 468B.110
Stats. Implemented: ORS 468B.020, ORS 468B.110
Hist.: DEQ 18-2002, f. & cert. ef. 12-20-02

340-042-0080

Implementing a Total Maximum Daily Load

(1) Management strategies identified in a WQMP to achieve wasteload and load allocations in a TMDL will be implemented through water quality permits for those sources subject to permit requirements in ORS 468B.050 and through sector-specific or source-specific implementation plans for other sources. WQMPs will identify the sector and source-specific implementation plans required and the persons, including DMAs, responsible for developing and revising those plans.

(2) The Oregon Department of Forestry will develop and enforce implementation plans addressing state and private forestry sources as authorized by ORS 527.610 through 527.992 and according to OAR chapter 629, divisions 600 through 665. The Oregon Department of Agriculture will develop

implementation plans for agricultural activities and soil erosion and enforce associated rules as authorized by ORS 568.900 through 568.933 and according to OAR chapter 603, divisions 90 and 95.

(3) Persons, including DMAs other than the Oregon Department of Forestry or the Oregon Department of Agriculture, identified in a WQMP as responsible for developing and revising sector-specific or source-specific implementation plans must:

(a) Prepare an implementation plan and submit the plan to the Department for review and approval according to the schedule specified in the WQMP. The implementation plan must:

(A) Identify the management strategies the DMA or other responsible person will use to achieve load allocations and reduce pollutant loading;

(B) Provide a timeline for implementing management strategies and a schedule for completing measurable milestones;

(C) Provide for performance monitoring with a plan for periodic review and revision of the implementation plan;

(D) To the extent required by ORS 197.180 and OAR chapter 340, division 18, provide evidence of compliance with applicable statewide land use requirements; and

(E) Provide any other analyses or information specified in the WQMP.

(b) Implement and revise the plan as needed.

(4) For sources subject to permit requirements in ORS 468B.050, wasteload allocations and other management strategies will be incorporated into permit requirements.

Stat. Auth.: ORS 468.020, ORS 468B.020, ORS 468B.030, ORS 468B.035 & ORS 468B.110
Stats. Implemented: ORS 468B.020, ORS 468B.110
Hist.: DEQ 18-2002, f. & cert. ef. 12-20-02

Attachment B

Title 40: Protection of Environment

PART 130—WATER QUALITY PLANNING AND MANAGEMENT

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§ 130.7 Total maximum daily loads (TMDL) and individual water quality-based effluent limitations.

(a) *General.* The process for identifying water quality limited segments still requiring wasteload allocations, load allocations and total maximum daily loads (WLAs/LAs and TMDLs), setting priorities for developing these loads; establishing these loads for segments identified, including water quality monitoring, modeling, data analysis, calculation methods, and list of pollutants to be regulated; submitting the State's list of segments identified, priority ranking, and loads established (WLAs/LAs/TMDLs) to EPA for approval; incorporating the approved loads into the State's WQM plans and NPDES permits; and involving the public, affected dischargers, designated areawide agencies, and local governments in this process shall be clearly described in the State Continuing Planning Process (CPP).

(b) Identification and priority setting for water quality-limited segments still requiring TMDLs.

(1) Each State shall identify those water quality-limited segments still requiring TMDLs within its boundaries for which:

(i) Technology-based effluent limitations required by sections 301(b), 306, 307, or other sections of the Act;

(ii) More stringent effluent limitations (including prohibitions) required by either State or local authority preserved by section 510 of the Act, or Federal authority (law, regulation, or treaty); and

(iii) 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 (WQS) applicable to such waters.

(2) Each State shall also identify on the same list developed under paragraph (b)(1) of this section those water quality-limited segments still requiring TMDLs or parts thereof within its boundaries for which controls on thermal discharges under section 301 or State or local requirements are not stringent enough to assure protection and propagation of a balanced indigenous population of shellfish, fish and wildlife.

(3) 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.

(4) The list required under §§130.7(b)(1) and 130.7(b)(2) of this section shall include a priority ranking for all listed water quality-limited segments still requiring TMDLs, taking into account the severity of the pollution and the uses to be made of such waters and shall identify the pollutants causing or expected to cause violations of the applicable water quality standards. The priority ranking shall specifically include the identification of waters targeted for TMDL development in the next two years.

(5) Each State shall assemble and evaluate all existing and readily available water quality-related data and information to develop the list required by §§130.7(b)(1) and 130.7(b)(2). At a minimum “all existing and readily available water quality-related data and information” includes but is not limited to all of the existing and readily available data and information about the following categories of waters:

(i) Waters identified by the State in its most recent section 305(b) report as “partially meeting” or “not meeting” designated uses or as “threatened”;

(ii) Waters for which dilution calculations or predictive models indicate nonattainment of applicable water quality standards;

(iii) Waters for which water quality problems have been reported by local, state, or federal agencies; members of the public; or academic institutions. These organizations and groups should be actively solicited for research they may be conducting or reporting. For example, university researchers, the United States Department of Agriculture, the National Oceanic and Atmospheric Administration, the United States Geological Survey, and the United States Fish and Wildlife Service are good sources of field data; and

(iv) Waters identified by the State as impaired or threatened in a nonpoint assessment submitted to EPA under section 319 of the CWA or in any updates of the assessment.

(6) Each State shall provide documentation to the Regional Administrator to support the State's determination to list or not to list its waters as required by §§130.7(b)(1) and 130.7(b)(2). This documentation shall be submitted to the Regional Administrator together with the list required by §§130.7(b)(1) and 130.7(b)(2) and shall include at a minimum:

(i) A description of the methodology used to develop the list; and

(ii) A description of the data and information used to identify waters, including a description of the data and information used by the State as required by §130.7(b)(5); and

(iii) A rationale for any decision to not use any existing and readily available data and information for any one of the categories of waters as described in §130.7(b)(5); and

(iv) Any other reasonable information requested by the Regional Administrator. Upon request by the Regional Administrator, each State must demonstrate good cause for not including a water or waters on the list. Good cause includes, but is not limited to, more recent or accurate data; more sophisticated water quality modeling; flaws in the original analysis that led to the water being listed in the categories in §130.7(b)(5); or changes in conditions, e.g., new control equipment, or elimination of discharges.

(c) Development of TMDLs and individual water quality based effluent limitations.

(1) Each State shall establish TMDLs for the water quality limited segments identified in paragraph (b)(1) of this section, and in accordance with the priority ranking. For pollutants other than heat, TMDLs shall be established at levels necessary to attain and maintain the applicable narrative and numerical WQS with seasonal variations and a margin of safety which takes into account any lack of knowledge concerning the relationship between effluent limitations and water quality. Determinations of TMDLs shall take into account critical conditions for stream flow, loading, and water quality parameters.

(i) TMDLs may be established using a pollutant-by-pollutant or biomonitoring approach. In many cases both techniques may be needed. Site-specific information should be used wherever possible.

(ii) TMDLs shall be established for all pollutants preventing or expected to prevent attainment of water quality standards as identified pursuant to paragraph (b)(1) of this section. Calculations to establish TMDLs shall be subject to public review as defined in the State CPP.

(2) Each State shall estimate for the water quality limited segments still requiring TMDLs identified in paragraph (b)(2) of this section, the total maximum daily thermal load which cannot be exceeded in order to assure protection and propagation of a balanced, indigenous population of shellfish, fish and wildlife. Such estimates shall take into account the normal water temperatures, flow rates, seasonal variations, existing sources of heat input, and the dissipative capacity of the identified waters or parts thereof. Such estimates shall include a calculation of the maximum heat input that can be made into each such part and shall include a margin of safety which takes into account any lack of knowledge concerning the development of thermal water quality criteria for protection and propagation of a balanced, indigenous population of shellfish, fish and wildlife in the identified waters or parts thereof.

(d) *Submission and EPA approval.* (1) Each State shall submit biennially to the Regional Administrator beginning in 1992 the list of waters, pollutants causing impairment, and the priority ranking including waters targeted for TMDL development within the next two years as required under paragraph (b) of this section. For the 1992 biennial submission, these lists are due no later than October

22, 1992. Thereafter, each State shall submit to EPA lists required under paragraph (b) of this section on April 1 of every even-numbered year. For the year 2000 submission, a State must submit a list required under paragraph (b) of this section only if a court order or consent decree, or commitment in a settlement agreement dated prior to January 1, 2000, expressly requires EPA to take action related to that State's year 2000 list. For the year 2002 submission, a State must submit a list required under paragraph (b) of this section by October 1, 2002, unless a court order, consent decree or commitment in a settlement agreement expressly requires EPA to take an action related to that State's 2002 list prior to October 1, 2002, in which case, the State must submit a list by April 1, 2002. The list of waters may be submitted as part of the State's biennial water quality report required by §130.8 of this part and section 305(b) of the CWA or submitted under separate cover. All WLAs/LAs and TMDLs established under paragraph (c) for water quality limited segments shall continue to be submitted to EPA for review and approval. Schedules for submission of TMDLs shall be determined by the Regional Administrator and the State.

(2) The Regional Administrator shall either approve or disapprove such listing and loadings not later than 30 days after the date of submission. The Regional Administrator shall approve a list developed under §130.7(b) that is submitted after the effective date of this rule only if it meets the requirements of §130.7(b). If the Regional Administrator approves such listing and loadings, the State shall incorporate them into its current WQM plan. If the Regional Administrator disapproves such listing and loadings, he shall, not later than 30 days after the date of such disapproval, identify such waters in such State and establish such loads for such waters as determined necessary to implement applicable WQS. The Regional Administrator shall promptly issue a public notice seeking comment on such listing and loadings. After considering public comment and making any revisions he deems appropriate, the Regional Administrator shall transmit the listing and loads to the State, which shall incorporate them into its current WQM plan.

(e) For the specific purpose of developing information and as resources allow, each State shall identify all segments within its boundaries which it has not identified under paragraph (b) of this section and estimate for such waters the TMDLs with seasonal variations and margins of safety, for those pollutants which the Regional Administrator identifies under section 304(a)(2) as suitable for such calculation and for thermal discharges, at a level that would assure protection and propagation of a balanced indigenous population of fish, shellfish and wildlife. However, there is no requirement for such loads to be submitted to EPA for approval, and establishing TMDLs for those waters identified in paragraph (b) of this section shall be given higher priority.

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