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**Date:** July 6, 2021

**To:** Environmental Quality Commission

**From:** Richard Whitman, Director  
Jennifer Wigal, Deputy Water Quality Administrator  
Gene Foster, Water Quality TMDL program, Watershed Management Manager

**Subject:** Item D: TMDL 2022, Division 42 Rulemaking (Informational)  
July 22-23, 2021, EQC meeting

**Why this is important** DEQ will brief the commission on a proposed rule change that would align the EQC's rules with state statute and allow TMDLs to be adopted either by the Director as an order, or by the Commission as a rule. This change will assist in timely preparation of TMDLs and Water Quality Management Plans in response to a federal court order requiring 15 temperature TMDLs to be redone over the next five years. The department expects this proposed rule to come to the EQC for a decision in January 2022.

**Prior EQC involvement** The May 2021 Director's Report to EQC provided a brief overview of this planned rulemaking.

**Background** 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 provided in Oregon Revised Statute 468B.110.

The state statute (ORS 468B.110) authorizes TMDLs and Water Quality Management Plans to be adopted either as rules (by the Commission) or as orders (by the DEQ Director). After this statute was enacted, the EQC decided to delegate TMDLs and WQMPs to the DEQ Director. The belief, at that time, was that this would expedite TMDL work for the agency. That has not turned out to be the case. Further, the lack of a clear public process for gaining input to TMDL and WQMP developed as orders has been problematic. As a result, DEQ is recommending that the Commission amend its rules to allow at least some TMDLs to be developed through the rulemaking process, with a final decision by the EQC. DEQ believes that where there are more significant policy choices, TMDLs and WQMPs generally should be considered as rules by the EQC.

DEQ is planning to bring the proposal for commission action in January 2022 to ensure that DEQ can initiate a rulemaking process in early 2022 for the first

set of TMDLs in the [Temperature TMDL replacement project](#).  
(<https://www.oregon.gov/deq/wq/tmdls/Pages/tmdlreplacement.aspx>).

The schedule governing the temperature TMDL replacement project is the outcome of a series of lawsuits and court decisions, beginning with the 2012 U.S. District Court decision that struck down the Natural Conditions Criteria, a section of the temperature standard. That decision found that EPA impermissibly approved the Natural Conditions Criteria as a narrative criteria that supplanted, rather than supplemented, the biologically based numeric criteria. In subsequent litigation, the court issued a judgment Oct. 4, 2019, requiring DEQ and EPA to replace Oregon temperature TMDLs that were based on the Natural Conditions Criteria and to reissue the temperature TMDLs in 15 project areas based on the current temperature criteria. DEQ must amend and submit revised temperature TMDLs to EPA for approval or disapproval in each of the 15 project areas starting in 2024.

**TMDL  
background**

A Total Maximum Daily Load, or clean water plan, is a science-based approach to cleaning up polluted water so that it meets state water quality standards. TMDL development includes an analysis to establish numerical in-stream pollution loads that represents the greatest amount of a pollutant a surface water body can receive and still meet water quality standards.

The federal Clean Water Act requires states to develop a TMDL for each water body on the state's list of impaired waters, also known as the 303(d) list ([Integrated Report](#)). DEQ develops TMDLs on a watershed basis to evaluate and reflect the relationship of waters and pollutant loading within the watershed, rather than a stream-by-stream approach.

TMDLs are prioritized based on a variety of factors including risk to beneficial use, court ordered schedules and permit issuance priorities. Priority TMDLs are documented in the Integrated Report and in the [Performance Partnership Agreement](#) between DEQ and EPA.

Each TMDL project is unique, but there are essential elements to all TMDLs, which are identified in the Federal Code of Regulations at 40 CFR § 130.7 and in Oregon Administrative Rules at OAR 340-042-0040. We begin by identifying the 303(d) listings, waterbodies, water quality standards and beneficial uses in the project area that the TMDL will be developed.

TMDL development typically includes analysis of sources and amounts of pollutants, monitoring of the waterbody, followed by more technical review and analysis of the monitoring results to assess if standards are met for the waterbody or if pollutant reductions are needed. Any amount of pollution over the TMDL level needs to be reduced or eliminated to achieve clean water.

TMDLs contain the following elements:

- **Loading capacity:** 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.
- **Excess load:** The difference between the actual pollutant load in a waterbody and its loading capacity.
- **Sources:** The pollutant sources and estimates, to the extent the existing data allow, of the amount of actual pollutant loading from these sources.
- **Wasteload allocations:** The portions of the receiving water's loading capacity that are allocated to existing point sources of pollution, including all point source discharges regulated by NPDES permits.
- **Load allocations:** The portions of the receiving water's loading capacity that are allocated to existing nonpoint sources, including runoff, deposition, soil contamination and groundwater discharges, 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, long-range transport and human nonpoint source loads will be distinguished from each other.
- **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.
- **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.
- **Reserve capacity:** 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.
- **Reasonable Assurance:** 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

**Rulemaking  
scope**

The scope of proposed changes to OAR chapter 340, Division 42 will be limited to (1) conforming the EQC TMDL rules to statute - allowing TMDLs and WQMPs to be issued either as a rule or as an order, consistent with ORS 468B.110, and (2) revisions to update the rule language to reflect current EPA requirements established by case law. These proposed changes include updating the definition for reasonable assurance, adding a definition for responsible

person, adding language to reasonable assurances of implementation, and adding the term “daily load” to the TMDL definition.

- Need for the proposed rule revisions** This proposed rulemaking will align the administrative rules with the statutory authority provided by the Oregon Legislature to allow TMDLs by rule and order. TMDLs by rule will also benefit DEQ and stakeholders through predictable and transparent administrative procedures associated with rulemakings. Further, where TMDLs contain important policy considerations, conducting rulemakings will result in those issues being considered by the EQC, DEQ’s policy making body, at the time of commission action.
- Rulemaking schedule** DEQ will open a public comment period in August, with a public hearing in September. DEQ will propose rules for commission action in January 2022. DEQ will not convene a Rule Advisory Committee for this rulemaking because the main purpose of this rulemaking is to conform the rules to the statute and federal requirements.
- Rulemaking webpage** Additional information for this rulemaking is on the DEQ website: <https://www.oregon.gov/deq/Regulations/rulemaking/Pages/tmdl2022.aspx>

*Report prepared from program information*