



State of Oregon Department of Environmental Quality

Draft Fiscal Impact Statement

Water Quality Total Maximum Daily Load 2022 Rulemaking

Overview

The Oregon Department of Environmental Quality is conducting a rulemaking to allow TMDLs to be adopted by rule by the Environmental Quality Commission, consistent to what is currently authorized in ORS 468B.110, in addition to issuing TMDLs by Department order.

This proposed rulemaking will also include minor changes to update the following rule language to reflect current EPA requirements established by case law:

1. Clarifying that “daily load is required” to the TMDL definition
2. Clarifying language to reasonable assurances of implementation

Statement of need

What need would the proposed rule address?

The proposed changes to OAR chapter 340, Division 42 will be limited to (1) conforming the Environmental Quality Commission 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 clarify or update the rule language to reflect current EPA requirements established by case law. These proposed changes include adding language regarding reasonable assurances of implementation and adding the term “daily load” to the TMDL definition.

How would the proposed rule address the need?

The proposed rule changes 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 EQC 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 seven years.

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.

Additionally, proposed changes address clarifications and updates to rule language that will align the rules to reflect current EPA requirements.

How will DEQ know the rule addressed the need?

DEQ will provide the EQC with a proposed rule change.

Fee analysis

This rulemaking does not involve fees.

The proposed rules will align Oregon Administrative Rules 340-42 with Oregon Revised Statute 468B.110 to allow TMDLs to be adopted by the Environmental Quality Commission as rule in addition to being issued by DEQ as an order. The revisions will also update the rule language to reflect current federal requirements as informed by case law. As such, these revisions reflect current requirements and are likely to have no negative fiscal impact to agencies, businesses, or the public.

Statement of fiscal and economic impact

Statement of cost of compliance

There is no expected cost of compliance with the proposed rule changes because issuing a TMDL by order or rule does not add cost to DEQ's TMDL development process nor to other entities' participation in that process. The additional changes to update the rule language to reflect current federal requirements informed by case law are not likely to have costs associated with that rule language alignment because the relevant requirements resulting from the TMDL will not be different as a result of these revisions. Additionally, the existing TMDL development process involves significant stakeholder engagement and is similar to a rule development process using a rules advisory committee.

State and federal agencies

There are no expected direct fiscal impacts to DEQ or other state and federal agencies as a result of this rule.

Local governments

DEQ does not expect a direct fiscal impact to local governments as a result of this rule.

Public

DEQ does not expect a direct fiscal impact to the public as a result of this rule.

Large businesses - businesses with more than 50 employees

DEQ does not anticipate fiscal impacts to any large businesses as a result of the rule, because adding TMDL by rule or updates to the rule language to reflect current federal requirements informed by case law are not expected to have a fiscal impact.

Small businesses – businesses with 50 or fewer employees

DEQ does not anticipate fiscal impacts to small businesses as a result of the rule, because adding TMDL by rule or updates to the rule language to reflect current federal requirements informed by case law are not expected to have a fiscal impact.

ORS 183.336 Cost of Compliance Effect on Small Businesses

a. Estimated number of small businesses and types of businesses and industries with small businesses subject to proposed rule.

The proposed rule would not subject any small businesses operating in either area to meet new requirements.

b. Projected reporting, recordkeeping and other administrative activities, including costs of professional services, required for small businesses to comply with the proposed rule.

No additional activities are required to comply with the proposed rules.

c. Projected equipment, supplies, labor and increased administration required for small businesses to comply with the proposed rule.

No additional resources are required for compliance with the proposed rules.

d. Describe how DEQ involved small businesses in developing this proposed rule.

DEQ did not directly involve small businesses. DEQ did provide email notification of this rulemaking using the GovDelivery opt-in notification tool.

Documents relied on for fiscal and economic impact

The requirement to list the documents relied on to determine fiscal impact is separate from and in addition to the similar list in the rules affected, authorities, supporting documents section above.

Document title	Document location
ORS 468B.110. Authority to establish and enforce water quality standards by rule or order; limitation on authority; instream water quality standards.	https://www.oregonlegislature.gov/bills_laws/ors/ors468B.html
OAR 340-042. Total Maximum Daily Loads (TMDLS)	https://secure.sos.state.or.us/oard/displayDivisionRules.action;JSESSIONID_OARD=HTcu9T5PrybTDdv3kPLmiWlzVls81d3wj49ITCtVTIP-

	Hh6Kv Rm!-1024219277?selectedDivision=1459
Anacostia Riverkeeper, et al. v. EPA, et al. 2019 [source for adding “daily load” to the definition of TMDL]	
America Farm Bureau et al., vs EPA 2013 (Chesapeake Bay TMDL lawsuit) [source for adding language regarding reasonable assurances of implementation]	

Housing cost

As ORS 183.534 requires, DEQ evaluated whether the proposed rules would have an effect on the development cost of a 6,000-square-foot parcel and construction of a 1,200-squarefoot detached, single-family dwelling on that parcel. DEQ determined the proposed rules would have no effect on development costs.

The rule changes proposed in this rulemaking do not have a direct or indirect effect on residential or business development costs.

Federal relationship

ORS 183.332, 468A.327 and OAR 340-011-0029 require DEQ to attempt to adopt rules that correspond with existing equivalent federal laws and rules unless there are reasons not to do so.

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 water quality standards.

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

These proposed rules correspond with existing equivalent federal laws and rules.

What alternatives did DEQ consider if any?

DEQ did not consider alternatives for these proposed rule changes.

Land use

Land-use considerations

In adopting new or amended rules, ORS 197.180 and OAR 340-018-0070 require DEQ to determine whether the proposed rules significantly affect land use. If so, DEQ must explain how the proposed rules comply with state wide land-use planning goals and local acknowledged comprehensive plans.

Under OAR 660-030-0005 and OAR 340 Division 18, DEQ considers that rules affect land use if:

- The statewide land use planning goals specifically refer to the rule or program, or
- The rule or program is reasonably expected to have significant effects on:
 - Resources, objects, or areas identified in the statewide planning goals, or
 - Present or future land uses identified in acknowledge comprehensive plans

DEQ determined whether the proposed rules involve programs or actions that affect land use by reviewing its Statewide Agency Coordination plan. The plan describes the programs that DEQ determined significantly affect land use. DEQ considers that its programs specifically relate to the following statewide goals:

Goal	Title
5	Natural Resources, Scenic and Historic Areas, and Open Spaces
6	Air, Water and Land Resources Quality
11	Public Facilities and Services
16	Estuarine Resources
19	Ocean Resources

Statewide goals also specifically reference the following DEQ programs:

- Nonpoint source discharge water quality program – Goal 16
- Water quality and sewage disposal systems – Goal 16
- Water quality permits and oil spill regulations – Goal 19

Determination

DEQ determined that these proposed rules do not affect land use under OAR 340-018-0030 or DEQ’s State Agency Coordination Program.

Alternative formats

DEQ can provide documents in an alternate format or in a language other than English upon request. Call DEQ at 800-452-4011 or email deqinfo@deq.state.or.us