State of Oregon Department of Environmental Quality

Oregon Environmental Quality Commission Meeting

Feb. 3-4, 2022

Item D: Rulemaking (Action)

Total Maximum Daily Loads by Rule

Table of Contents

DEQ Recommendation to the EQC

DEQ recommends that the Environmental Quality Commission adopt the proposed rules in Attachment A as part of Chapter 340, division 42 of the Oregon Administrative Rules.

Language of proposed EQC motion:
"I move that the commission adopt the proposed rule amendments in Attachment A as part of Chapter 340, division 42 of the Oregon Administrative Rules."

Introduction

The Commission's current rules *require* that Total Maximum Daily Loads (TMDLs) be adopted by the Director as an order. This is in spite of the fact that the legislature has specifically authorized the agency to adopt TMDLs either as a rule (by the EQC) or as an order (by the Director). After many years of experience, DEQ is recommending that the commission restore the flexibility to have TMDLs adopted by the Commission as a rule, and that the agency do so when particular TMDLs raise important policy questions that are most appropriately decided by the Commission.

Following discussion with the Commission, DEQ has developed a rulemaking proposal that would remove the self-imposed requirement currently in EQC rules for TMDLs to be adopted by the Director as an order. This would restore the ability of the Environmental Quality Commission to adopt TMDLs as rules, consistent with what is currently authorized in ORS 468B.110.

This proposed rulemaking also includes changes to update rule language to reflect current EPA requirements for TMDLs:

1. Clarifying that “daily loads" are required in a TMDL; and
2. Adding specificity regarding what it required in order for there to be a reasonable assurances that a TMDL will achieve expected improvements in water quality.

Statement of Need

What need does the proposed rule address?

The proposed changes to OAR Chapter 340, Division 42 (1) conform the EQC TMDL rules to statute and allow TMDLs and Water Quality Management Plans to be issued either as a rule or as an order, consistent with ORS 468B.110, and (2) revise rule language to reflect current U.S. Environmental Protection Agency requirements and case law.

How do the proposed rule address the need?

The proposed rule changes align the EQC's rules with state statute and allow TMDLs to be adopted either by the DEQ 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 six years.

TMDLs developed in a rulemaking proceeding benefit DEQ and stakeholders by providing 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. These proposed changes include adding language regarding reasonable assurances of implementation and adding the term "daily load" to the TMDL definition.

How will DEQ know the rule addressed the need?

DEQ will know the revised rules are working as expected as we work through the schedule of temperature TMDLs over the next six years.

Rules Affected, Authorities, Supporting Documents

Lead division
Water Quality

Program or activity
Total Maximum Daily Loads

Chapter 340 action

Amend				
340-042-0025	340-042-0030	340-042-0040	340-042-0050	340-042-0060
340-042-0070	340-042-0080			

Statutory Authority - ORS				
468.020	468.065	468B.020	468B.030	468B.035
468B.110				

Legislation
Not applicable

Documents relied on for rulemaking

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=HTcu9T5PrybTDdv3kPLmiWIzVls81d3wj49ITCtVTIP-Hh6Kv_Rm!-1024219277?selectedDivision=1459
Anacostia Riverkeeper, et al. v. EPA, et al. 2019 [source for adding "daily load" to the definition of TMDL]	Publications referenced are available from the agency. DEQ Headquarters, 700 NE Multnomah St., Ste. 600, Portland, OR 97232 or tmdl.2022@oregon.gov

EPA Guidance on Reasonable Assurance in TMDLs and America Farm Bureau et al., vs EPA 2013 (Chesapeake Bay TMDL lawsuit) [source for adding language regarding reasonable assurances of implementation]	https://www.epa.gov/tmdl/supplemental-information-reviewing-reasonable-assurance-tmdls and Chesapeake Bay TMDL, EPA webpage: https://www.epa.gov/chesapeake-bay-tmdl/chesapeake-bay-tmdl-document

Fee Analysis

This rulemaking does not involve fees.

Statement of Fiscal and Economic Impact

Fiscal and economic impact

The proposed rules will align Oregon Administrative Rules Chapter 340 Division 42 with Oregon Revised Statute 468B.110 to allow TMDLs to be adopted by the EQC as rule, or by the DEQ Director 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 cost of compliance

The expected cost of compliance with the proposed rules changes is minimal or none, because issuing a TMDL by rule does not add cost to DEQ's TMDL development process nor to other entities' participation in TMDL development, adoption or implementation. Existing TMDL development processes normally involve a local advisory group, along with a public comment process. The Oregon Administrative Procedures Act requirements for a rulemaking also generally provide for a rules advisory committee that includes representation from affected persons and communities, along with public notice and comment. The rulemaking process does generally also require preparation of a fiscal impact statement, along with review by a committee, but these costs are expected to be minor. The costs of implementing TMDLs are not expected to change as a result of the administrative process used to adopt the TMDL. If a person seeks judicial review of a TMDL, the costs would likely be lower for TMDLs adopted as a rule as review would be directly in the Oregon Court of Appeals. The additional changes to update the rule language to reflect current federal requirements informed by case law will not have additional costs, because these requirements already apply as a result of federal actions – adding them to Oregon state rules simply makes the changes transparent to the public.

State and federal agencies

DEQ does not expect direct fiscal impacts to 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.

Small businesses – businesses with 50 or fewer employees

DEQ does not anticipate fiscal impacts to small businesses as a result of the rule.

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.

Federal Relationship

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

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. DEQ begins by identifying in the 303(d) listings, waterbodies that are not meeting water quality standards. In the Integrated Report, DEQ then identifies priority areas for developing TMDLs, which identify what reductions in pollution must be attained in order to a standard to be achieved.

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. TMDL loads will be set at levels designed to achieve that applicable standard.
- Excess load: The difference between the actual pollutant load currently present in a waterbody and the levels necessary to achieve 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

Land Use

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 statewide 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.

EQC Prior Involvement

- The May 2021 Director's Report to EQC provided a brief overview of this planned rulemaking.
- DEQ presented information about this rulemaking at the EQC meeting on July 22, 2021.

Advisory Committee

Background

DEQ convened a rules advisory committee and a fiscal advisory committee on Sept. 2, 2021, which included representatives from local and state agencies, industry, and non-governmental organizations, and met one time. The committee's web page is located at: https://www.oregon.gov/deq/Regulations/rulemaking/Pages/tmdl2022.aspx

The committee members were:

Name	Title	Affiliation
April Snell	Executive Director	Oregon Water Resources Congress
Carl Merkle	Salmon Recovery Policy Analyst, First Food Policy Program	Confederated Tribes of the Umatilla Indian Reservation
Corissa Holmes	Environmental Programs Supervisor, City of Redmond	Oregon Association of Clean Water Agencies
Kathryn VanNatta	Director of Government and Regulatory Affairs	Northwest Pulp and Paper Association
Marganne Allen	Water Quality Program Manager	Oregon Deptartment of Agriculture
Mary Ann Cooper	Vice President of Public Policy	Oregon Farm Bureau
Mike Eliason	General Counsel & Director of Government Affairs	Oregon Forest & Industries Council
Sharla Moffett	Director - Energy, Environment, Natural Resources and Infrastructure	Oregon Business and Industry
Thomas Whittington	Water Quality Specialist	Oregon Deptartment of Forestry

Meeting notifications

To notify people about the advisory committee's activities, DEQ:

- Sent GovDelivery bulletins, a free e-mail subscription service, to the following subscribers of DEQ Public Notices, Nonpoint Source Water Quality, Onsite (Septic) Sewage Systems, Rulemaking, Total Maximum Daily Loads, Wastewater System.

Operator Certification Program, Water Quality Assessment Reporting and 303(d), Water Quality Standards, and Water Quality Trading.
- Emailed the advisory committee members directly.
- Added advisory committee announcements to DEQ's calendar of public meetings at DEQ Calendar.

Committee discussions

For a complete meeting summary and materials, please visit the rulemaking webpage here: https://www.oregon.gov/deq/Regulations/rulemaking/Pages/tmdl2022.aspx.

The meeting agenda included a discussion of the draft proposed rules and the fiscal impact statement. In addition to the recommendations described under the Statement of Fiscal and Economic Impact section above, members of the committee provided feedback on the proposal to have TMDLs adopted by the commission as a rule.:

- A number of committee members favor having DEQ continue issuing TMDLs as an order. They believe that judicial review in Oregon trial courts is preferable to review in the Oregon Court of Appeals. Representatives of landowners also expressed that environmental advocates tend to seek review of these decisions in federal courts.
- DEQ Response: DEQ's experience is that rulemaking processes provide an open, transparent and fair public process for development of TMDLs. Having key policy decisions come to the Environmental Quality Commission aligns with the role of the commission as the agency's policy-making body. Concerns expressed about ability to communicate with the commission can be addressed by assuring that rulemakings include opportunities for advisory committee members and others to communicate with commissioners before the comment period closes. Recent experience with judicial review of TMDLs issued by order in Oregon Circuit Courts is that this process is very slow and very expensive for all involved. Direct review of rules in the Court of Appeals following a public rulemaking process combines transparency and fairness with efficiency and lower costs. Advocates that wish to challenge EPA approval of EQC and DEQ actions have the ability to go to federal court, as we are implementing federal law. All citizens have the same ability to seek review in federal court if they disagree with an EPA action.
- Committee members had some specific suggesting for clarifying draft rule language to emphasize that DEQ work on development of rules is done on the behalf of the commission.
- DEQ Response: DEQ has incorporated this feedback into the proposed rule.
- Committee members sought clarification in the rule regarding that a rule advisory committee will be utilized when future TMDLs are adopted through rulemaking.
- DEQ Response: DEQ expects to always utilize a rules advisory committee in TMDLs developed for adoption as a rule. Recent legislation requires the agency to have a rules advisory committee that includes representation of affected communities.
- If doing TMDLs by rule, ensure a robust fiscal impact analysis.
- DEQ Response: DEQ agrees that a robust fiscal impact analysis is an important tool for the agency and the commission in designing TMDLs and in making ultimate decisions about the contents of a TMDL. To some degree, the extent and quality of

analysis will depend on receiving quality information from participants in the rulemaking process.

Public Engagement

DEQ provided notice of the proposed rulemaking and rulemaking hearing by:

- Notification by GovDelivery of the rule advisory committee meeting on Aug. 17, 2021
- On Sept. 14, 2021, filing notice with the Oregon Secretary of State for publication in the October 2021 Oregon Bulletin;
- Notifying the EPA via GovDelivery;
- Posting the Notice, Invitation to Comment and Draft Rules on the web page for this rulemaking, located at: Total Maximum Daily Loads, Division 42 rulemaking
- Emailing approximately 20,225 interested parties on the following DEQ lists through GovDelivery:
    - DEQ public notices
    - Rulemaking
    - Total Maximum Daily Loads
- Emailing the following key legislators required under ORS 183.335:
    - Senate President Peter Courtney
    - Senator Lee Beyer
    - House Speaker Tina Kotek
    - Representative Pam Marsh
    - Representative Ken Helm
- Posting on the DEQ event calendar: DEQ Calendar

Public Hearing

DEQ held one public hearing. DEQ received no comments at the hearing. Later sections of this document include a summary of the seven comments received during the open public comment period, DEQ's responses, and a list of the commenters. Original comments are on file with DEQ and included as Attachment C of this report.

Presiding Officer's Record

Hearing 1

Date	Thursday, Oct. 28, 2021
Place	Zoom, virtual
Start Time	1 p.m. Pacific Time (US and Canada)
End Time	1:21 p.m. Pacific Time (US and Canada)
Presiding Officer	Michele Martin, Project Manager, DEQ

The presiding officer convened the hearing, provided an overview and informational session with question-and-answer period of the proposed changes, summarized procedures for the hearing, and explained that DEQ was recording the hearing. The presiding officer asked people who wanted to present verbal comments to indicate their intent to present comments. The presiding officer advised all attending parties interested in receiving future information about the rulemaking to sign up for GovDelivery email notices.

As Oregon Administrative Rule 137-001-0030 requires, the presiding officer summarized the content of the rulemaking notice.

No person presented any oral testimony or written comments at the public hearing.

Summary of Public Comments and DEQ Responses

Public comment period

DEQ accepted public comment on the proposed rulemaking from Tuesday, Sept. 14, 2021, until 4 p.m. on Friday, Nov. 12, 2021.

For public comments received by the close of the public comment period, the following table organizes comments by commenter. DEQ's response follows the summary. All comments are summarized and prioritized for comments relevant to this rulemaking. Original comments are on file with DEQ.

DEQ did not change the proposed rules in response to comments.

Comments received by close of public comment period

The table below lists people and organizations that submitted public comments about the proposed rules by the deadline. Original comments are on file with DEQ and are provided in Attachment C of this report. DEQ did not receive public comments during the public hearing for this rulemaking.

Commenter 1 Candace Bronner
Affiliation **This commenter is a small woodland owner**

Commenter 2 Susan Hansen
Affiliation **Bear Creek Recovery**

Commenter 3 Claire Schary
Affiliation **USEPA Region 10**

Commenter 4 Nina Bell
Affiliation **Northwest Environmental Advocates and the North Coast Communities for Watershed Protection**

Commenter 5 Thomas Benke
Affiliation **ECO LLC on behalf of Hayes Oyster Company**

Commenter 6 Mary Anne Cooper, **Oregon Farm Bureau**
April Snell, **Oregon Water Resources Congress**
Sharla Moffett, **Oregon Business & Industry**
Mike Eliason, **Oregon Forest & Industries Council**
Shaun Jillions, **Oregon Manufacturers & Commerce**
JR Cook, **Northeast Oregon Water Association**
Tammy Dennee, **Oregon Cattlemen's Association**

	Tami Kerr, **Oregon Dairy Farmers Association** Katie Murray, **Oregonians for Food & Shelter** Jeff Stone, **Oregon Association of Nurseries**
Affiliation	(please see above)
Commenter 7	Tim Wiginton, Sammi Teo
Affiliation	**The Freshwater Trust**

List of comments and responses	
Commenter #	**Comment Summary**
1 **This commenter is a small woodland owner**	As a small woodland owner, I strongly support the rule making for TMDLs to be adopted by rule, so they will have stronger regulatory impact, and greater likelihood of achieving TMDL goals in our waterways.
DEQ response	Thank you for your comment.
2 **Bear Creek Recovery**	Bear Creek Recovery, an environmental non-profit working to improve water and air quality in south Clackamas County, supports that rule making for TMDLs be adopted by rule. Bear Creek Recovery believes that TMDL's adopted by rule will have a stronger regulatory impact. We do not believe current practice is achieving TMDL goals in our waterways. We see, for example, what ends up being a feel-good list of TMDL goals for a place like the City of Molalla with no actual outcomes and no enforcement by DEQ other than requiring the TMDL list to be submitted.
DEQ response	Thank you for your comment.
3 **USEPA Region 10**	We are expressing our support for ODEQ's proposed revisions to its Total Maximum Daily Loads (TMDL) rule. We understand that the proposed revisions will provide an option for a TMDL to be issued as a rule by the Environmental Quality Commission. This option will be in addition to the current authorization in Oregon Revised Statute 468B.110 for the ODEQ Administrator to issue a TMDL as a department order. The proposed rulemaking also includes updates to the rule language to reflect updates to EPA's TMDL requirements established by recent court rulings. These changes include adding that daily loads must be established as a required element and clarifying language regarding reasonable assurances of implementation. EPA's approval of a TMDL remains the final step in the TMDL development process before it can take effect. The proposed rule change

List of comments and responses	
Commenter #	**Comment Summary**
	to allow the Environmental Quality Commission to issue the TMDL as a rule does not conflict with EPA's review and approval process. The rule language updates will also help ensure the TMDLs submitted by ODEQ to EPA satisfy EPA's required elements of a TMDL.
DEQ response	Thank you for your comment.
4 Northwest Environmental Advocates and the North Coast Communities for Watershed Protection	DEQ's choice to conduct a rulemaking to conform rule language to current EPA requirements and allow the Commission to adopt TMDLs by rule is time-wasting. There is nothing urgent or necessary about adopting these requirements into rule. Reference comment page 1. It is neither urgent nor necessary for DEQ to have rules that copy the statute, particularly where there is no need or intent to add any nuance to what the law already allows. a straight-up authority that already exists, making this rulemaking a lot of trouble for nothing. Here there is nothing added other than that DEQ has to respond to a federal court order to produce TMDLs with some expediency does not alter what the statute already provides, namely the authority of the Commission to adopt TMDLs by rule. Reference comment page 1-2. There is nothing urgent or necessary about conforming TMDL rules with EPA policies. Daily loads were established in statutory language of the Clean Water Act. All DEQ or the Commission need do is conform the TMDLs it develops and adopts, by order or rule, to EPA policy and case law. Obviously DEQ has managed to run its TMDL program since 2006 without having this case law reflected in its rules. Reference comment page 2. We do, however, appreciate that the definition of reasonable assurance cites the three principles of the policy, in the additions at OAR 340-042-0040(5)(g). The problem, however, is two-fold. First, this definition is inconsistent with the incomplete definition provided in the definitions section where the rules define reasonable assurance as 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." OAR 340-042-0030(9). We propose that the longer definition used in OAR 340-042 0040(5)(g) be provided in the definitions because the current definition is too narrow to encompass the three principles. Reference comment page 2.

List of comments and responses	
Commenter #	**Comment Summary**
	EPA does not view and act on water quality management plans. The demonstration of reasonable assurance should be located in the TMDL, on which EPA acts. Second, the description of reasonable assurance in this Oregon requirement does not mirror the details that are set out in the rules' section on determining allocations. As those details, that in turn mirror EPA guidance, are also not in the definitions that govern the entire section, the details do not provide reasonable assurance as required in the TMDL for EPA's approval but, rather, only provide those details on the largely discretionary actions by Oregon on how to establish its allocations. The language that DEQ has added at OAR 340-042-0040(5)(g) belongs elsewhere if it is intended to reflect EPA guidance and federal case law. Reference comment page 3 (second paragraph) Commenter suggests that DEQ was not specific enough in the proposed changes and had several other discussion points for what was absent from this proposed rulemaking. *Additional comments provided by this commenter are outside the scope of this rulemaking. All comments in full are available in Attachment C.*
DEQ response	This rule change aligns the administrative rules with the statutory authority provided by the Oregon Legislature to allow TMDLs by rule under the authority of the Environmental Quality Commission, DEQ's policy making body. Despite the broader statutory authority referenced in the comment, the EQC had previously constrained that authority by directing DEQ to issue TMDLs as orders. This rulemaking would add language for the EQC or DEQ to establish TMDLs. TMDLs adopted by rule will use the rulemaking administrative and public processes that are standardized and familiar to stakeholders for TMDL development. This rulemaking adds daily load to the rules. DEQ believes this will help to clarify the rules and the requirements during TMDL development. DEQ believes the proposed reasonable assurance language in OAR 340-042-0040(5)(g) is consistent with EPA guidance and that the inclusion of this language clarifies the requirements to be more comprehensive rather than limiting. In the comment, there are additional topics related to reasonable assurance that are beyond the scope of this rulemaking.

List of comments and responses	
Commenter #	**Comment Summary**
	OAR 340-042-0040(4) states, "A TMDL will include the following elements" with "(l) Water quality management plan (WQMP)" being a section and a required element of the TMDL. DEQ believes section OAR 340-042-0040(5)(g) is an appropriate location for additional information on reasonable assurance as it describes how allocations will be determined in the TMDL. Adding language to reasonable assurance of implementation: *America Farm Bureau et al., vs EPA 2013* (Chesapeake Bay TMDL lawsuit) further considered EPA's reasonable assurance review and EPA has summarized the decision in guidance. DEQ used the language from the court case in section 7.1, page 7-1. See the links below. • Chesapeake Bay TMDL, section 7.1, page 7-1 Section 7: Reasonable Assurance and Accountability Framework (pdf) or https://www.epa.gov/sites/default/files/2014-12/documents/cbay_final_tmdl_section_7_final_0.pdf • 2012 supplemental; references to older guidance and memos, here: https://www.epa.gov/tmdl/supplemental-information-reviewing-reasonable-assurance-tmdls • EPA page: https://www.epa.gov/chesapeake-bay-tmdl/chesapeake-bay-tmdl-document Additionally, EPA has submitted comments supporting this rulemaking. *DEQ has not responded here to other comments provided by this commenter that are outside the scope of this rulemaking.*
5 **ECO LLC on behalf of Hayes Oyster Company**	a) Proposed amendment: The Director will issue a TMDL as an order or the Environmental Quality Commission by rule. This provision as amended suggests that if issued by the Director, the TMDL will be a final order subject to challenge pursuant to the Oregon Administrative Procedures Act OREGON REVISED STATUTE § 183.484. On the other hand, OAR 340-042-0060(1) suggests that if issued by the Environmental Quality Commission, the TMDL will be a rule subject to challenge pursuant to the Oregon APA Oregon Revised Statute E § 183.400. Is this a correct interpretation of the proposed amended rule? Reference comment email, first paragraph. b) DEQ proposed amended definition of "Total Maximum Daily Load (TMDL)" at OAR 340-042-0030(15) does not propose to adopt a

List of comments and responses	
Commenter #	**Comment Summary**
	definition of "daily load" or of "load". Because the existing definition of "Total Maximum Daily Load (TMDL)" already incorporates the concept of the maximum / greatest "amount" of a pollutant allowed relative to water quality standards, the question arises as to why the Department believes it is important to insert the phrase "daily load" into the definition of "Total Maximum Daily Load (TMDL)". Is "daily load" to be given a different meaning by a reviewing court, and if so, what is the distinction intended by the Department? Reference comment email under *"Total Maximum Daily Load (TMDL)" and "Loading Capacity"* header. c) Hayes Oyster Company does not ask the Department to weigh in on a matter presently being litigated but does request that the Department consider whether it should be adopting TMDLs as rules and, if so, that the Department clarify that adopting as rules WLAs [waste load allocations], LAs [load allocations] or the "written quantitative plan and analysis" upon which WLAs and LAs are based that the Department does not intend to amend any other rule (water quality standard or otherwise). Otherwise, the Department might later argue at the court of appeals that its TMDL cannot violate an existing standard because its adoption by "rule" necessarily amended that standard as well. Reference comment email. d) The Department should reconsider its proposed amended OAR 340-042-0070 "Requesting Reconsideration of Appealing a Total Maximum Daily Load". As drafted, subsection (1) limits those who may request "reconsideration" of a Director's order establishing a TMDL to the following: • Any person who participated in establishing a TMDL; • Persons who submitted comments (during the notice period, presumably); and • Any other person entitled to seek judicial review of an order. The problem with that list is that it does not necessarily include persons who may be directly or indirectly impacted by the Director's decision to allow the established "daily load" of pollutants. The Department's attention seems always directed at the polluters and only occasionally directed towards those persons who rely on attainment of

List of comments and responses	
Commenter #	**Comment Summary**
	water quality standards (e.g., fisheries, recreational interests etc.) Reference comment email paragraph under bullet points. e) The Department says in its "Statement of cost of compliance" that "The existing TMDL development process involves significant stakeholder engagement" but does not clarify who it includes among those "stakeholders". To exclude known water quality dependent stakeholders from the process of establishing TMDL is bad enough, but excluding them by rule from participating in reconsideration and/or appeal of the TMDL will only encourage more back-room political deals with polluters. Reference comment email, second part of paragraph under bullet points. f) In the amended rule addressing "Reasonable assurances of implementation", proposed OAR 340-042-0040(6)(g), the Department should reference the "pollution prevention and control measures" mandated at ORS § 568.909(1)(a). • Also with regard to OAR 340-042-0040(6)(g), the reference therein to "practices" that "are technically feasible at a level required to meet allocations" must be stricken. "Technically feasible" is not the standard for attainment of water quality standards in Oregon. "Necessary" is the applicable standard. *Other comments provided by this commenter are outside the scope of this rulemaking. All comments in full are available in Attachment C.*
DEQ response	a) The proposed draft rule in OAR 340-042-0070(1) clarifies the process for seeking administrative or judicial review depending on whether the TMDL was issued as an agency order or an EQC rule. For a TMDL issued by order: "(1) Any person who participated in establishing a TMDL by order, 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." OAR 340-042-0070(2) further clarifies orders as the following: (2) A person may file a petition for judicial review of a final TMDL order as allowed by Oregon Revised Statute 183.484.

List of comments and responses	
Commenter #	**Comment Summary**
	OAR 340-042-0070(3) is added to clarify that for TMDLs by rule "(3) A person may file a petition for judicial review of a TMDL adopted by rule as allowed by Oregon Revised Statute 183.400." b) The proposed rule language to add *daily load* to the definition of Total Maximum Daily Load in OAR 340-042-0030(15) comes from, *Anacostia Riverkeeper Inc., et al., v. Wheeler*, 404 F. Supp. 3d 160 (2019). Publications referenced are available from the agency. DEQ Headquarters, 700 NE Multnomah St., Ste. 600, Portland, OR 97232 or email tmdl.2022@oregon.gov. DEQ believes adding daily load to the rule will help to clarify the rules and the requirements during TMDL development. c) Water quality standards are also developed through rulemaking and must be approved by EPA. d) DEQ considers audiences who are directly or indirectly impacted by a proposed rule change when developing a TMDL. The proposed change of OAR 340-042-0070(1) clarifies the public processes for TMDLs by rule. DEQ did not propose a change for the process for seeking review of TMDLs developed by order. For TMDLs developed by rule, DEQ is committed to ensure that rule advisory committees convened for rulemakings include a diverse population of the regulated community and others who rely on the regulated community for water quality. In the case of rulemakings, DEQ's practice is to post all committee members on the webpage for the rulemaking along with agendas, meeting summaries, and all materials. DEQ uses an opt-in email notification system for rule advisory committees so that any non-rule advisory committee members can participate by listening to the conversation. During the rule advisory committees, as time allows, input from non-committee members about the meeting content is invited. DEQ's practice is to record all rule advisory committee and make them available to the public from DEQ though a records request. e) DEQ adds language highlighted in bold to the public participation rule section in Oregon Administrative Rules 340-042-0050(1) "If establishing a TMDL as an agency order, DEQ will establish a local advisory group or identify an existing group or forum to assist in developing a TMDL. When the Environmental Quality Commission establishes a TMDL through rulemaking DEQ will appoint a rule advisory committee and the rulemaking process will provide other opportunities for public

List of comments and responses	
Commenter #	**Comment Summary**
	participation." Rulemaking procedures generally use the term *rule advisory committee* (Oregon Revised Statute 183.333) where TMDLs by order use the term *local advisory group* (Oregon Administrative Rules 340-042-0050(1)). Both the rule advisory committee and the local advisory group are similar opportunities for stakeholder and public input. The rule advisory committee for this rulemaking requested DEQ to ensure that TMDLs developed by rule would *require* a rules advisory committee. The proposed rule change ensures stakeholders that a rules advisory committee is required for TMDLs issued by rule. Advisory committees are developed to have a robust public process, and DEQ follows Oregon Revised Statute 183.333 in the development of public participation for rulemakings. f) ORS 568.900 refers to agricultural land water quality management plans developed by the Department of Agriculture. Where applicable these plans can be a component of establishing reasonable assurance. As to the reasonable assurance language, the consideration of whether a practice is "technically feasible" is from the *American Farm Bureau Federation v. EPA* case also referenced above and EPA guidance. *DEQ has not responded here to other comments provided by this commenter that are outside the scope of this rulemaking*
6 **Oregon Farm Bureau, et al.**	While DEQ has framed these rule changes as minor, we believe that the rules have the potential to have significant impact on our members as it relates to their obligations and ability to engage with the development and implementation of TMDLs, as well as the vetting process prior to final action. We appreciated the agency forming a rules advisory committee earlier this year to discuss these rules, and many of our organizations participated in that effort and provided comment through that process. We write to day to urge DEQ not to move forward with the following changes proposed by the agency: Reference comment page 1, paragraph 1. • **DEQ should not develop TMDLs by rule.** a) DEQ proposes to allow TMDLs to be developed under both rule and order, whereas currently TMDLs are just developed by order. This change – while seemingly minor – will alter the development, implementation, and appeals processes for the TMDLs. It will have a significant impact on the ability of our members to effectively engage with DEQ around TMDL development and will drastically decrease

List of comments and responses	
Commenter #	**Comment Summary**
	the agencies incentive to work with all stakeholders to develop workable TMDLs. While we understand that the statutes provide that the agency may adopt TMDLs by rule and order, and that portions of TMDLs have often required minor updates to rules, the decision to move to wholesale adoption of a document as complex as a TMDL by rule has the effect of subverting due process for those impacted by the TMDL. Reference comment page 1, paragraph 2. b) Adopting TMDLs by rule will severely limit judicial review of the TMDL, which dramatically constrains the ability of our members to challenge TMDLs that utilize outdated or debatable modeling, will fail to achieve their goals, or seek to achieve their goals in the highest cost manner possible. Reference comment page 1, paragraph 3. c) As a practical matter, the limitation on judicial review will affect most severely the entities who are regulated by a TMDL, not those who believe that the TMDL is insufficiently stringent, who will almost always challenge in federal court EPA's approval of the TMDL. This is not fair or appropriate. Reference comment page 2, paragraph 2. d) Finally, adopting the TMDL by rule will substantially truncate public participation, particularly for TMDLs that DEQ is under a court order to adopt by a specific date, as there are limitations on public participation and comment in rulemaking that are not present for an order. Reference comment page 2, paragraph 2. e) Finally, we sincerely believe that the EQC will not be in a position to meaningfully evaluate, in a one- or two-hour meeting agenda item, a TMDL that runs to hundreds or even thousands of pages and that includes innumerable complex technical and factual issues, all of which will be adopted in rule and difficult to amend. If there are any issues of policy for the EQC, those policies should be adopted as part of a general TMDL rule, not addressed ad hoc in individual TMDLs that include countless other issues. • We strongly urge DEQ not to move forward with this change. Reference comment page 2, paragraph 2.

List of comments and responses	
Commenter #	**Comment Summary**
	DEQ should not redefine "reasonable assurances" f) The proposed rule would add: "To establish reasonable assurance that the TMDL's load allocations will be achieved requires determination that practices capable of reducing the specified pollutant load: (1) exist; (2) are technically feasible at a level required to meet allocations; and (3) have a high likelihood of implementation." DEQ's only explanation for adding this language is that it is intended to "clarify or update the rule language to reflect current EPA requirements established by case law." DEQ points to the federal district court decision in *American Farm Bureau Federation v. EPA* (2013) on the Chesapeake Bay TMDL, as well as a 2012 EPA guidance document, but it does not explain why the proposed rule language is required by the court decision and guidance. Nor can we find the specific language that DEQ has proposed in the decision or guidance—or in any other court decision or EPA guidance. Reference comment page 2, paragraph 3. g) While we appreciate that DEQ's current rules will still consider incentive based and voluntary work in determining whether "reasonable assurances" exist, the proposed definition seems to be of DEQ's own invention, and not closely tied to case law or EPA guidance. This is a concerning approach. Specifically, we are concerned that the third proposed element, that the practices "have a high likelihood of implementation," is overly vague and has the potential to be construed to establish an evidentiary burden that is "unreasonably" high, particularly for incentive based or other non-regulatory measures. We are also concerned by the absence of any explanation for the proposed language or any identification of its source—or why the rule's existing explanations of what "reasonable assurance" means are inadequate. We urge DEQ not to move forward with this proposed change, or at the very least, to reconvene the rules advisory committee to provide an explanation for this change and work on language for the third element that isn't overly vague. Reference comment page 3, paragraph 2. *Additional comments provided by this commenter are outside the scope of this rulemaking. All comments in full are available in Attachment C.*

List of comments and responses	
Commenter #	**Comment Summary**
DEQ response	a) 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 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 Environmental Quality Commission, DEQ's policy making body, at the time of commission action. The public process for rulemakings includes stakeholder engagement through a rule advisory committee. DEQ is required to provide notification of the draft rules and an opportunity to comment. DEQ held a rule advisory committee for these proposed changes. During that meeting, stakeholders requested that DEQ put into rule that a rule advisory committee is required to be convened for TMDLs. DEQ agreed to that change and added the following content to the proposed rules: OAR 340-042-0070(1) "When the Environmental Quality Commission establishes a TMDL through rulemaking DEQ will appoint a rule advisory committee and the rulemaking process will provide other opportunities for public participation." DEQ seeks rule advisory committee input on potential fiscal impacts of the proposed TMDL during the rule advisory committee. Discussion of fiscal impacts are not required when TMDLs are developed by order. As described in the rule, interested parties may seek judicial review of a rule per ORS 183.400 in the Court of Appeals. b) Please see answer in a) above. c) Please see answer in a) above. d) Please see answer in a) above. e) The Environmental Quality Commission is a five-member panel appointed by the governor of Oregon for four-year terms to serve as the Oregon Department of Environmental Quality's policy and rulemaking board. In addition to adopting rules, the commission also establishes policies, issues orders, judges appeals of fines or other DEQ actions. While TMDLs are technical and often complex, DEQ disagrees that those

List of comments and responses	
Commenter #	**Comment Summary**
	attributes should be a basis for not conducting these processes by rulemaking. In complex rulemakings, it is the agency's practice to engage the Environmental Quality Commission multiple times to ensure sufficient familiarity with key issues before decisions are made. Typically, this is done through an initial informational agenda item and discussion at a public meeting, often with time set aside for public comment, and/or by having the commission hold a public hearing during the comment period for the rule. Sometimes, the agency will have a commissioner participate in the rules advisory committee directly as a means of gaining in-depth understanding. These are all tools that the department and the commission will use as we work through the next phase of TMDL development and adoption. DEQ does not expect that TMDL documentation will differ for TMDLs issued by rule. Rather, the content may be organized differently to be conducive to the administrative requirements governing rule content and structure. All materials will be provided to the Environmental Quality Commission and available to the public similar to TMDLs developed by order. f) *America Farm Bureau et al., vs EPA* 2013 (Chesapeake Bay TMDL lawsuit) further considered EPA's reasonable assurance review and EPA has summarized the decision in guidance. EPA considers reasonable assurances in its review of state TMDLs. The applicable case law cited, and EPA guidance provide further information regarding this element of EPA review. Adding this language to the rule updates this concept to be consistent with EPA's interpretation of the necessary requirements for an approvable TMDL. EPA submitted comments for this rulemaking in support of this proposed rule change. DEQ used the language from the court case in section 7.1, page 7-1. See the links below. • Chesapeake Bay TMDL, section 7.1, page 7-1 Section 7: Reasonable Assurance and Accountability Framework (pdf) or https://www.epa.gov/sites/default/files/2014-12/documents/cbay_final_tmdl_section_7_final_0.pdf • 2012 supplemental; references to older guidance and memos, here: https://www.epa.gov/tmdl/supplemental-information-reviewing-reasonable-assurance-tmdls

List of comments and responses	
Commenter #	**Comment Summary**
	• EPA page: https://www.epa.gov/chesapeake-bay-tmdl/chesapeake-bay-tmdl-document h) DEQ explains above the reason for the proposed language in OAR 340-042-0040(6)(g) and links of where to the find the information online. *DEQ has not responded here to other comments provided by this commenter that are outside the scope of this rulemaking.*
7 **The Freshwater Trust**	a) TFT agrees that the reasonable assurances of implementation must be clarified to ensure that the practices exist, are feasible, and are likely to be implemented in a manner that succeeds in reducing nonpoint source pollutant loads. However, strengthened reasonable assurances should also apply to the WQMPs and associated implementation plans. The assurances should amount to more than just one of many factors to consider when distributing allocations between point and nonpoint sources. Reference comment page 3. b) OAR 340-042-0040(5)(g)(6). *[Clarification by DEQ that assumes this change is in reference to OAR 340-042-0040(6)(g) for Reasonable assurances of implementation, and not* OAR 340-042-0040(5)(g)(6), *which is not a valid rule section]* Commenter adds rule language in bold to the proposed changes: The Department or the EQC will distribute wasteload and load allocations among identified sources and in doing so, may consider the following factors: … (g) Reasonable assurances of implementation. To establish reasonable assurance that the TMDL's load allocations will be achieved requires determination that practices capable of reducing the specified pollutant load: (1) exist; (2) are technically feasible at a level required to meet allocations; **and** (3) **have been specifically quantified and prioritized throughout a watershed; and (4)** have a high likelihood of implementation **based on the applicable WQMP;** Reference comment page 6. *Other comments provided by this commenter are outside the scope of this rulemaking. All comments in full are available in Attachment C.*
DEQ response	a) Thank you for your support for adding additional information regarding the reasonable assurance element of the TMDL. The proposed addition is

List of comments and responses	
Commenter #	**Comment Summary**
	focused on the element as it relates to EPA review of the TMDL. This proposed rule change was not included because it is outside the scope of this rulemaking. b) Thank you for the rule language recommendation. DEQ has not made a change in response to this comment. DEQ considers quantification and prioritization in the Water Quality Management Plans currently and additional regulatory provisions are not needed to address this element. *DEQ has not responded here to other comments provided by this commenter that are outside the scope of this rulemaking.*

Implementation

Notification

The proposed rules would become effective upon filing on approximately Feb. 7, 2022. DEQ would notify affected parties by:

- GovDelivery:
    - DEQ public notices
    - Rulemaking
    - Total Maximum Daily Loads

Compliance and enforcement

Affected parties – Point and nonpoint sources
DEQ staff – Staff who work on Water Quality, Total Maximum Daily Loads

Measuring, sampling, monitoring and reporting

Affected parties – Point and nonpoint sources
DEQ staff – Staff who work on Water Quality, Total Maximum Daily Loads

Systems

Website – Webpages on the DEQ website related to Total Maximum Daily Loads
Database – Not applicable
Invoicing – Not applicable

Training

Affected parties – Not appliable
DEQ staff – Staff who work on Water Quality, Total Maximum Daily Loads

Five-Year Review

Requirement

Oregon law requires DEQ to review new rules within five years after EQC adopts them. The law also exempts some rules from review. DEQ determined whether the rules described in this report are subject to the five-year review. DEQ based its analysis on the law in effect when EQC adopted these rules.

Exemption from five-year rule review

The Administrative Procedures Act exempts all of the proposed rules from the five-year review because the proposed rules would:

- Amend or repeal an existing rule. ORS 183.405(4).

Accessibility Information

You may review copies of all documents referenced in this announcement electronically. To schedule a review of all websites and documents referenced in this announcement, call Michele Martin, DEQ at 503-880-7737.

Please notify DEQ of any special physical or language accommodations or if you need information in large print, Braille or another format, or any other arrangements necessary to accommodate a disability. To make these arrangements, contact DEQ, Portland, at 503-229-5696 or call toll-free in Oregon at 1-800-452-4011, ext. 5696; fax to 503-229-6762; or email to deqinfo@deq.state.or.us. Hearing impaired persons may call 711.

State of Oregon Department of Environmental Quality

Draft Rules – Edits Highlighted

Water Quality Total Maximum Daily Loads Division 42 Rulemaking

Key to Identifying Changed Text:

~~Strikethrough: Deleted Text~~
Underline: New/inserted text

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~~EQC 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~~EQC is to establish, or have ~~the Department of Environmental Quality~~DEQ 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~~DEQ 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~~DEQ may subsequently recommend that the ~~Environmental Quality Commission~~EQC amend, repeal or adopt new rules. Rules adopted by the ~~Commission~~ EQC remain in effect until the ~~Commission~~ EQC takes action on the recommendations.

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

Statutory/Other Authority: ORS 468.020, 468B.020, 468B.030, 468B.035 & 468B.110
Statutes/Other Implemented: ORS 468B.020 & 468B.110
History:
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~~2~~2 and 340-045-0010, unless otherwise required by context, the following definitions apply to OAR 340-042.

(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~~DEQ 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 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~~DEQ 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 daily load 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.]

Statutory/Other Authority: ORS 468.020, 468B.020, 468B.030, 468B.035 & 468B.110
Statutes/Other Implemented: ORS 468B.020 & 468B.110
History:
DEQ 18-2002, f. & cert. ef. 12-20-02

340-042-0040
Establishing Total Maximum Daily Loads (TMDLs)

(1) ~~The Department~~DEQ or the EQC 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~~DEQ or the EQC 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~~DEQ or the EQC 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, 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 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~~DEQ or the EQC:

(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~~ DEQ or the EQC 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~~ DEQ or the EQC 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. To establish reasonable assurance that the TMDL's load allocations will be achieved requires determination that practices capable of reducing the specified pollutant load: (1) exist; (2) are technically feasible at a level required to meet allocations; and (3) have a high likelihood of implementation; and

(h) Any other relevant factor.

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

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

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

Statutory/Other Authority: ORS 468.020, ORS 468B.020, ORS 468B.030, ORS 468B.035 & ORS 468B.110
Statutes/Other Implemented: ORS 468B.020 & ORS 468B.110
History:
DEQ 10-2011, f. & cert. ef. 7-13-11
DEQ 18-2002, f. & cert. ef. 12-20-02

340-042-0050
Public Participation

(1) If establishing a TMDL as an agency order, DEQ will establish a local advisory group or identify an existing group or forum to assist in developing a TMDL. When the EQC establishes a TMDL through rulemaking DEQ will appoint a rule advisory committee and the rulemaking process will provide other opportunities for 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~~DEQ 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~~DEQ will maintain a mailing list for each TMDL.

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

Statutory/Other Authority: ORS 468.020, 468B.020, 468B.030, 468B.035 & 468B.110
Statutes/Other Implemented: ORS 468B.020 & 468B.110
History:
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 or the EQC by rule. If the Environmental Protection Agency establishes a TMDL addressing waterbodies in Oregon, the Director may issue as an order or the EQC by rule a WQMP to implement that TMDL.

(2) The order will be effective and final on the date signed by the Director or in the case of rule when the proposed TMDL is adopted by the EQC and filed with the Secretary of State.

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

(4) Within 20 business days after the Director signs the order or the EQC adopts the rule, ~~the Department~~DEQ 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 or rule has been issued and the summary of responses to comments is available.

Statutory/Other Authority: ORS 468.020, 468B.020, 468B.030, 468B.035 & 468B.110
Statutes/Other Implemented: ORS 468B.020 & 468B.110
History:
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 by order, 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.

(3) A person may file a petition for judicial review of a TMDL adopted by rule as allowed by ORS 183.400.

Statutory/Other Authority: ORS 468.020, 468B.020, 468B.030, 468B.035 & 468B.110
Statutes/Other Implemented: ORS 468B.020 & 468B.110
History:
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) Nonpoint source discharges of pollutants from forest operations on state or private lands are subject to best management practices and other control measures established by the Oregon Department of Forestry under the ORS 527.610 to 527.992 and according to OAR chapter 629, divisions 600 through 665. Such forest operations, when conducted in good faith compliance with the Forest Practices Act requirements are generally deemed not to cause violations of water quality standards as provided in ORS 527.770. Where ~~the department~~DEQ determines that there are adequate resources and data available, ~~the department~~DEQ will also assign sector or source specific load allocations needed for nonpoint sources of pollution on state and private forestlands to implement the load allocations. In areas where a TMDL has been approved, site specific rules under the Forest Practices Act rules will need to be revised if ~~the department~~DEQ determines that the generally applicable Forest Practices Act rules are not adequate to implement the TMDL load allocations. If a resolution cannot be achieved, ~~the department~~DEQ will request the ~~Environmental Quality Commission~~EQC to petition the Board of Forestry for a review of part or all of Forest Practices Act rules implementing the TMDL.

(3) In areas subject to the Agricultural Water Quality Management Act the Oregon Department of Agriculture (ODA) under ORS 568.900 to 568.933 and 561.191 and according to OAR chapter 603, divisions 90 and 95 develops and implements agricultural water quality management area plans and rules to prevent and control water pollution from agricultural activities and soil erosion on agricultural and rural lands. Where ~~the department~~DEQ determines that there are adequate resources and data available, ~~the department~~DEQ will also assign sector or source specific load allocations needed for agricultural or rural nonpoint sources to implement the load allocations. In areas where a TMDL has been approved, agricultural water quality management area plans and rules must be sufficient to meet the TMDL load allocations. If ~~the department~~DEQ determines that the plan and rules are not adequate to implement the load allocation, ~~the department~~DEQ will provide ODA with comments on what would be sufficient to meet TMDL load allocations. If a resolution cannot be achieved, ~~the department~~DEQ will request the ~~Environmental Quality~~

~~Commission~~EQC to petition ODA for a review of part or all of water quality management area plan and rules implementing the TMDL.

(4) 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~~DEQ 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.

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

Statutory/Other Authority: ORS 468.020, ORS 468B.020, ORS 468B.030, ORS 468B.035 & ORS 468B.110
Statutes/Other Implemented: ORS 468B.020 & ORS 468B.110
History:
DEQ 10-2011, f. & cert. ef. 7-13-11
DEQ 18-2002, f. & cert. ef. 12-20-02

State of Oregon Department of Environmental Quality

Draft Rules – Edits Incorporated

Water Quality Total Maximum Daily Loads Division 42 Rulemaking

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 EQC 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 EQC is to establish, or have DEQ 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) DEQ 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. DEQ may subsequently recommend that the EQC amend, repeal or adopt new rules. Rules adopted by the EQC remain in effect until the EQC takes action on the recommendations.

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

Statutory/Other Authority: ORS 468.020, 468B.020, 468B.030, 468B.035 & 468B.110
Statutes/Other Implemented: ORS 468B.020 & 468B.110
History:
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 340-041-0002 and 340-045-0010, unless otherwise required by context, the following definitions apply to OAR 340-042.

(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 DEQ 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 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 DEQ 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 daily load 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.]

Statutory/Other Authority: ORS 468.020, 468B.020, 468B.030, 468B.035 & 468B.110
Statutes/Other Implemented: ORS 468B.020 & 468B.110
History:
DEQ 18-2002, f. & cert. ef. 12-20-02

340-042-0040
Establishing Total Maximum Daily Loads (TMDLs)

(1) DEQ or the EQC 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) DEQ or the EQC will group stream segments and other waterbodies geographically by subbasin and develop TMDLs for those subbasins, unless it determines another approach is warranted.

(3) DEQ or the EQC 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, 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 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, DEQ or the EQC:

(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. DEQ or the EQC 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) DEQ or the EQC 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. To establish reasonable assurance that the TMDL's load allocations will be achieved requires determination that practices capable of reducing the specified pollutant load: (1) exist; (2) are technically feasible at a level required to meet allocations; and (3) have a high likelihood of implementation; and

(h) Any other relevant factor.

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

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

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

Statutory/Other Authority: ORS 468.020, ORS 468B.020, ORS 468B.030, ORS 468B.035 & ORS 468B.110
Statutes/Other Implemented: ORS 468B.020 & ORS 468B.110
History:
DEQ 10-2011, f. & cert. ef. 7-13-11
DEQ 18-2002, f. & cert. ef. 12-20-02

340-042-0050
Public Participation

(1) If establishing a TMDL as an agency order, DEQ will establish a local advisory group or identify an existing group or forum to assist in developing a TMDL. When the EQC establishes a TMDL through rulemaking DEQ will appoint a rule advisory committee and the rulemaking process will provide other opportunities for public participation.
(2) DEQ 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) DEQ will maintain a mailing list for each TMDL.

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

Statutory/Other Authority: ORS 468.020, 468B.020, 468B.030, 468B.035 & 468B.110
Statutes/Other Implemented: ORS 468B.020 & 468B.110
History:
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 or the EQC by rule. If the Environmental Protection Agency establishes a TMDL addressing waterbodies in Oregon, the Director may issue as an order or the EQC by rule a WQMP to implement that TMDL.

(2) The order will be effective and final on the date signed by the Director or in the case of rule when the proposed TMDL is adopted by the EQC and filed with the Secretary of State.

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

(4) Within 20 business days after the Director signs the order or the EQC adopts the rule, DEQ 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 or rule has been issued and the summary of responses to comments is available.

Statutory/Other Authority: ORS 468.020, 468B.020, 468B.030, 468B.035 & 468B.110
Statutes/Other Implemented: ORS 468B.020 & 468B.110
History:
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 by order, 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.

(3) A person may file a petition for judicial review of a TMDL adopted by rule as allowed by ORS 183.400.

Statutory/Other Authority: ORS 468.020, 468B.020, 468B.030, 468B.035 & 468B.110
Statutes/Other Implemented: ORS 468B.020 & 468B.110

History:
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) Nonpoint source discharges of pollutants from forest operations on state or private lands are subject to best management practices and other control measures established by the Oregon Department of Forestry under the ORS 527.610 to 527.992 and according to OAR chapter 629, divisions 600 through 665. Such forest operations, when conducted in good faith compliance with the Forest Practices Act requirements are generally deemed not to cause violations of water quality standards as provided in ORS 527.770. Where DEQ determines that there are adequate resources and data available, DEQ will also assign sector or source specific load allocations needed for nonpoint sources of pollution on state and private forestlands to implement the load allocations. In areas where a TMDL has been approved, site specific rules under the Forest Practices Act rules will need to be revised if DEQ determines that the generally applicable Forest Practices Act rules are not adequate to implement the TMDL load allocations. If a resolution cannot be achieved, DEQ will request the EQC to petition the Board of Forestry for a review of part or all of Forest Practices Act rules implementing the TMDL.

(3) In areas subject to the Agricultural Water Quality Management Act the Oregon Department of Agriculture (ODA) under ORS 568.900 to 568.933 and 561.191 and according to OAR chapter 603, divisions 90 and 95 develops and implements agricultural water quality management area plans and rules to prevent and control water pollution from agricultural activities and soil erosion on agricultural and rural lands. Where DEQ determines that there are adequate resources and data available, DEQ will also assign sector or source specific load allocations needed for agricultural or rural nonpoint sources to implement the load allocations. In areas where a TMDL has been approved, agricultural water quality management area plans and rules must be sufficient to meet the TMDL load allocations. If DEQ determines that the plan and rules are not adequate to implement the load allocation, DEQ will provide ODA with comments on what would be sufficient to meet TMDL load allocations. If a resolution cannot be achieved, DEQ will request the EQC to petition ODA for a review of part or all of water quality management area plan and rules implementing the TMDL.

(4) 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 DEQ 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.

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

Statutory/Other Authority: ORS 468.020, ORS 468B.020, ORS 468B.030, ORS 468B.035 & ORS 468B.110
Statutes/Other Implemented: ORS 468B.020 & ORS 468B.110
History:
DEQ 10-2011, f. & cert. ef. 7-13-11
DEQ 18-2002, f. & cert. ef. 12-20-02

Compilation of Comments Received

Water Quality Total Maximum Daily Loads Division 42 Rulemaking

This document is a compilation of written comments received during the public comment period that was open from Sept. 14, 2021 until 4 p.m. on Nov. 12, 2021.

Comments

Commenter 1	Candace Bronner
Affiliation	**This commenter is a small woodland owner**
Commenter 2	Susan Hansen
Affiliation	**Bear Creek Recovery**
Commenter 3	Claire Schary
Affiliation	**USEPA Region 10**
Commenter 4	Nina Bell
Affiliation	**Northwest Environmental Advocates and the North Coast Communities for Watershed Protection**
Commenter 5	Thomas Benke
Affiliation	**ECO LLC on behalf of Hayes Oyster Company**
Commenter 6	Mary Anne Cooper, **Oregon Farm Bureau** April Snell, **Oregon Water Resources Congress** Sharla Moffett, **Oregon Business & Industry** Mike Eliason, **Oregon Forest & Industries Council** Shaun Jillions, **Oregon Manufacturers & Commerce** JR Cook, **Northeast Oregon Water Association** Tammy Dennee, **Oregon Cattlemen's Association** Tami Kerr, **Oregon Dairy Farmers Association** Katie Murray, **Oregonians for Food & Shelter** Jeff Stone, **Oregon Association of Nurseries**
Affiliation	(See above)
Commenter 7	Tim Wiginton, Sammi Teo
Affiliation	**The Freshwater Trust**

From: Candace Bonner
To: TMDL2022 * DEQ
Subject: TMDL rulemaking
Date: Monday, September 27, 2021 6:45:49 PM

As a small woodland owner, I strongly support the rule making for TMDLs to be adopted by rule, so they will have stronger regulatory impact, and greater likelihood of achieving TMDL goals in our waterways.
Candace Bonner, MD, MPH
Corbett, OR

From: Susan Hansen
To: TMDL2022 * DEQ
Subject: TDML rule making
Date: Tuesday, September 28, 2021 11:30:00 AM

Dear DEQ,

Bear Creek Recovery, an environmental non-profit working to improve water and air quality in south Clackmas County, supports that rule making for TMDLs be adopted by rule. Bear Creek Recovery believes that TMDL's adopted by rule will have a stronger regulatory impact. We do not believe current practice is achieving TMDL goals in our waterways. We see, for example, what ends up being a feel good list of TMDL goals for a place like the City of Molalla with no actual outcomes and no enforcement by DEQ other than requiring the TMDL list to be submitted.

Sincerely,
Susan Hansen, secretary for the Board of Bear Creek Recovery
PO Box 50, Molalla Oregon 97038

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 10
1200 Sixth Avenue, Suite 155
Seattle, WA 98101-3188

WATER
DIVISION

November 2, 2021

Ms. Michelle Martin
TMDL Program
Oregon Department of Environmental Quality
700 NE Multnomah Street, Room 600
Portland, Oregon 97232-4100

Sent via email to TMDL.2022@deq.state.or.us

RE: Oregon Department of Environmental Quality (ODEQ) - Total Maximum Daily Loads, Division 42 Rulemaking

Dear Ms. Martin:

We are expressing our support for ODEQ's proposed revisions to its Total Maximum Daily Loads (TMDL) rule. We understand that the proposed revisions will provide an option for a TMDL to be issued as a rule by the Environmental Quality Commission (EQC). This option will be in addition to the current authorization in ORS 468B.110 for the ODEQ Administrator to issue a TMDL as a department order. The proposed rulemaking also includes updates to the rule language to reflect updates to EPA's TMDL requirements established by recent court rulings. These changes include adding that daily loads must be established as a required element and clarifying language regarding reasonable assurances of implementation.

EPA's approval of a TMDL remains the final step in the TMDL development process before it can take effect. The proposed rule change to allow the EQC to issue the TMDL as a rule does not conflict with EPA's review and approval process. The rule language updates will also help ensure the TMDLs submitted by ODEQ to EPA satisfy EPA's required elements of a TMDL.

Thank you for the opportunity to provide comment on the proposed rulemaking. Please contact Claire Schary, Oregon TMDL Coordinator, at *schary.claire@epa.gov* if you need any additional information.

Sincerely,

Cami Grandinetti, Branch Manager
Standards, Assessment, and Watershed
Management Branch

NORTHWEST ENVIRONMENTAL ADVOCATES

November 9, 2021

Michele Martin
Oregon Department of Environmental Quality
700 N.E. Multnomah St., Room 600
Portland, OR 97232-4100 *via email only:* TMDL.2022@deq.state.or.us

Re: **Proposed Rules Total Maximum Daily Loads, OAR Chapter 340, Division 42**

Dear Ms. Martin:

This letter constitutes the comments of Northwest Environmental Advocates' (NWEA) and the North Coast Communities for Watershed Protection on the Oregon Department of Environmental Quality's (DEQ) proposed rule changes to Division 42.

DEQ's choice to conduct a rulemaking to conform rule language to current EPA requirements and to allow the Commission to adopt TMDLs by rule is a study in bureaucratic time-wasting. Neither of these categories of rules is urgent or even required. What is urgent, however, is that DEQ use the TMDLs that it manage to produce—which are few and far between—to restore water quality to meeting water quality standards and thereby protect human health and aquatic life, much of which has been identified under the federal Endangered Species Act as threatened or endangered. It is shocking that at a time when the impacts of climate change on these beleaguered species and Oregon's poor water quality are increasingly in the public eye, DEQ still plans to produce TMDLs that have little or no consequence to restoring water quality that is currently at, for example, temperatures lethal to salmon. The agency's having decided to not use this rulemaking as an opportunity to shore up its implementation of TMDLs demonstrates its featly to the paperwork exercise in lieu of regulatory actions desperately needed in the field.

I. THE PROPOSED RULES

A. Commission Adoption of TMDLs by Rule

As DEQ states, it "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[.]" Notice of Proposed Rulemaking (Sept. 14, 2021) at 1. It is neither urgent nor necessary for DEQ to have rules that copy the statute, particularly where there is no need or intent to add any nuance to what the law already allows. Here there is nothing added other than

a straight-up authority that already exists, making this rulemaking a lot of trouble for nothing. That DEQ has to respond to a federal court order to produce TMDLs with some expediency does not alter what the statute already provides, namely the authority of the Commission to adopt TMDLs by rule.

B. Conforming Oregon's TMDL Rules with EPA Policies

The second purpose of this rulemaking is to "reflect current EPA requirements established by case law." Again, there is nothing urgent or necessary about adopting these requirements into rule. All DEQ or the Commission need do is conform the TMDLs it develops and adopts, by order or rule, to EPA policy and case law. DEQ cites to a "Anacostia Riverkeeper, et al. v. EPA, et al. 2019" court decision as the "source for adding 'daily load' to the definition of TMDL" as if courts have only just ruled on this issue. This, of course, is incorrect, as the litigation on the requirement for a "daily load"—as established in the statutory language of the Clean Water Act—stems from cases *about* the Anacostia River, but not by the Anacostia Riverkeeper, that preceded the partially cited case. *See Friends of the Earth v. EPA*, 446 F.3d 140 (April 25, 2006) ("The law says 'daily.'"). Obviously DEQ has managed to run its TMDL program since 2006 without having this case law reflected in its rules.

It then cites to the "EPA Guidance on Reasonable Assurance in TMDLs and America Farm Bureau et al., vs EPA 2013 (Chesapeake Bay TMDL lawsuit)" as the "source for adding language regarding reasonable assurances of implementation." But as EPA's 2012 email to which it presumably refers notes, EPA did not establish any new guidance on reasonable assurance but, rather, cited earlier EPA guidance, namely the 1991 *Guidance for Water Quality-based Decisions: the TMDL Process;* the 1997 Robert Perciasepe memorandum *New Policies for Establishing and Implementing Total Maximum Daily Loads*; and the 2002 *Guidelines for Reviewing TMDLs Under Existing Regulations*. *See* Email from Denise Keehner, EPA, to Alexis Strauss, et al., Re: *Follow-up to WDD Hot Issues Discussion on Reasonable Assurance in TMDLs* (Deb. 15, 2012). The dates on these EPA guidance documents point to the fact that it is irrelevant whether DEQ's rules conform to EPA requirements or not, as the TMDL program has been functioning—if one can call it that—for many years without this update.

We do, however, appreciate that the definition of reasonable assurance cites the three principles of the policy, in the additions at OAR 340-042-0040(5)(g). The problem, however, is two-fold. First, this definition is inconsistent with the incomplete definition provided in the definitions section where the rules define reasonable assurance as 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." OAR 340-042-0030(9). We propose that the longer definition used in OAR 340-042-0040(5)(g) be provided in the definitions because the current definition is too narrow to encompass the three principles. Second, DEQ only cites to this updated and correct definition of reasonable assurance in the

portion of its rules that pertain to how it will distribute wasteload and load allocations to point and nonpoint sources. OAR 340-042-0040(6). Despite that reasonable assurance is a requirement of TMDLs with mixed point and nonpoint sources—*see* 40 C.F.R. § 130.2(i) (TMDL defined to include: "If Best Management Practices (BMPs) or other nonpoint source pollution controls make more stringent load allocations practicable, then waste load allocations can be made less stringent. Thus, the TMDL process provides for nonpoint source control tradeoffs.")—DEQ's rules on the required elements of a TMDL at If Best Management Practices (BMPs) or other nonpoint source pollution controls make more stringent load allocations practicable, then waste load allocations can be made less stringent. Thus, the TMDL process provides for nonpoint source control tradeoffs.(4)(a)–(k) do not include reasonable assurance. Instead, there is a reference to reasonable assurance's being required in a Water Quality Management Plan. *See* OAR 340-042-0040(l)(J).

The problem with this location is two-fold as well. First, EPA does not view and act on water quality management plans. The demonstration of reasonable assurance should be located in the TMDL, on which EPA acts. Second, the description of reasonable assurance in this Oregon requirement does not mirror the details that are set out in the rules' section on determining allocations. As those details, that in turn mirror EPA guidance, are also not in the definitions that govern the entire section, the details do not provide reasonable assurance as required in the TMDL for EPA's approval but, rather, only provide those details on the largely discretionary actions by Oregon on how to establish its allocations. The language that DEQ has added at OAR 340-042-0040(5)(g) belongs elsewhere if it is intended to reflect EPA guidance and federal case law.

II. WHAT IS ABSENT FROM THE PROPOSED RULEMAKING

The most important aspect of a TMDL is that it is implemented. While, so long as DEQ is issuing NPDES permits, a TMDL's wasteload allocations are more or less self-implementing, the exact opposite is true of load allocations for nonpoint sources. There, the existence of a TMDL has no effect on pollution levels other than whatever actions DEQ chooses to take. For example, despite a three-decades long TMDL program, TMDL load allocations have never been translated into improved logging practices by the Oregon Board of Forestry nor have they been used to change rules pertaining to agricultural water quality through the Oregon Department of Agriculture.

The most clear example of this failure to ensure that the major expenditure of funds on TMDL development result in water quality improvements is demonstrated by the lack of improved logging practices. That the Oregon logging practices are inadequate to protect water quality is well established. *See, e.g.*, NOAA/EPA, *NOAA/EPA Finding that Oregon Has Not Submitted a Fully Approvable Coastal Nonpoint Program* (January 30, 2015) at 1, 4 ("the State has not implemented or revised management measures, backed by enforceable authorities, to (1) protect

riparian areas for medium-sized and small fish-bearing (type "F") streams and non-fish-bearing (type "N") streams; (2) address the impacts of forest roads, particularly on so-called "legacy" roads; (3) protect high-risk landslide areas; and (4) ensure adequate stream buffers for the application of herbicides, particularly on non-fish-bearing streams.").

Despite the federal agencies' determination having cost Oregon $8,171,040 in lost federal grant funds to date, a penalty that grows with each passing year, DEQ is not proposing in this rulemaking to change its rules on implementing TMDLs. The rule on implementing TMDLs to control polluted runoff from logging pollution reads as follows:

> Nonpoint source discharges of pollutants from forest operations on state or private lands are subject to best management practices and other control measures established by the Oregon Department of Forestry under the ORS 527.610 (Short title) to 527.992 (Civil penalties) and according to OAR chapter 629, divisions 600 through 665. Such forest operations, when conducted in good faith compliance with the Forest Practices Act requirements are generally deemed not to cause violations of water quality standards as provided in ORS 527.770 (Good faith compliance with best management practices not violation of water quality standards). Where the department determines that there are adequate resources and data available, the department will also assign sector or source specific load allocations needed for nonpoint sources of pollution on state and private forestlands to implement the load allocations. In areas where a TMDL has been approved, site specific rules under the Forest Practices Act rules will need to be revised if the department determines that the generally applicable Forest Practices Act rules are not adequate to implement the TMDL load allocations. If a resolution cannot be achieved, the department will request the Environmental Quality Commission to petition the Board of Forestry for a review of part or all of Forest Practices Act rules implementing the TMDL.

OAR 340-042-0080(2). This rule language is highly problematic. First, it relies entirely on the adoption of "site specific rules under the Forest Practices Act," thereby failing to reflect all of DEQ's current legal authority to control polluted runoff from logging activities. Second, it relies on DEQ's making a determination that the generally applicable rules are not adequate. Last, it requires the DEQ to request that the Commission petition the Board of Forestry.[1]

[1] We also note that even though the DEQ is proposing to sign a Memorandum of Agreement with the ODF that would require ODF to prepare implementation plans for approved TMDLs, DEQ is not proposing the correlary rule change that would currently preclude such a plan. *See* OAR 340-042-0080(4) ("Persons, including DMAs other than the Oregon Department of Forestry or the Oregon Department of Agriculture, . . . must: (a) Prepare an implementation

DEQ's current legal authority was set out over a decade ago by the Oregon Department of Justice (DOJ), a memorandum that was produced for the purpose of allowing DEQ to make commitments in furtherance of a settlement that would ensure Oregon continued to obtain those now-diminished federal grant funds referred to above. In its memorandum, DOJ concluded that DEQ has the legal authority to ensure that the state's logging practices protect water quality and salmon. *See Northwest Environmental Advocates v. Locke, et al.*, Civil No. 09-0017-PK, Final Settlement Agreement (September 27, 2010) ("Settlement"), Ex. B, Memorandum from Larry Knudsen, Senior Assistant Attorney General, Natural Resources Section, to Neil Mullane, Water Quality Division Administrator DEQ, Re: *DEQ Authority to Develop and Implement Load Allocations for Forestland Sources* (July 2, 2010) (hereinafter "2010 DOJ Memo"); *see also id.*, Ex. A, Letter from John King, National Oceanic and Atmospheric Administration, ("NOAA") and Mike Bussell, U.S. Environmental Protection Agency ("EPA") Region 10, to Neil Mullane, DEQ, and Bob Bailey, Oregon DLCD (May 12, 2010), at 4, Attachment (Oregon to "[p]rovide a legal opinion from the Oregon Attorney General's Office that clearly concludes Oregon DEQ has the authority to prevent nonpoint source pollution and require implementation of the additional management measures for forestry. Specifically, under the state's current proposal, the legal opinion must conclude that DEQ has the authority to enforce TMDLs, including "safe harbor" BMPs, with regard to riparian buffers, landslide-prone areas, and legacy roads.").

The 2010 DOJ memo was summarized in the Final Settlement of the above-referenced case, describing DEQ's legal authority over logging practices as follows:

> WHEREAS, Oregon, in order to resolve the outstanding condition on its CNPCP [Coastal Nonpoint Pollution Control Program] for additional management measures for forestry [required to meet water quality standards and protect designated uses], has proposed to develop Implementation Ready TMDLs, which is a new and novel approach to achieving and maintaining water quality standards in the State's coastal sub-basins, and which includes the development and issuance of enforceable load allocations, implementation plans, and "safe harbor" Best Management Practices ("BMPs") thoughout Oregon's CNPCP management area (collectively, "Oregon Coastal TMDL Approach");
>
> * * *
>
> WHEREAS, on July 2, 2010, and in response to EPA and NOAA's May 12, 2010, letter, the Oregon Attorney General sent a legal opinion, which is attached hereto as Exhibit B, to EPA and NOAA that describes the Oregon Coastal TMDL Approach as a new process by which ODEQ "assigns [load allocations] to individual property owners—including forestland owners—adjacent to the

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plan and submit the plan to the Department for review and approval according to the schedule specified in the WQMP.").

> waterbody as opposed to the general [load allocation] for the nonpoint source pollution sectors as has typically been done in previous TMDLs. The water quality management plan (WQMP) issued in conjunction with the TMDL would require each source to undertake an approved implementation plan specific to the property. The [O]DEQ would also establish 'safe harbor' BMPs or other ground control measures that it believes to be adequate to meet the [load allocations] to the maximum extent practicable.";
>
> WHEREAS, the July 2, 2010, legal opinion further concludes that "[O]DEQ is authorized to establish its own implementation requirements to the extent required by the [Clean Water Act] ["CWA"] and to the extent that controls adopted by the [Oregon Board of Forestry] under the [Oregon Forest Practices Act] are deemed by[O]DEQ to be inadequate to implement the TMDL. . . . [O]DEQ may legally conclude, and in some cases likely must conclude, that implementation of its safe harbor BMPs is required.";
>
> WHEREAS, the July 2, 2010, legal opinion confirms that ODEQ has the authority to develop and enforce the Oregon Coastal TMDL Approach, specifically proposing that "[if] the [Board of Forestry] does not adopt basin-specific BMPs or if the [O]DEQ finds that the [Board of Forestry's] BMPs are not as protective as the safe harbor BMPs, the [O]DEQ will require the forestland owner to comply with the safe harbor BMPs, or to develop its own BMPs and submit them to the [O]DEQ for review and approval," and concluding that "if the [Board of Forestry] does not promulgate such implementation measures, [O]DEQ has the authority to directly order compliance with the load allocation because such measures are required by the CWA."

Settlement at 4–5. Moreover, the attorneys described DEQ's commitment—based on the 2010 DOJ memorandum—as follows:

> WHEREAS, in the July 26, 2010, letter, and Attachment A to that letter, ODEQ commits to developing Oregon Coastal TMDLs that will "specifically identify significant nonpoint sources, including significant forestry sources," and ODEQ commits to establishing enforceable load allocations in the TMDLs, and to developing safe harbor BMPs for the load allocations established for those sources, as well as to issuing implementation orders to significant sources, including significant forestry nonpoint sources that have received load allocations through the Oregon Coastal TMDL Approach. Further, Attachment A to the July 26, 2010, letter states that ODEQ will approve or disapprove TMDL Implementation Plans "based on the plans ability to meet the load allocations or [Oregon Board of Forestry] basin specific rule[s]" and that ODEQ "would reserve

> its authority to impose BMPs under ORS 468B.110 to the extent necessary to comply with Sections 303 and 3[1]9 of the CWA."

Id. at 5–6. DEQ went on to describe TMDLs that met this description as "Implementation Ready TMDLs." It has yet to issue any Implementation Ready TMDLs despite the DOJ's having concluded that when DEQ deems current logging practices "to be inadequate to implement the TMDL. . . . [O]DEQ may legally conclude, and in some cases likely must conclude, that implementation of its safe harbor BMPs is required." 2010 DOJ Memo (emphasis added).

The existing DEQ rules pertaining to implementation of TMDLs with regard to nonpoint sources are simply inconsistent with the DOJ memorandum of 2010, fail to reflect DEQ's actual legal authority, and make clear that DEQ has no intention of taking action to protect Oregon's water quality and dwindling populations of threatened and endangered aquatic species, including salmon, steelhead, and bull trout, and candidate species such as amphibians.

The second problem with the existing rules and the TMDLs that DEQ has developed to date is that, while the rules rely on DEQ's making a determination that the generally applicable logging rules are not adequate, DEQ has never yet made any determination that the logging rules are or are not adequate to meet load allocations. This is simply not a part of DEQ's TMDL effort. The only time in the history of the TMDL program that DEQ has used a TMDL to evaluate logging practices was its evaluation of the Bureau of Land Management's (BLM) proposed Western Oregon Plan Revision ("WOPR"), a review taken at the behest of the Oregon Governor. *See* Science Team Review, *Western Oregon Plan Revision Draft Environmental Impact Statement* (March 3, 2008), Appendix 2, DEQ, *Evaluation of the Western Oregon Plan Revision (WOPR) – Draft Environmental Impact Statement (DEIS) Alternatives for Stream Temperature* (November 26, 2007). Even this effort did not lead to a determination pertaining to state logging practices.

In the WOPR analysis, DEQ evaluated four riparian buffer alternatives for logging by the BLM against the water quality standards and TMDL load allocations, specifically the TMDLs for Canton Creek in the North Umpqua Subbasin. *Id*. at B-3. As DEQ described, "two changes were made to the original TMDL model" consisting of modifying the riparian vegetation to simulate the WOPR alternatives and changing the model distance step "to offer higher resolution results for evaluating changes in effective shade[.]" *Id*. DEQ's analysis concluded that a 150-foot riparian buffer width was sufficient, 100-foot buffers were not, and that two other alternatives (with smaller buffer widths and thinning) "show temperature increases and reductions to effective shade that exceed the TMDL load allocation and therefore do not meet Oregon's temperature standard. This occurs at a single harvest unit and cumulatively." *Id.* at B-21.

Using TMDLs to make such an analysis—because it is key to using TMDLs to protect water quality for cold-water species—should be routine and should be required by the TMDL

implementation rules that DEQ proposes to amend in this action. Without a requirement to use TMDLs to review whether existing logging practices are sufficient to meet load allocations, DEQ will never make a determination that the generally applicable logging rules are not adequate. A program that is set up to avoid the very mechanism established by its own rules to stimulate change in response to a scientific evaluation of a problem is a program that, by definition, is set up to fail.

The last problem with the existing implementation rules is that they require DEQ to request that the Commission petition the Board of Forestry. This is almost a moot subject given the lack of any reason that DEQ would make a determination in the first instance that current logging practices are insufficient to meet load allocations. In any event, it is a far cry from DEQ's taking its own actions to ensure that the requirements of the Clean Water Act are met, as set out in the 2010 DOJ memorandum.

Conclusion

In light of the urgent need for Oregon to use its agency resources to protect and recover threatened and endangered species, DEQ's intention to revise its TMDL rules without addressing the single most significant deficit in those rules—their failure to reflect DEQ's legal authority to control polluted runoff from nonpoint sources to protect those species and drinking water—is simply unconscionable.

Sincerely,

Nina Bell
Executive Director

and on behalf of

Nancy Webster, Founder
North Coast Communities for Watershed Protection

From: Thomas Benke
To: TMDL2022 * DEQ
Cc: Jesse Hayes
Subject: 2022 TMDL Rulemaking
Date: Friday, November 12, 2021 3:00:01 PM

Please accept the following comments filed on behalf Hayes Oyster Company regarding DEQ's Notice of Proposed Rulemaking for Division 42, Total Maximum Daily Loads.

The proposed amended OAR 340-042-0060(1) provides as follows:

The Director will issue a TMDL as an order or the EQC by rule.

This provision as amended suggests that if issued by the Director, the TMDL will be a final order subject to challenge pursuant to the Oregon Administrative Procedures Act ORS § 183.484. On the other hand, OAR 340-042-0060(1) suggests that if issued by the EQC, the TMDL will be a rule subject to challenge pursuant to the Oregon APA ORS § 183.400. Is this a correct interpretation of the proposed amended rule?

The proposed amended definition of "Total Maximum Daily Load (TMDL)" at OAR 340-042-0030(15) is as follows:

"Total Maximum Daily Load (TMDL)" means a written quantitative plan and analysis of attaining and maintaining water quality standards and includes the elements described in OAR 340-042-0040. These elements include a daily load 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.

The Department does not propose to adopt a definition of "daily load" or of "load". The state definition of "loading capacity" promulgated at OAR 340-041-0002(31) is as follows:

"Loading Capacity" or "LC" means the greatest amount of loading that a water body can receive without violating water quality standards.

Because the existing definition of "Total Maximum Daily Load (TMDL)" already incorporates the concept of the maximum / greatest "amount" of a pollutant allowed relative to water quality standards, the question arises as to why the Department believes it is important to insert the phrase "daily load" into the definition of "Total Maximum Daily Load (TMDL)". Is "daily load" to be given a different meaning by a reviewing court, and if so, what is the distinction intended by the Department?

The proposed amendments do not address the different, arguably contrary, definition of "Total Maximum Daily Load (TMDL)" codified in DEQ rules at OAR 340-041-0002(65):

"Total Maximum Daily Load (TMDL)" means the sum of the individual waste load allocations (WLAs) for point sources and load allocations (LAs) for nonpoint sources and background. If receiving water has only one point source discharger, the TMDL is the sum of that point source WLA plus the LAs for any non-point sources of pollution and natural background sources,

> *tributaries, or adjacent segments. TMDLs can be expressed in terms of either mass per time, toxicity, or other appropriate measure. If Best Management Practices (BMPs) or other nonpoint source pollution controls make more stringent load allocations practicable, then wasteload allocations can be made less stringent. Thus, the TMDL process provides for nonpoint source control tradeoffs.*

We say "arguably" because the definition of TMDL in Division 41 clearly describes an "amount" – the sum of amounts as Wasteload Allocations or Load Allocations developed for individual point source dischargers and non-point dischargers as a group, respectively. On the other hand, the definition of TMDL in Division 42 describes much more than an amount. That definition references the "written quantitative plan and analysis" by which the aforesaid amounts are calculated. We have always wondered "Which is it?" when the DEQ references the "TMDL" for any given body of water. "Amounts" can and should be imposed upon individual point source dischargers by order, whereas a "written quantitative plan and analysis" more fairly describes a rule than an order (as those two terms are defined in the Administrative Procedures Act).

Hayes Oyster Company is concerned that by adopting a "written quantitative plan and analysis" as a rule that the EQC may be inadvertently amending one or more of the rules upon which the "TMDL" has been established. In particular, Hayes Oyster Company is concerned about a scenario similar to that which occurred with establishment of the 2001 Tillamook Bay Watershed TMDL. In that instance, the Department disregarded the water quality standard then applicable to large portions of the estuarine waters of Tillamook Bay. In the parlance of the 252-page written quantitative plan and analysis the Department "adopted" a dilution ratio for freshwater flowing into the estuarine waters of Tillamook Bay from the Tillamook, Trask and Wilson rivers that was only intended to attain the applicable shellfish harvesting standard in the middle and lower bay. As the lead drafter for the Tillamook Bay Watershed TMDL later testified:

> *The interpretation of the standard was made to define where the beneficial uses were to be protected, where the TMDL was to be applied, and DEQ did that, as they often must do, with standards that are not specific and that's where we chose to apply them.*

He described the decision as "political", basically above his paygrade.

Of course, "designation" of the "beneficial use" of shellfish harvesting in the upper part of Tillamook Bay, including the area prohibited to commercial oyster harvesting due to agricultural stormwater discharges in the watershed, had already occurred by the time DEQ submitted its "303(d)" list to EPA in 1998. Director Stephanie Hallock's intentional disregard of that beneficial use imposed great harm on plat holders throughout the Bay (in that the goal of attainment at mid-bay rather than at the shellfish growing waters nearest Tillamook's dairies has resulted in chronic and regular exceedences of the bacteria standard throughout the bay for the last two decades).

Hayes Oyster Company does not ask the Department to weigh in on a matter presently being litigated but does request that the Department consider whether it should be adopting TMDLs as rules and, if so, that the Department clarify that adopting as rules WLAs, LAs or the "written quantitative plan and analysis" upon which WLAs and LAs are based that the Department does not intend to amend any other rule (water quality standard or otherwise).

Otherwise, the Department might later argue at the court of appeals that its TMDL cannot violate an existing standard because its adoption by "rule" necessarily amended that standard as well.

The Department should reconsider its proposed amended OAR 340-042-0070 "Requesting Reconsideration of Appealing a Total Maximum Daily Load". As drafted, subsection (1) limits those who may request "reconsideration" of a Director's order establishing a TMDL to the following:

- <!--[if !supportLists]--><!--[endif]-->Any person who participated in establishing a TMDL;

- <!--[if !supportLists]--><!--[endif]-->Persons who submitted comments (during the notice period, presumably); and

- <!--[if !supportLists]--><!--[endif]-->Any other person entitled to seek judicial review of an order.

The problem with that list is that it does not necessarily include persons who may be directly or indirectly impacted by the Director's decision to allow the established "daily load" of pollutants. Hayes Oyster Company was not notified of DEQ's decision to write-off fully 1/3 of the shellfish growing waters of Tillamook Bay with its issuance of a final order establishing WLAs and LAs for point and nonpoint source discharges in the Tillamook Bay Watershed. Hundreds of acres of Hayes Oyster Company's platted tidelands were effectively permanently removed from use by the TMDL, a wrong that continues to this day because the Department refuses to revisit the TMDL despite this clear error. The Department's attention seems always directed at the polluters and only occasionally directed towards those persons who rely on attainment of water quality standards (e.g., fisheries, recreational interests etc.) The Department says in its "Statement of cost of compliance" that "The existing TMDL development process involves significant stakeholder engagement" but does not clarify who it includes among those "stakeholders". To exclude known water quality dependent stakeholders from the process of establishing TMDL is bad enough, but excluding them by rule from participating in reconsideration and/or appeal of the TMDL will only encourage more back-room political deals with polluters.

In the amended rule addressing "Reasonable assurances of implementation", proposed OAR 340-042-0040(6)(g), the Department should reference the "pollution prevention and control measures" mandated at ORS § 568.909(1)(a).

Also with regard to OAR 340-042-0040(6)(g), the reference therein to "practices" that "are technically feasible at a level required to meet allocations" must be stricken. "Technically feasible" is not the standard for attainment of water quality standards in Oregon. "Necessary" is the applicable standard.

Finally, Hayes Oyster Company asks that the Department address agricultural stormwater discharge expressly and directly in its rulemaking. Establishment of acceptable Load Allocations for agricultural stormwater discharges (by definition a nonpoint source) should be a high priority for the Department.

Please direct the Department's responses to comments and any further notices regarding this matter to:

Thomas R. Benke
ECO LLC
PO Box 83706
Portland, OR 97283

Regards,
Thomas R. Benke

November 12, 2021

Department of Environmental Quality
Attn: Michelle Martin
700 NE Multnomah Street, Suite 600
Portland, OR 97232

VIA EMAIL: TMDL.2022@deq.state.or.us

Re: Total Maximum Daily Loads, Division 42 Rulemaking

Ms. Martin:

Thank you for the opportunity to comment on the Department of Environmental Quality (DEQ) proposal to modify the rules regarding the development and implementation of Total Maximum Daily Loads (TMDLs). While DEQ has framed these rule changes as minor, we believe that the rules have the potential to have a significant impact on our members as it relates to their obligations and ability to engage with the development and implementation of TMDLs, as well as the vetting process prior to final action. We appreciated the agency forming a rules advisory committee earlier this year to discuss these rules, and many of our organizations participated in that effort and provided comment through that process. We write today to urge DEQ not to move forward with the following changes proposed by the agency:

DEQ Should Not Develop TMDLs by Rule

DEQ proposes to allow TMDLs to be developed under both rule and order, whereas currently TMDLs are just developed by order. This change – while seemingly minor – will alter the development, implementation, and appeals processes for the TMDLs. It will have a significant impact on the ability of our members to effectively engage with DEQ around TMDL development and will drastically decrease the agency's incentive to work with all stakeholders to develop workable TMDLs. While we understand that the statutes provide that the agency may adopt TMDLs by rule and order, the decision to move to wholesale adoption of a document as complex as a TMDL by rule makes it impossible as a practical matter for this impacted by a TMDL to address specific issues of concern to them.

Adopting TMDLs by rule will severely limit judicial review of the TMDL, which dramatically constrains the ability of our members to challenge TMDLs that utilize

outdated or debatable modeling, will fail to achieve their goals, or seek to achieve their goals in the highest cost manner possible. As recent TMDLs have shown, DEQ is often severely resource constrained and dealing with inadequate data as it develops TMDLs, often under court ordered deadlines. This has resulted in TMDLs that ask regulated entities to do things that exceed the agency's scope, are based on multiple layers of inappropriate assumptions, are unlikely to achieve their goals, or do not seek to achieve their goals in the most efficient and least costly manner. This has been demonstrated through both the Klamath TMDL and the Willamette Mercury TMDL, both of which impact our members greatly.

As a practical matter, the limitation on judicial review will affect most severely the entities who are regulated by a TMDL, not those who believe that the TMDL is insufficiently stringent, who will almost always challenge in federal court EPA's approval of the TMDL. This is not fair or appropriate. In addition, adopting the TMDL by rule will substantially truncate public participation, particularly for TMDLs that DEQ is under a court order to adopt by a specific date, as there are limitations on public participation and comment in rulemaking that are not present for an order. Finally, we sincerely believe that the EQC will not be in a position to meaningfully evaluate, in a one- or two-hour meeting agenda item, a TMDL that runs to hundreds or even thousands of pages and that includes innumerable complex technical and factual issues, all of which will be adopted in rule and difficult to amend. If there are any issues of policy for the EQC, those policies should be adopted as part of a general TMDL rule, not addressed ad hoc in individual TMDLs that include countless other issues.

We strongly urge DEQ not to move forward with this change.

DEQ Should Not Redefine "Reasonable Assurances"

Finally, we have concerns about DEQ's new proposed definition of reasonable assurances. DEQ's current rule provides that, in distributing TMDL wasteload allocations (to NPDES sources) and load allocations to nonpoint and other non-NPDES sources, DEQ may consider "[r]easonable assurances of implementation." The proposed rule would add: "To establish reasonable assurance that the TMDL's load allocations will be achieved requires determination that practices capable of reducing the specified pollutant load: (1) exist; (2) are technically feasible at a level required to meet allocations; and (3) have a high likelihood of implementation."

DEQ's only explanation for adding this language is that it is intended to "clarify or update the rule language to reflect current EPA requirements established by case law." DEQ points to the federal district court decision in *American Farm Bureau Federation v. EPA* (2013) on the Chesapeake Bay TMDL, as well as a 2012 EPA guidance document, but it does not explain why the proposed rule language is required by the court decision and guidance. Nor can we find the specific language that DEQ has proposed in the decision or guidance—or in any other court decision or EPA guidance.

It's clear from the case law and guidance that TMDL load allocations must be supported by reasonable assurance that the load allocations will actually be achieved. But neither EPA's guidance nor the case law defines in any precise and technically defensible way what "reasonable assurance" means.

While we appreciate that DEQ's current rules, which it does not propose to amend, expressly allow consideration of incentive based and voluntary work in determining whether "reasonable assurances" exist, the proposed definition seems to be of DEQ's own invention, and not closely tied to case law or EPA guidance. This is a concerning approach. Specifically, we are concerned that the third proposed element, that the practices "have a high likelihood of implementation," is overly vague and has the potential to be construed to establish an evidentiary burden that is "unreasonably" high, particularly for incentive based or other non-regulatory measures. We are also concerned by the absence of any explanation for the proposed language or any identification of its source—or why the rule's existing explanations of what "reasonable assurance" means are inadequate. We urge DEQ not to move forward with this proposed change, or at the very least, to reconvene the rules advisory committee to provide an explanation for this change and work on language for the third element that isn't overly vague.

Thank you for your consideration, and please let us know if you have any questions.

Sincerely,

Mary Anne Cooper, Oregon Farm Bureau

April Snell, Oregon Water Resources Congress

Sharla Moffett, Oregon Business & Industry

Mike Eliason, Oregon Forest & Industries Council

Shaun Jillions, Oregon Manufacturers & Commerce

JR Cook, Northeast Oregon Water Association

Tammy Dennee, Oregon Cattlemen's Association

Tami Kerr, Oregon Dairy Farmers Association

Katie Murray, Oregonians for Food & Shelter

Jeff Stone, Oregon Association of Nurseries

November 12, 2021

THE FRESHWATER TRUST

Oregon Department of Environmental Quality
700 NE Multnomah St., Room 600
Portland, OR 97232-4100

Submitted to TMDL.2022@deq.state.or.us

Subject: Proposed Revisions to OAR 340, Division 42
Total Maximum Daily Load Rules

The Freshwater Trust (TFT) submits the following comments in response to the Oregon Department of Environmental Quality's (DEQ) Notice of Proposed Rulemaking to OAR chapter 340, Division 42 published on September 14, 2021. The following comments outline key opportunities to increase the likelihood of "reasonable assurances" being reasonable or assured, and ultimately, the likelihood of successfully implementing Total Maximum Daily Loads (TMDLs). TFT's comments seek to highlight the disconnect between the required Water Quality Management Plan (WQMP) regulations and the proposed reasonable assurance rule. In particular, the WQMP should provide the framework of actions and management strategies to attain and maintain the water quality standards, and the implementation of the actions outlined therein should be reasonably assured to occur. However, the rules as currently proposed only seek to expand and strengthen the understanding of reasonable assurances related to the distribution of allocations. The proposed rules stop short of strengthening the reasonable assurances as it relates to the WQMPs. Focusing on assuring the management actions outlined in the WQMP exist, are technically feasible, and have a high likelihood of implementation would lay the foundation for greater success in achieving the stated goals of this rulemaking effort.

TFT is a systems change-focused nonprofit that builds and deploys technical, financial, and policy tools to enable large-scale on-the-ground solutions that bolster watershed resiliency. With 38 years of technology-driven, watershed-scale restoration expertise, TFT has a proven track record of successfully collaborating with landowners, regulated entities, governments, and private business to design and implement watershed conservation programs. TFT's growing portfolio of work spans Oregon, Idaho, California, Washington, and Colorado, and ranges from on-the-ground restoration and agricultural efficiency projects, to analytical work that allows resource managers to optimize funding toward the projects that produce the most environmental benefits for the least cost, to environmental market design and policy efforts that improve the overall conservation system. The common theme among TFT's diverse work is that it is all based on a watershed-perspective, a perspective that TFT now brings to bear in commenting on the reasonable assurances and WQMP rules.

Background

Water is a critical resource sector, yet as a society we do not regulate, finance, or manage it in a way befitting its national importance and vulnerability. Since 1960, America has spent over $2 trillion on water quality improvements,[1] and yet a large majority of U.S. waterways remain impaired for water quality.[2] Most of these impairments are now driven by distributed nonpoint sources (e.g., agricultural runoff, septic leaks, urban stormwater). Despite this reality, most public funding goes to support point source projects.[3] The key is therefore to identify the specific projects, funds, and priorities necessary to achieve the basin-scale targets set in TMDLs.

Unfortunately, water is a public good for which a compelling business case for private investment is rarely present, and so government is largely in the driver seat to overcome these challenges, especially as it relates to addressing these nonpoint-driven issues. Over the last several decades, federal, state, and local policymakers have developed an extensive but fragmented public funding and regulatory apparatus to solve the problem. These public tools are currently being used in a way that dilutes, rather than leverages, the enormous purchasing power of government, making it very difficult to realize the nonpoint source goals of TMDLs. With drought and water quality issues intensifying, cities growing, and inequities widening, the status quo approach cannot achieve water-shed targets unless priorities are much better understood, and the financial and implementation plan for achieving those priorities is just as detailed and robust as the scientific analysis within TMDLs.

Achieving watershed resiliency within this public funding-dominated system will require the right mix of centralized and distributed projects, a holistic approach that addresses water quality and community concerns, consolidated, and coordinated funding, and a prioritization and procurement system capable of quickly delivering all combined public financial resources to the highest priority projects. Statutory changes can undoubtedly accelerate progress, but national and state natural resource agencies can also make creative and coordinated use of their existing tools and authorities to catalyze these pre-conditions for success. TFT believes the reasonable assurances and WQMP rules are the place to do just that. Failure to add this clarity will result in the continued inability to realize the goals of TMDLs and the continued inequitable distribution of the burdens onto the regulated point sources without meaningfully addressing the large nonpoint source share of the problem.

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[1] "Investments to decrease pollution in rivers, lakes, and other surface waters have constituted one of the largest environmental expenditures in US history. Since 1960, US public and private actors have spent over $1.9 trillion ($2014) to abate surface water pollution. This comes to over $140 per person per year, or over $35 billion total per year. These totals exceed total public and private spending to abate air pollution[.]" D.A. Keiser, C.L. Kling & J.S. Shapiro, *The Low but Uncertain Measured Benefits of US Water Quality Policy*, 116 PROC. NAT'L ACAD. SCI. 5262, 5262 (Mar. 19, 2019), www.pnas.org/content/116/12/5262.

[2] The 2017 national inventory of water found that 53% of rivers and streams, 71% of lakes and reservoirs, and 79% of bays and estuaries are water quality impaired. EPA, NATIONAL SUMMARY OF STATE INFORMATION (July 2017), https://ofmpub.epa.gov/waters10/attains_nation_cy.control#total_assessed_waters.

[3] Most watershed impairments are now being driven by nonpoint sources. Excess nutrient and sediment loss from nonpoint sources is the leading source of surface water quality impacts nationwide. As of 2011, approximately 75% of waterbodies with TMDLs were primarily impaired by nonpoint source discharges. EPA, NATIONAL EVALUATION OF THE CWA SECTION 319 PROGRAM (2011), www.epa.gov/sites/production/files/2015-09/documents/319evaluation.pdf. In contrast, of the $139.7 billion in Clean Water State Revolving Fund (SRF) investments made from 1988 to 2020, only $5 billion, or 3.5% was directed to nonpoint activities. EPA, Clean Water SRF Program Summary, National Summary, at 24, 28 (2021), www.epa.gov/sites/default/files/2021-02/documents/us20.pdf.

Overview

TFT agrees that the reasonable assurances of implementation must be clarified to ensure that the practices exist, are feasible, and are likely to be implemented in a manner that succeeds in reducing nonpoint source pollutant loads. However, strengthened reasonable assurances should also apply to the WQMPs and associated implementation plans. The assurances should amount to more than just one of many factors to consider when distributing allocations between point and nonpoint sources.

The actions and practices needed to realize water quality standards in a watershed must be reasonably assured. Yet, these practices cannot exist nor succeed without timely and certain funding, and a clear understanding of where to consolidate and direct those funds. In the following sections TFT outlines how "Precision Watershed Analytics" can direct funding towards high-impact practices that offer the greatest load reductions, and how an integrated "watershed action plan" that focuses on funding and implementation can significantly increase the likelihood of achieving TMDL targets. TFT suggests targeted additions to the OAR 340-042 rules to address these shortcomings and ends by noting the consequences of failing to require these key layers of additional rigor in reasonable assurances analyses.

Precision Watershed Analytics (PWA) to Identify and Prioritize the Best Outcomes

Existing technology is available that would enable agencies to efficiently identify and prioritize the nonpoint source actions with the greatest likelihood of achieving the desired load reductions. These PWA can evaluate an entire watershed at a fine resolution to identify the benefits and costs of a suite of potential management practices and actions. This enables a comparison across multiple project types that have traditionally only been assessed and funded in individual silos.

PWA use existing technology as well as publicly available data sets and models to identify the highest impact projects, develop a specific implementation roadmap for local stakeholders to use and improve, and identify and test the feasibility of funding strategies. Numerous nonprofits and agencies across the nation utilize this technology. Developing and then using PWA follows three basic steps:

1. Integrate established government models and data with satellite imagery and machine-learning technology to remotely survey a watershed and identify specific distributed conservation practices that could be implemented at the field-level, and the specific cost of implementing those practices on each field.
2. From the group of feasible practices, identify optimal combinations of practices that would produce the best ecological and economic options on the ground, as well as estimated costs and desired outcomes. This step also requires an "implementability" analysis as the "best" projects may have significant social, physical, or legal obstacles.
3. Develop scenarios to identify the most efficient combination of regional investments to achieve watershed-level objectives, such as a TMDL nutrient reduction target or a water savings target, or both (importantly, analytics can be used to solve for multiple objectives).

As a specific illustration of the potential for PWAs to help achieve nutrient and sediment reduction in a watershed, TFT analyzed the Crooked River watershed in Central Oregon and determined that of the 4,070 agricultural fields, only 1,500 were feasible for implementing a conservation action that could improve water quality.

The PWA estimated that it would cost $106 million to implement the actions on all 1,500 identified fields. However, the PWA prioritization also showed that by pursuing the highest impact fields it is possible to produce **75% of the overall sediment and phosphorous loading reductions** at only **35% of that overall cost**. The converse to this efficient, prioritized approach is also true—it is possible to spend up to $70 million without achieving meaningful pollutant reductions. As this example demonstrates, the opportunity to reoptimize project priorities when achieving nutrient and sediment reduction targets.

Figure 1: Crooked River Analytical Output. The red circle identifies projects that are a priority for funding and implementation.

Although most watersheds fail to meet water quality standards due to the proliferation of nonpoint impacts, the CWA does not directly regulate nonpoint sources. Therefore, this proposed rulemaking provides Oregon DEQ with a critical opportunity to help address this shortcoming by providing a means of identifying and fostering the implementation of priority projects. The severity of impaired waterways throughout Oregon can no longer tolerate the inefficiencies of TMDL implementation plans and reasonable assurances that are neither reasonable nor assured. Tomorrow's TMDLs must cut through these practical constraints with data, modern analytics, and robust WQMPs that contain concrete and particularized reasonable assurances, not lofty aspirational statements.

WQMPs Must Coordinate and Leverage Existing Regulatory Authorities and Public Funding Tools to Jumpstart and Drive Nonpoint Action

Precision watershed analytics help make reasonable assurances more reasonable by daylighting the optimal pathway to implementing nonpoint TMDL targets, illustrating that the practices exist and can meet allocations. Yet, the necessary assurances only exist if there is a high likelihood of implementation, which requires having the right combination of funds available to quickly implement the priority projects identified by analytics. Achieving TMDL targets requires the right mix of centralized (point source) and distributed (nonpoint source) projects; however, the funds and follow through associated with distributed activities pale in comparison to those for centralized actions. While significant centralized investments in centralized water treatment infrastructure remain necessary, the CWA cannot achieve its purpose with continued imbalance between point and nonpoint efforts.

A major limiting factor with respect to nonpoint progress is financial. Though more money would obviously improve the prospects, there is often no clear market of buyers and sellers for small-scale, distributed nonpoint projects, which means that solving this problem will need to be led and funded, at least at the outset, by public agencies. There are several other practical challenges that must be overcome. A major impediment is that existing public funds are not combined, coordinated, or leveraged to maximize their collective impact. Currently, water-related efforts and dollars are stuck in individual program silos, each with their own metrics of success, disbursement criteria, and administrative processes. Moreover, most water resource funding programs make it hard to use multiple sources of financing together,[4] and most compliance activities occur on a permit-by-permit basis.[5] Taken together, this means that although there is a lot of publicly directed money in the system it is not well coordinated toward broader watershed resiliency needs. In addition, most nonpoint projects exist in a pre-market space, so a dearth of project development capital and capacity exists, which exacerbates the practical challenges to developing and implementing these kinds of projects at speed and scale.[6]

DEQ must use the reasonable assurance and WQMP mechanisms to drive integrated "watershed action frameworks" of equal rigor to TMDL science. Moving forward, leverage and speed must become critical strategic objectives of any reasonable assurance and WQMP determination. Under current

[4] 2 CFR 200.306(b) requires that cost-share come from non-federal sources, which makes it hard to leverage programs together. Individual environmental programs have their own non-federal cost share requirements. For example, FEMA's Building Resilient Infrastructure and Communities grant generally requires 25% non-federal match. 42 U.S.C. §5193(a). CWA section 319 funds require a 40% non-federal match. 33 U.S.C. § 1329(h)(3). In developing innovative watershed action frameworks as proposed herein, 2 CFR 200.102(d) affords flexibility with respect to standard 200.306(b) cost share requirements.

[5] While individual permittees might wish to spend a portion of their compliance funds on watershed projects, the permit-by-permit nature of compliance usually creates too much risk for sources to participate at the watershed scale. This often results in overly expensive technology to remove the last increments of pollution, and future uncertainty about the viability of their investments since overall watershed impairments have not been comprehensively addressed.

[6] Distributed projects are very hard to implement at speed and scale because of how hard it is to secure and manage the cash necessary to get them off the ground. Thus, funding for distributed projects is slow and uncertain. Moreover, completing a single watershed project often requires navigation of multiple governmental and private programs with uncertainty as to whether each funding stream will be awarded. Moreover, most all government dollars flow through complicated, technical, competitive grant or cost-share programs that reimburse for effort, not outcomes achieved.

laws and regulations, as well as federal legislation recently proposed by Senator Wyden,[7] this is possible, though doing so will require creativity and coordination from EPA and the states. The first step will be to align and combine the power of public funding resources, "bending" these sources—but not drastically changing them—toward optimal placement in a broader watershed approach that still adheres to laws and requirements. Under this leverage approach, each funding stream can be used for its maximal purpose and cover blind spots of other resources, with the combined funding sources directed to the highest priority projects. Given these long odds to watershed project viability, EPA and the states must creatively leverage their existing tools and make those resources directly available within WQMPs as the catalyst for pile-on activity, and to incentivize participation and coordination among the currently fractured funding landscape.[8]

DEQ can also incentivize regulated point sources to participate, which in turn increases availability of non-federal funds to meet cost-share requirements. Specifically, their participation allows them to direct appropriately sized ratepayer-funded investments into point source technology, and thus they can retain sufficient funding and leverage for distributed projects. For example, if part of a broader watershed action framework, a city could install secondary treatment technology to meet NPDES requirements instead of the vastly more expensive tertiary wastewater treatment technology, then dedicate a significant portion of remaining funds as revenue sources to support nonpoint projects. This approach should simultaneously result in municipalities spending less money overall—a big affordability win for disadvantaged communities and low-income ratepayers—while also securing critical non-federal revenue to support distributed projects. Facilitating these types of outcomes would be greatly assisted by the existence of meaningful WQMPs that have more detailed and refined reasonable assurances to identify priority projects and actions.

Suggested Changes to Reasonable Assurances & Water Quality Management Plan Rules

To account for these critical elements, TFT proposes the following changes to the reasonable assurance and WQMP rules (advisory committee suggested edits in red, additional TFT's suggested edits in green):

> **OAR 340-042-0040(5)(g)(6).** ~~The Department~~ DEQ or the EQC will distribute wasteload and load allocations among identified sources and in doing so, may consider the following factors: … (g) Reasonable assurances of implementation. To establish reasonable assurance that the TMDL's load allocations will be achieved requires determination that practices capable of reducing the specified pollutant load: (1) exist; (2) are technically feasible at a level required to meet allocations; ~~and~~ (3) have been specifically quantified and prioritized throughout a watershed; and (4) have a high likelihood of implementation based on the applicable WQMP;

[7] Recent natural resource legislation introduced by Senator Wyden has recognized this core challenge and would actively seek to remove this barrier. *See* Watershed Results Act, S. 2087 117th Cong. (2021), www.congress.gov/bill/117th-congress/senate-bill/2807/text; 21st Century Conservation Corps Act, S. 487, 117th Cong. (2021), www.congress.gov/bill/117th-congress/senate-bill/487/text.

[8] Specifically, EPA could commit to provide cheap, long-term upfront capital to a watershed action framework so that project work could have a chance of accelerating quickly and hitting targets faster. EPA's existing Water Infrastructure Finance and Innovation Act (WIFIA) lending program would be an excellent avenue for this approach.

OAR 340-042-0040(4)(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, as well as the identification of potential nonpoint control actions, the load reduction potential of the identified actions, and any management strategies necessary to facilitate the implementation of the identified actions.

(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, verified by assessing the feasibility of the management strategy, funding plan implementation, and timing in accordance with the requirements of this section.

(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. To establish reasonable assurance that the goals of the management strategies and implementation plans will be achieved requires determination that practices capable of reducing the specified pollutant load: (1) exist; (2) are technically feasible at a level required to meet allocations; (3) have been specifically quantified and prioritized throughout a watershed; and (4) have a high likelihood of implementation. In evaluating the sufficiency of the reasonable assurances, consideration should be given to whether DMAs can and will require the management strategies and control actions as well as the certainty, adequacy, and rigor of the funding plan articulated in OAR 340-042-0040(4)(l)(N).

(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~~.~~, and

(iii) Plan to aggregate and track nonpoint source progress toward TMDL load allocations.

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

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

(N) ~~General~~ Specific discussion of costs and funding sources for implementing management strategies and control measures. Sector-specific or source-specific implementation plans ~~may~~ should be developed to provide more detailed analyses of costs and funding for specific management strategies.

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

Consequence of Not Appropriately Bolstering this Rule

Failure to address reasonable assurances in a more meaningful way will continue to push this discussion into the wrong forum. The comment letter TFT recently submitted to DEQ in support of the City of Ashland's Water Quality Trading Program[9] highlights the result of continuing to gloss over the reasonable assurances that should accompany every TMDL and associated WQMP. Most of the key issues daylighted around trading in the Ashland context came up because of the lack of clarity related to nonpoint source implementation and funding (i.e., the lack of reasonable assurances associated with the TMDL WQMP). Failing to strengthen the reasonable assurances as outlined herein will only perpetuate the problems facing watersheds across the state, place an unreasonable burden on regulated point sources with the stated goal of achieving outcomes that are patently impossible to attain by only regulating point sources.

In conclusion, TFT believes that the changes proposed here will help usher in a new era of accountability and certainty, provide the means to actually realize the goals of TMDLs, and ultimately improve the health of watersheds throughout Oregon. Thank you for considering our comments.

Sincerely,

Tim Wigington
Vice President, Finance & Policy
The Freshwater Trust
tim@thefreshwatertrust.org

[9] Available at www.thefreshwatertrust.org/wp-content/uploads/2021/11/TFT-comment-supporting-Ashland-WQT-program_10-20-21.pdf.