



State of Oregon Department of Environmental Quality

Draft Rules – Edits Highlighted

Water Quality Total Maximum Daily Loads Division 42 Rulemaking
Sept. 2, 2021 Fiscal Advisory Committee Meeting

Key to Identifying Changed Text:

~~Deleted Text~~

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 may impose limitations and controls including Total Maximum Daily Loads (TMDLs), wasteload allocations for point sources and load allocations for nonpoint sources.

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

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

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

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

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 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 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 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)(1).

[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 [or Commission](#) 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 [or Commission](#) 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 [or Commission](#) 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 [or Commission](#):

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

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

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

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, the Department will establish a local advisory group or identify an existing group or forum to assist in developing a TMDL. When the Commission establishes a TMDL through rulemaking the rulemaking process will satisfy the requirement 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 will provide an opportunity for persons to review and comment on a draft TMDL and on proposals to revise loading capacity or allocations in a TMDL as follows:

- (a) The Department will maintain a mailing list for each TMDL.
- (b) The Department will provide notice and an opportunity for public comment on a proposed TMDL or revision to loading capacity or allocations in a TMDL. The public comment period will generally be 60 days.
- (c) The Department will respond to public comments received during the public comment period and will prepare a written summary of responses.

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 Commission by rule](#). If the Environmental Protection Agency establishes a TMDL addressing waterbodies in Oregon, the Director may issue as an order [or the Commission 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 Commission and filed with the Secretary of State](#).
- (3) Following issuance, the Department will submit the TMDL to the Environmental Protection Agency.
- (4) Within 20 business days after the Director signs the order [or the Commission adopts the rule](#), the Department will notify all affected NPDES permittees, nonpoint source DMAs identified in the TMDL and persons who provided formal public comment on the draft TMDL that the order [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 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.

(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 determines that there are adequate resources and data available, the department 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 determines that the plan and rules are not adequate to implement the load allocation, the department will provide ODA with comments on what

would be sufficient to meet TMDL load allocations. If a resolution cannot be achieved, the department will request the Environmental Quality Commission 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 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