



State of Oregon Department of Environmental Quality

# Notice of Proposed Rulemaking

Sept. 14, 2021

Total Maximum Daily Loads, Division 42

This package contains the following documents:

- Notice of Rulemaking
- Draft rules – edits highlighted
- Draft rules – edits incorporated (final clean version)

## Note for Readers:

This package contains multiple documents. If you want to read more than one document at a time, you can open multiple copies of this PDF by downloading the PDF and then opening it in Adobe. You can then either:

- Click on the “Windows” item in the top ribbon
- Click on “New Window”
- A second copy of the PDF will open in a new window

Or:

- Click on “File” in the top ribbon
- Click on “Open” in the top ribbon
- Double click on the name of the PDF you want to open
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# Introduction

DEQ invites public input on proposed permanent rule amendments to chapter 340, division 42 of the Oregon Administrative Rules.

## Request for Other Options

During the public comment period, DEQ asks for public comment on whether there are other options for achieving the rules' substantive goals while reducing the rules' negative economic impact on business.

## Overview

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

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

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

## Public notice for this rulemaking

Start date: Tuesday, Sept. 14, 2021

End date: Friday, Nov. 12, 2021

## Procedural Summary

### More information

Information about this rulemaking is on this rulemaking's web page: [Total Maximum Daily Loads, Division 42 rulemaking](#)

### Public hearing

Date: Thursday, Oct. 28, 2021

Time: 1 p.m.

Join Zoom Meeting

<https://us02web.zoom.us/j/86159583043?pwd=anJITHpNd21UY3VxTVZ3UDJEdUxtZz09>

Meeting ID: 861 5958 3043

Passcode: 952300

Instructions on how to join webinar or teleconference: [Instructions](#) or copy and paste: <https://www.oregon.gov/deq/Regulations/rulemaking/RuleDocuments/participantlinklog.pdf>

## How to comment on this rulemaking proposal

DEQ is asking for public comment on the proposed rules. Anyone may submit comments and questions about this rulemaking. A person may submit comments by email, by regular mail or at the public hearing.

### Comment deadline

DEQ will only consider comments on the proposed rules that DEQ receives by 4 p.m., Nov. 12, 2021.

### Submit comments by email to:

[TMDL.2022@deq.state.or.us](mailto:TMDL.2022@deq.state.or.us)

### Note for public university students:

ORS 192.345(29) allows Oregon public university and OHSU students to protect their university email addresses from disclosure under Oregon's public records law unless the public interest requires otherwise. If you are an Oregon public university or OHSU student, notify DEQ that you wish to keep your email address confidential.

### By mail

Oregon DEQ  
Attn: Michele Martin  
700 NE Multnomah St., Room 600  
Portland, OR 97232-4100

### At hearing

Date: Thursday, Oct. 28, 2021  
Start time: 1 p.m. Pacific Time (US and Canada)  
Remote meeting held via Zoom

Join Zoom Meeting

<https://us02web.zoom.us/j/86159583043?pwd=anJITHpNd21UY3VxTVZ3UDJEdUxtZz09>

Join by phone:

Call-in number: 1-253-215-8782  
Meeting ID: 861 5958 3043  
Passcode: 952300

Instructions on how to join webinar or teleconference: [Instructions](#) or copy and paste:  
<https://www.oregon.gov/deq/Regulations/rulemaking/RuleDocuments/participantlinklog.pdf>

## Sign up for rulemaking notices

Get email or text updates about this rulemaking by either:

- Signing up through this link: [GovDelivery](#) (select *rulemaking* list or *Total Maximum Daily Loads* list)
- Signing up on the rulemaking web site: [Total Maximum Daily Loads, Division 42 rulemaking](#) webpage or cut and paste into a browser the following address:  
<https://www.oregon.gov/deq/Regulations/rulemaking/Pages/tmdl2022.aspx>

## What will happen next?

DEQ will include a written response to comments in a staff report that will be submitted to the EQC. DEQ may modify the rule proposal based on the comments.

Proposed rules only become effective if the EQC adopts them. DEQ's intended action is to present the proposed rule changes to the EQC as soon as possible after the earliest date on which the rule changes could take effect. DEQ intends to submit the proposed rule changes to the EQC on or after Oct. 27, 2021.

# Statement of Need

## **What need would the proposed rule address?**

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

## **How would the proposed rule address the need?**

The proposed rule changes would align the EQC’s rules with state statute and allow TMDLs to be adopted either by the Director as an order, or by the EQC as a rule. This change will assist in timely preparation of TMDLs and Water Quality Management Plans in response to a federal court order requiring 15 temperature TMDLs to be redone over the next seven years.

TMDLs by rule will also benefit DEQ and stakeholders through predictable and transparent administrative procedures associated with rulemakings. Further, where TMDLs contain important policy considerations, conducting rulemakings will result in those issues being considered by the EQC, DEQ’s policy making body, at the time of commission action.

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

## **How will DEQ know the rule addressed the need?**

DEQ will provide the EQC with a proposed rule change.

# Rules affected, authorities, supporting documents

## Lead division

Water Quality

## Program or activity

Total Maximum Daily Load program

## 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.	<a href="https://www.oregonlegislature.gov/bills_laws/ors/ors468B.html">https://www.oregonlegislature.gov/bills_laws/ors/ors468B.html</a>
OAR 340-042. Total Maximum Daily Loads (TMDLS)	<a href="https://secure.sos.state.or.us/oard/displayDivisionRules.action;JSESSIONID_OARD=HTcu9T5PrybTDdv3kPLmiWlzVls81d3wj49ITCtVTIP-Hh6Kv_Rm!-1024219277?selectedDivision=1459">https://secure.sos.state.or.us/oard/displayDivisionRules.action;JSESSIONID_OARD=HTcu9T5PrybTDdv3kPLmiWlzVls81d3wj49ITCtVTIP-Hh6Kv_Rm!-1024219277?selectedDivision=1459</a>

<p>Anacostia Riverkeeper, et al. v. EPA, et al. 2019 [source for adding “daily load” to the definition of TMDL]</p>	<p>Publications referenced are available from the agency. DEQ Headquarters, 700 NE Multnomah St., Ste. 600, Portland, OR 97232 or <a href="mailto:tmdl.2022@oregon.gov">tmdl.2022@oregon.gov</a></p>
<p>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]</p>	<p><a href="https://www.epa.gov/tmdl/supplemental-information-reviewing-reasonable-assurance-tmdls">https://www.epa.gov/tmdl/supplemental-information-reviewing-reasonable-assurance-tmdls</a> and Chesapeake Bay TMDL, EPA webpage: <a href="https://www.epa.gov/chesapeake-bay-tmdl/chesapeake-bay-tmdl-document">https://www.epa.gov/chesapeake-bay-tmdl/chesapeake-bay-tmdl-document</a></p>

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

## Statement of cost of compliance

This rule is permissive and provides administrative options, and therefore doesn't in and of itself result in any costs or savings associated with litigation venue.

The expected cost of compliance with the proposed rules changes is minimal or none, because issuing a TMDL by order or rule does not add cost to DEQ's TMDL development process nor to other entities' participation in that process. The existing TMDL development process involves significant stakeholder engagement and is similar to a rule development process using a rules advisory committee, and only adds the requirement to develop a fiscal statement, which would be a minor cost to DEQ to prepare. Further, for any future TMDL adopted by rule, should parties choose to challenge the resultant TMDL, litigation costs would likely decrease due to the decreased burden on parties filing a petition challenging an Agency's rulemaking. The additional changes to update the rule language to reflect current federal requirements informed by case law are not likely to have costs associated with that rule language alignment because the relevant requirements resulting from the TMDL will not be different because of these revisions.

## State and federal agencies

There are no expected 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, because adding TMDL by rule or updates to the rule language to reflect current federal requirements informed by case law are not expected to have a fiscal impact.

## **Small businesses – businesses with 50 or fewer employees**

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

### **ORS 183.336 Cost of Compliance Effect on Small Businesses**

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

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

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

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

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

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

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

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

## **Documents relied on for fiscal and economic impact**

<b>Document title</b>	<b>Document location</b>
ORS 468B.110. Authority to establish and enforce water quality standards by rule or order; limitation on authority; instream water quality standards.	<a href="https://www.oregonlegislature.gov/bills_laws/ors/ors468B.html">https://www.oregonlegislature.gov/bills_laws/ors/ors468B.html</a>
OAR 340-042. Total Maximum Daily Loads (TMDLS)	<a href="https://secure.sos.state.or.us/oard/displayDivisionRules.action;JSESSIONID_OARD=HTcu9T5PrybTDdv3kPLmiWlzVls81d3wj49ITCtVTIP-Hh6Kv_Rm!-1024219277?selectedDivision=1459">https://secure.sos.state.or.us/oard/displayDivisionRules.action;JSESSIONID_OARD=HTcu9T5PrybTDdv3kPLmiWlzVls81d3wj49ITCtVTIP-Hh6Kv_Rm!-1024219277?selectedDivision=1459</a>

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 <a href="mailto:tmdl.2022@oregon.gov">tmdl.2022@oregon.gov</a>
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]	<a href="https://www.epa.gov/tmdl/supplemental-information-reviewing-reasonable-assurance-tmdls">https://www.epa.gov/tmdl/supplemental-information-reviewing-reasonable-assurance-tmdls</a> and Chesapeake Bay TMDL, EPA webpage: <a href="https://www.epa.gov/chesapeake-bay-tmdl/chesapeake-bay-tmdl-document">https://www.epa.gov/chesapeake-bay-tmdl/chesapeake-bay-tmdl-document</a>

## Advisory committee fiscal review

DEQ appointed an advisory committee.

As ORS 183.33 requires, DEQ asked for the committee’s recommendations on:

- Whether the proposed rules would have a fiscal impact,
- The extent of the impact, and
- Whether the proposed rules would have a significant adverse impact on small businesses; if so, then how DEQ can comply with ORS 183.540 to reduce that impact.

The committee reviewed the draft fiscal and economic impact statement and provided feedback on the overall analysis provided by DEQ. Comments by some rule advisory committee members were that their organization’s members could potentially be impacted by future rulemakings adopting TMDLs by rule. The draft rule changes, however, do not alter or dictate the content of future rulemakings, and committee members did not identify circumstances associated with the current draft rules that would result in a fiscal impact. There were also comments suggesting that DEQ could have a fiscal impact resulting from a potential change in operations from the draft rule changes. To reduce potential fiscal impacts associated with future rulemakings adopting TMDLs, the committee responded that DEQ could ensure that a rule advisory committee is convened, involve entities in the discussions when developing TMDLs and Water Quality Management Plans, and work with sister agencies who administer regulatory programs that would implement future TMDLs.

## Housing cost

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

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

# Federal relationship

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

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

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

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

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

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

TMDLs contain the following elements:

- Loading capacity: The amount of a pollutant or pollutants that a waterbody can receive and still meet water quality standards. The TMDL will be set at a level to ensure that loading capacity is not exceeded.
- Excess load: The difference between the actual pollutant load in a waterbody and its loading capacity.
- Sources: The pollutant sources and estimates, to the extent the existing data allow, of the amount of actual pollutant loading from these sources.
- Wasteload allocations: The portions of the receiving water's loading capacity that are allocated to existing point sources of pollution, including all point source discharges regulated by NPDES permits.

- Load allocations: The portions of the receiving water's loading capacity that are allocated to existing nonpoint sources, including runoff, deposition, soil contamination and groundwater discharges, or to background sources. Load allocations are best estimates of loading and may range from reasonably accurate estimates to gross allotments depending on the availability of data and appropriate techniques for predicting loading. Whenever reasonably feasible, natural background, long-range transport and human nonpoint source loads will be distinguished from each other.
- Margin of safety: This element accounts for uncertainty related to the TMDL and, where feasible, quantifies uncertainties associated with estimating pollutant loads, modeling water quality and monitoring water quality. The TMDL will explain how the margin of safety was derived and incorporated into the TMDL.
- Seasonal variation: This element accounts for seasonal variation and critical conditions in stream flow, sensitive beneficial uses, pollutant loading and water quality parameters so that water quality standards will be attained and maintained during all seasons of the year.
- Reserve capacity: An allocation for increases in pollutant loads from future growth and new or expanded sources. The TMDL may allocate no reserve capacity and explain that decision.
- Reasonable assurance: A demonstration that a TMDL will be implemented by federal, state, or local governments or individuals through regulatory or voluntary actions including management strategies or other controls

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

### **What alternatives did DEQ consider if any?**

DEQ did not consider alternatives for these proposed rule changes.

# Land Use

## Land-use considerations

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

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

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

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

<b>Goal</b>	<b>Title</b>
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, and in the Director's Report to the EQC on July 23, 2021.

# Advisory Committee

## Background

DEQ convened a fiscal advisory committee, 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 Dept. 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 Dept. 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, some members of the committee had the following comments and discussion:

- Preference to continue Total Maximum Daily Loads and Water Quality Management Plans by order.
- Ability to have meaningful judicial review if TMDLs are adopted by rule; it may be more difficult to challenge the TMDL under the proposed draft rule.
- Discussion regarding the clarity of the draft rule language to clarify that DEQ is doing the work on the behalf of the commission.
- Preference and clarification in rule that a rule advisory committee will be utilized when future TMDLs are adopted through rulemaking.
- If doing TMDLs by rule, ensure a robust fiscal impact analysis.

# Public Engagement

## Public notice

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

- 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](#)

## How to comment on this rulemaking proposal

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### Comment deadline

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### By mail

Oregon DEQ  
Attn: Michele Martin

700 NE Multnomah St., Room 600  
Portland, OR 97232-4100

## **At hearing**

Date: Thursday, Oct. 28, 2021  
Start time: 1 p.m. Pacific Time (US and Canada)  
Remote meeting held via Zoom

Join Zoom Meeting

<https://us02web.zoom.us/j/86159583043?pwd=anJITHpNd21UY3VxTVZ3UDJEdUxtZz09>

Join by phone:

Call-in number: 1-253-215-8782  
Meeting ID: 861 5958 3043  
Passcode: 952300

Instructions on how to join webinar or teleconference: [Instructions](#) or copy and paste:  
<https://www.oregon.gov/deq/Regulations/rulemaking/RuleDocuments/participantlinklog.pdf>

## **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 (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](mailto:deqinfo@deq.state.or.us). Hearing impaired persons may call 711.



# Draft Rules – Edits Highlighted

Water Quality Total Maximum Daily Loads Division 42 Rulemaking

## 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~~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~~ 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)(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~~[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



## Draft Rules – Edits Incorporated

### 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)(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) 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