WA CAFO Permit Fact Sheet

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What Are Total Maximum Daily Loads?

Under the Clean Water Act each state is required to set the standards for water quality necessary to support the many uses each waterbody may support—namely, drinking water supply, fish habitat, swimming, etc. The state is required every two years to determine which waterbodies are and which are not meeting those standards. For those that are not in compliance, the state is required to develop cleanup plans. These plans are called Total Maximum Daily Loads (TMDLs) because they identify the level of pollutants that waterbody can receive and still recover. — As the Environmental Protection Agency has explained, "the TMDL process is important for improving water quality because it serves as a link in the chain between water quality standards and implementation of control actions designed to attain those standards."

That link is seriously strained in Washington State. We have over 4,500 waterbodies on the impaired list (303(d) list) that do not have TMDLs.

"A Total Maximum Daily Load (TMDL) is a numerical value that represents the highest amount of pollutant a surface water body can receive and still meet water quality standards." (WA State Dept. of Ecology).

The equation for each pollutant in each water body is:

$$TMDL = \Sigma WLA + \Sigma LA + MOS$$

WLA equals allowable amounts of pollutants discharged into the water by point sources

LA equals allowable amounts of pollutants discharged into the water by non-point sources

MOS equals a margin of safety

Ecology may develop a water quality plan for a stretch of polluted water or for an entire watershed. Plans may be pollutant specific or may include several pollutants.

How does the 303(d) Impaired Waters and TMDL Program fit into the Clean Water Act?

The Law

Under section 303(d) of the CWA, states, territories, and authorized tribes, must develop lists of impaired waters. These are waters for which technology-based regulations and other required controls are not stringent enough to meet the water quality standards set by states. The law requires that states establish priority rankings for waters on the lists and develop Total Maximum Daily Loads (TMDLs) for these waters.

According to the Environmental Protection Agency (EPA) the stepwise process for implementing the 303(d) program is:

- The State defines water quality goals
- The State compiles data and assesses the condition of water bodies
- The State lists impaired and threatened bodies of water – the 303(d) list
- The State develops TMDLs to address pollutants for the 303(d) listed water bodies
- The State controls point source pollution through NPDES permits
- The State controls non-point source pollution through grants, partnerships, and other voluntary programs
- The EPA approves State 303(d) lists and TMDLs

Washington is far behind in developing TMDLs for impaired waters.[1]

Non-point Source Pollution

According to Ecology [2]:

> *Nonpoint pollution is one of the state's most serious pollution problems, and the most difficult one to solve. This pollution comes from diffused sources, is*

generated by every kind of land use, and has no specific regulatory tool (like a permit) to deal with it.

In December 2022 Ecology published *Washington's Water Quality Management Plan to Control Nonpoint Sources of Pollution*.[3, 4] This plan lists many voluntary programs to address non-point source pollution, including Pollution Identification and Correction (PIC) programs, the National Estuary Program (NEP), shellfish protection districts, Farmed Smart Certification, the Dairy Nutrient Management Program, and the Voluntary Stewardship Program.

According to *Washington's Water Quality Management Plan to Control Nonpoint Sources of Pollution,* "The expectation that state and federal clean water laws will serve as a regulatory backstop is documented in correspondence to legislative leadership, the implementation budget for the law, and other sources."

FOTC has seen little regulatory backup. When unpermitted CAFO dairies discharge to ground and surface waters, regulators respond with warning letters and recommendations for technical assistance, but rarely proceed to requiring NPDES permits that would place the facilities where they belong, in the point source category. There are currently only two permitted CAFOs in Whatcom County where nitrate pollution of ground water and bacterial pollution of surface waters have been problematic for decades. There are no permitted CAFOs in Skagit County or Snohomish County despite well documented pollution of surface waters from agricultural runoff.

History of TMDLs in Washington State

Here is a brief history of efforts by the Northwest Environmental Advocates (NWEA) to compel Washington State to develop TMDLs as required by the Clean Water Act (CWA).[1]

1972: Congress passes the Clean Water Act which requires states to develop water quality standards for waterways within the state's jurisdiction, identify impaired waters, and develop clean-up plans (TMDLs) for impaired waters.

1991: For twenty years Washington did essentially nothing to implement this part of the CWA, so NWEA sued the U.S. Environmental Protection Agency (EPA) to compel the EPA to enforce the law in our state.

1998: After much back and forth the case was settled, in part with a Memorandum of Agreement (MOA) in which Ecology agreed to submit 1,566 TMDLS by June 30, 2013, and the EPA agreed to make sure this was completed.

2013: The MOA terminated on June 30, but Ecology had only completed about 870 TMDLs. During that time Washington added about 220 bodies of water to the impaired list every year.

2019: On September 26 NWEA filed a complaint in the U.S. District Court for the Western District of Washington against the EPA. NWEA alleged failure to ensure protection and restoration of fresh and marine waters of the State of Washington in violation of the mandates of the Clean Water Act, because the EPA failed to make sure the MOA with Ecology was completed. NWEA alleged that Ecology completed no TMDLs in 2016, 2017, 2018, and up to the time of filing in 2019. This case is still pending.

Washington TMDLs at Present

In recent years the WA State Dept. of Ecology has shifted away from writing TMDLs and introduced a process called "Straight to Implementation". According to Ecology [5]:

> *TMDLs are useful to identify sources of pollution and set targets for reducing pollution. However, there are times when the sources of pollution and the steps to prevent it are obvious, so a TMDL is not necessary.*
>
> *This happens most often in watersheds with a small set of similar land uses. In these situations, we may choose to work directly with landowners and other partners in the watershed to implement management practices that will eliminate the pollution problem*

Whether this process complies with the Clean Water Act is an open question.

Thank you for reading.

Friends of Toppenish Creek

You have received this Fact Sheet because you are on a list of potentially interested parties. If you do not want to receive further information, please contact Jean Mendoza at jeanrmendoza@icloud.com

1 Northwest Environmental Advocates. TMDL complaints. WA TMDLs and 303(d) list, Sept. 26, 2019. https://northwestenvironmentaladvocates.org/project/tmdl-documents/

2 WA State Dept of Ecology, Water Quality. https://ecology.wa.gov/About-us/Who-we-are/Our-Programs/Water-Quality

3 WA Ecology. *Washington's Water Quality Management Plan to Control Nonpoint Sources of Pollution.* Available at https://apps.ecology.wa.gov/publications/SummaryPages/2210025.html

4 Ecology's *Voluntary Clean Water Guidance for Agriculture* will not be completed until 2025. https://ecology.wa.gov/About-us/Accountability-transparency/Partnerships-committees/Voluntary-Clean-Water-Guidance-for-Agriculture-Adv

5 WA State Dept. of Ecology. Straight to Implementation. https://ecology.wa.gov/Water-Shorelines/Water-quality/Water-improvement/Straight-to-implementation#:~:text=TMDLs%20are%20useful%20to%20identify,a%20TMDL%20is%20not%20necessary.

Glossary

303(d) List of Impaired Waters: Is comprised of all waters where required pollution controls are not sufficient to attain or maintain applicable water quality standards. The law requires that states establish a prioritized schedule for waters on the lists and develop Total Maximum Daily Loads (TMDLs).

Best management practices (BMPs) mean schedules of activities, prohibitions of practices, maintenance of procedures, and other management practices, to prevent or reduce the pollution of groundwaters of the state. BMPs also include treatment requirements, operating procedures and practices to control plant site runoff, spillage or leaks, sludge or water disposal, or drainage from raw material storage. WAC 173-200-020

Criteria means numerical values or narrative standards that represent the maximum allowable contaminant concentrations in the groundwater. WAC 173-200-020

Loading capacity. The loading capacity is the sum total of all of the pollutant loading the water body can absorb without violating water quality standards.

Load allocation (LA): Applies to non-point sources. The LA quantifies how much of the pollutant(s) can be discharged from nonpoint sources, along with the other pollutant sources, and have the water body still meet water quality standards.

Margin of safety: An allowance so that surface water quality standards will be met under the worst conditions likely to be experienced.

Surrogate measures: Are used for TMDL allocations when—

- The direct pollutant is too expensive or too difficult to measure, or
- When the impairment is caused by a combination of factors, as with stormwater, AND there is a direct correlation between the surrogate and the pollution problem.

Surrogate measures are either indirect pollutant targets (e.g. measuring total suspended solids as an indication of the concentration of copper or mercury) or as an "other appropriate measure" (e.g. an effective shade target to shade and cool a stream).

Total Maximum Daily Load: A TMDL is the calculation of the maximum amount of a pollutant allowed to enter a waterbody so that the waterbody will meet and continue to meet water quality standards for that particular pollutant. A TMDL determines a pollutant reduction target and allocates load reductions necessary to the source(s) of the pollutant.

Wasteload allocations (WLA): Applies to point sources. The WLA quantifies how much of the pollutant(s) can be discharged from point sources, along with other sources, and have the water body still meet water quality standards. Load allocations and wasteload allocations may be based on surrogate measures.

Water Quality Standards are provisions of state, territorial, authorized tribal or federal law approved by EPA that describe the desired condition of a water body and the means by which that condition will be protected or achieved. Water quality

standards consist of three core components, 1. designated uses of a water body, 2. criteria to protect designated uses, and 3. antidegradation requirements to protect existing uses and high quality/high value waters.