

SOUTH CAROLINA DEPARTMENT OF
HEALTH AND ENVIRONMENTAL CONTROL



Total Maximum Daily Loads for Pollutants in Water.
Regulation 61-110

May 27, 2005

Bureau of Water

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DEPARTMENT OF HEALTH AND ENVIRONMENTAL CONTROL
CHAPTER 61
Statutory Authority: 1976 Code Section 48-1-10 et seq.

61-110. Total Maximum Daily Loads for Pollutants in Water.

Synopsis:

Section 303(d) of the Federal Water Pollution Control Act (33 USC Section 1313(d)) requires States to establish the total loading that a water can receive without violating State water quality standards for waters that do not meet them.

This regulation defines the term “Total Maximum Daily Load” (TMDL) and defines the administrative appeal process for TMDLs. In addition, the regulation provides for public notice, public hearing, and notice of proposed decision, and addresses revisions to approved TMDLs.

Changes requested by the House Agriculture, Natural Resources and Environmental Affairs
Committee:

<u>SECTION</u>	<u>CHANGE</u>
61-110.C(1)	Requirement for responsiveness summary added.
61-110.C(2)	Provision for comment period extension requests added.
61-110.D(2)	Provision for hearing at request of elected or appointed body added.
61-110.F(2)	Correction of number of days within which a TMDL may be appealed.

Discussion:

Sections A and B address the purpose and scope of the regulation, and definitions.

Sections C through F address provisions for public participation, public hearings, notices of proposed decisions, and the administrative appeals process.

Section G addresses revisions to an approved TMDL.

Instructions:

Add new regulation R.61-110, Total Maximum Daily Loads for Pollutants in Water, to Chapter 61 regulations.

Text:

R.61-110. Total Maximum Daily Loads for Pollutants in Water.

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A. Purpose and Scope.

(1) Section 48-1-50(20), S.C. Code of Laws (1976), authorizes the Department to conduct investigations of conditions in the air or waters of the State to determine whether or not standards are being contravened and the origin of materials which are causing the polluted condition. Section 48-1-50(6) authorizes the Department to conduct studies, investigations and research with respect to pollution abatement, control or prevention.

(2) The Department establishes Total Maximum Daily Loads (TMDLs) for pollutants in waters of the state, including those listed in accordance with the Federal Water Pollution Control Act (Public Law 92 500, as amended by Pub. L. 95-217, Pub. L. 95-276, Pub. L. 96-483, Pub. L. 97-117, and Pub. L. 100-4; 33 U.S.C. 1251 et seq.) Section 303(d) (33 USC Section 1313(d)) and 40 CFR Part 130. These regulations establish the process for public participation in and administrative appeal of TMDLs developed under section 303(d) of the Act.

B. Definitions.

(1) Other than those terms defined below, any term used in this regulation shall mean the same as defined in S.C. Regulation 61-68 or Section 48-1-10 et seq. of the Code of Laws, 1976, as amended.

(2) "Total Maximum Daily Load" (TMDL) means a written quantitative analysis of water quality for a pollutant at one or more sites in a watershed. A TMDL shall include identification of the pollutant, a calculation of the maximum amount of the pollutant that a waterbody can receive and still meet state water quality standards, load allocations for nonpoint sources and natural background, individual or categorical wasteload allocations for point sources, and a margin of safety.

(3) "Margin of safety" means a consideration of any lack of knowledge concerning the relationship between load and wasteload allocations and water quality. The margin of safety may be implicit, i.e., incorporated into the TMDL through conservative assumptions in the analysis, or explicit, i.e., expressed in the TMDL as a specific loading, or both. If the margin of safety is implicit, the conservative assumptions in the analysis that account for it shall be described. If the margin of safety is explicit, the loading set aside shall be identified. The Department shall present a detailed justification and rationale for use of the selected margin of safety.

C. Public Notice

(1) A notice will be published on the Department website or equivalent publicly available electronic media, when available, upon commencement of development of each TMDL, until such time as a draft is completed or the Department elects not to proceed with TMDL development, to solicit data and information in support of TMDL development. All data and information submitted, including characterizations of local conditions that affect attainment of water quality standards, shall be considered by the department before completing the TMDL and answered in a responsiveness summary that would be included in the TMDL.

(2) A public notice of each initial draft TMDL shall provide at least thirty (30) days from the date of notice within which interested persons may submit their views and information concerning the TMDL to the Department. The comment period shall be extended for an additional 30 days if a request is made in the initial 30 day comment period by any party, including an affected local public body. Comments will be considered in development of the final draft TMDL and addressed in a responsiveness summary, which will be provided to all commenters.

(3) Public notice of the draft TMDL shall be made by each of the following methods:

(a) publication of a notice in a daily or weekly newspaper within or near the area included in the TMDL; and

(b) notification of anyone who has specifically requested public notices. The list of such persons may be updated periodically and persons will be deleted who fail to respond to Department requests to identify continued interest; and

(c) publication on the Department website or equivalent publicly available electronic media, when available.

(4) All information supporting the TMDL, such as, but not limited to, data, models, inputs, and output, shall be available upon request from the outset of the public comment period.

D. Public Informational Hearing

(1) Any person may request a public informational hearing during the public comment period discussed in Article C.(1) above. Requests shall be in writing and shall state the nature of the issues to be raised at the informational hearing.

(2) The Department shall hold a public informational hearing upon request through an affirmative vote by an elected or appointed public body, or whenever fifteen (15) or more individual written requests are received during the public comment period and which raise issues specifically related to the development of the TMDL. An informational hearing may also be held whenever the Department staff determines that it may be beneficial. Such informational hearing will be conducted by Department staff.

(3) A notice of informational hearing shall be mailed to those persons providing comment in response to the public notice at least fifteen (15) days prior to the informational hearing.

(4) The close of the comment period shall be at the end of the informational hearing or later date if so specified by the Department.

(5) All public informational hearings shall be reported verbatim. A copy of the transcript shall be made available upon request.

E. Notice of Proposed Decision

Department staff shall issue a notice of proposed decision to submit a TMDL to the U.S. Environmental Protection Agency for approval. Such notice shall advise of availability of the final draft TMDL and related file information. Such notice shall be made available to those persons providing comment in response to the public notice and to those persons participating at an informational hearing.

F. Administrative Appeal Process

(1) The Notice of Proposed Decision may be appealed as a contested case in accordance with S.C. Regulation 61-72 and the S.C. Administrative Procedures Act.

(2) A person desiring to appeal a TMDL must submit a written request for an adjudicatory hearing to the Clerk of the Board of Health and Environmental Control within thirty (30) days after the date of the notice of proposed decision. The request must set forth the manner in which the person requesting the hearing would be injured by issuance of the TMDL. If no appeal of the proposed decision is timely received, the proposed decision of the Department shall become final.

(3) Upon timely request for a hearing, the matter shall be heard as a "contested case" under the South Carolina Administrative Procedures Act, and shall be processed according to law. Determinations of whether a person has legal standing to contest a determination shall be made in the course of the contested case proceeding.

G. Revisions to an Approved TMDL

The Department may revise an approved TMDL to accommodate new information. Revisions to load or wasteload allocations in approved TMDLs shall be subject to the same public participation and administrative appeal processes set forth herein.

H. Severability

Should any section, paragraph, sentence, word, clause or phrase of this regulation be declared unconstitutional or invalid for any reason, the remainder of this regulation shall not be affected thereby.

Fiscal Impact Statement:

The Department estimates no additional cost will be incurred to the state or its political subdivisions by the implementation of this regulation; therefore, no additional state funding is being requested. Existing staff and resources will be utilized to implement this regulation.

Statement of Need and Reasonableness:

The statement of need and reasonableness of the regulation was determined by staff analysis pursuant to S.C. Code Section 1-23-115(C)(1)-(3) and (9)-(11):

DESCRIPTION OF REGULATION: New Regulation, Total Maximum Daily Loads for Pollutants in Water.

Purpose: This regulation will define the term total maximum daily load (TMDL) and clarify the public participation and administrative appeal processes for TMDLs.

Authority: S.C. Code Sections 48-1-10 et seq. (South Carolina Pollution Control Act of 1976).

Plan for implementation: The regulation will be implemented upon approval of the General Assembly and publication in the State Register. SCDHEC Bureau of Water staff will conduct the activities set forth in the regulation in the manner presented in the regulation.

DETERMINATION OF NEED AND REASONABLENESS OF THE REGULATION BASED ON ALL FACTORS HEREIN AND EXPECTED BENEFIT:

TMDL development is required under Section 303(d) of the Federal Water Pollution Control Act. The goal of TMDL development and implementation is to ensure that waters attain and maintain standards set forth in R.61-68, Water Classifications and Standards. Currently, there is no definition of TMDL in any South Carolina statute or regulation. This regulation will define the term and provide clarification of South Carolina public participation and administrative appeal opportunities during TMDL development.

DETERMINATION OF COSTS AND BENEFITS:

No additional cost is expected to be incurred by the State by implementation of this regulation. Existing staff and resources will be utilized to implement this regulation. This regulation is administrative in nature; costs to the regulated community for the voluntary public participation and appeal processes described in the regulation are expected to be minimal.

UNCERTAINTIES OF ESTIMATES:

Minimal.

EFFECT ON ENVIRONMENT AND PUBLIC HEALTH:

The regulation will clarify the public participation and administrative appeal processes associated with TMDL development. Upon implementation, TMDLs will result in attainment and maintenance of State water quality standards.

DETRIMENTAL EFFECTS ON THE ENVIRONMENT AND PUBLIC HEALTH IF THE REGULATION IS NOT IMPLEMENTED:

There may be an adverse effect on the environment if the regulation is not implemented. Without clarification of the public participation and administrative appeal processes, South Carolina TMDLs cannot be finalized by the Department, and delays in developing and implementing TMDLs could occur, resulting in delays in water quality improvement and possible degradation of water quality.

Statement of Rationale:

The statement of rationale was determined by staff analysis pursuant to S.C. Code Ann. Section 1-23-110(A)(3)(h) (1976, as amended).

To fulfill the requirements of the Federal Water Pollution Control Act, South Carolina must develop TMDLs. Recent litigation demonstrated the lack of a clear administrative appeal

process associated with TMDL development. In addition, there was no definition of the term in any state statute or regulation. Until this regulation is promulgated, South Carolina TMDLs cannot be finalized by the Department.

This regulation is administrative in nature; therefore, no scientific studies were needed or used. The regulation provides a needed complement to existing regulations.