Deschutes, WA Watershed TMDL

I. TIMING

EPA has informed the Court that it intends to approve and/or disapprove the Deschutes Watershed TMDL by June 29, 2018. We anticipate the Court will enter an Order that we do so.

II. PURPOSE

The draft decision document includes disapprovals of TMDLs for waters impaired by multiple pollutants submitted by Washington Department of Ecology (Ecology). The draft decision document also includes approvals of some of the state-submitted TMDLs.

III. BACKGROUND/HISTORY

Timeline

December 17, 2015	Ecology submitted the final Deschutes TMDL to EPA for approval.
July 17, 2017	Ecology submitted supplemental TMDL information, including new bacteria loads and a temperature equation.
September 6, 2017	Northwest Environmental Advocates (NWEA) filed a complaint against EPA alleging violation of section 303(d)(2) of the Clean Water Act (CWA) for failure to act on the TMDL submission within the statutorily required 30-day timeframe.
June 29, 2018	Date by which EPA has said it will take action on the Deschutes TMDLs.

Background

The Washington Department of Ecology submitted the final Deschutes TMDL to EPA for approval on December 17, 2015. The TMDL addresses 73 waterbody-pollutant pairs for five pollutants – fecal coliform, temperature, dissolved oxygen (DO), pH, and fine sediment. EPA must approve or disapprove each waterbody-pollutant pair – essentially requiring 73 individual decisions to either approve or disapprove loadings developed for a waterbody-pollutant pair. Region 10 OWW and ORC have been consulting with counterparts at Headquarters in the Watershed Branch and Office of General Counsel (OGC) regarding the Agency's planned action on this TMDL.

This TMDL is the first phase of a multi-phase process to address water quality impairments for waters flowing into south Puget Sound. The watershed addressed in this phase includes the Deschutes River and its tributaries, Percival Creek, and the tributaries to Budd Inlet. The Deschutes River originates in heavily forested regions of the Bald Hills, then flows northward into Capitol Lake (in Olympia), then into Budd Inlet (south Puget Sound). Capitol Lake was formed in 1951 as an impoundment of the Deschutes estuary to create a reflecting pool for the State Capitol Building. The TMDL watershed is situated within the boundaries of Thurston and Lewis Counties, Washington, and includes the cities or towns of Olympia, Lacey, Tumwater, and Rainier. Ecology has stated that a second phase of the TMDL to address the marine segments of Budd Inlet, impaired for DO and bacteria, is planned for completion in 2021. No plans have been made by Ecology to develop a TMDL for Capitol Lake, which is impaired for total phosphorus and bacteria.

Litigation

On September 6, 2017, NWEA filed a complaint against EPA alleging violation of section 303(d)(2) of the CWA for failure to act on the Deschutes River TMDL submission. Section 303(d)(2) requires EPA to either approve or disapprove a state's TMDL submission within 30 days of submittal. EPA has represented in recent court filings that it will complete its action no later than June 29, 2018, and it is likely that the court will soon order EPA to complete its action by this date.

IV. KEY ISSUES

The Agency has discussed its concerns about the TMDL's failure to meet statutory and regulatory requirements with the State since early 2016. One reason the Agency has not yet acted is because we worked with Ecology for over a year to attempt to remedy issues with the bacteria and temperature TMDLs. As a result, Ecology submitted supplemental TMDL information in July 2017, including new bacteria loads and a temperature equation. However, the July 2017 submittal failed to remedy all of EPA's concerns and did not meet public process requirements.

Once EPA disapproves a TMDL, CWA section 303(d)(2) requires the Agency to develop a new TMDL within 30 days. Thus, for the waterbody-pollutant pairs we disapprove, we will need to develop revised TMDLs that remedy our concerns.

Ex. 5 Deliberative Process (DP)

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Ex. 5 Deliberative Process (DP) The primary deficiencies we have found with the TMDL submittal are summarized below:

- Incomplete TMDL submittals: The State did not provide critical TMDL components (e.g., loading capacity, wasteload allocations, and load allocations) for some waterbody-pollutant pairs, as required by 40 CFR § 130.2 and 40 CFR § 130.7.
- Public notice requirements not met: The supplemental 2017 submittal did not undergo public review. Since it contains new loading calculations for bacteria, we are concerned these waterbody-pollutant pairs do not meet public review requirements at 40 CFR § 130.7(c)(1)(ii). We find these TMDLs otherwise approvable.
- Downstream uses not protected: Washington's water quality standards at WAC 173-201A-260(3)(b-d) require that downstream uses be protected. Some waterbody-pollutant pair TMDL calculations allow pollutant loadings that are not protective of downstream waters. Thus, they are not consistent with requirements at 40 CFR § 130.7(c)(1) that TMDLs be established at levels necessary to attain and maintain the applicable water quality standards.
- TMDL target not protective of water quality standards: Some waterbody-pollutant pair TMDL calculations do not provide a clear linkage analysis to demonstrate that the water quality target chosen to develop the loading capacity is protective of State water quality standards. Thus, they are not consistent with requirements at 40 CFR § 130.7(c)(1) that TMDLs be established at levels necessary to attain and maintain the applicable water quality standards.

V. ROLL-OUT / COMMUNICATIONS PLAN

Other than notifying the State, NWEA, and the court of our final action, a communication plan has not been developed, nor is one anticipated to be necessary.

VI. NEXT STEPS / UPCOMING DEADLINES

The Region has developed an anticipated schedule for meeting the June 29th deadline. This was put forth to the court in a declaration filed on April 4, 2018, by David Croxton, the Watershed Unit manager. The following steps represent our planned course for developing decision documents and briefing management:

- *April 23 – May 18*: R10 OWW, ORC, OGC and Office of Water (Headquarters) review draft decision document.
- *May 28 – June 15*: R10 Watershed Unit shares draft decision document with RA, Office of Water AA, and OGC for senior management review.
- *June 18 – June 28*: R10 Watershed Unit finalizes review.
- *June 29*: Agency finalizes Deschutes TMDL decision document and takes final action on TMDL.